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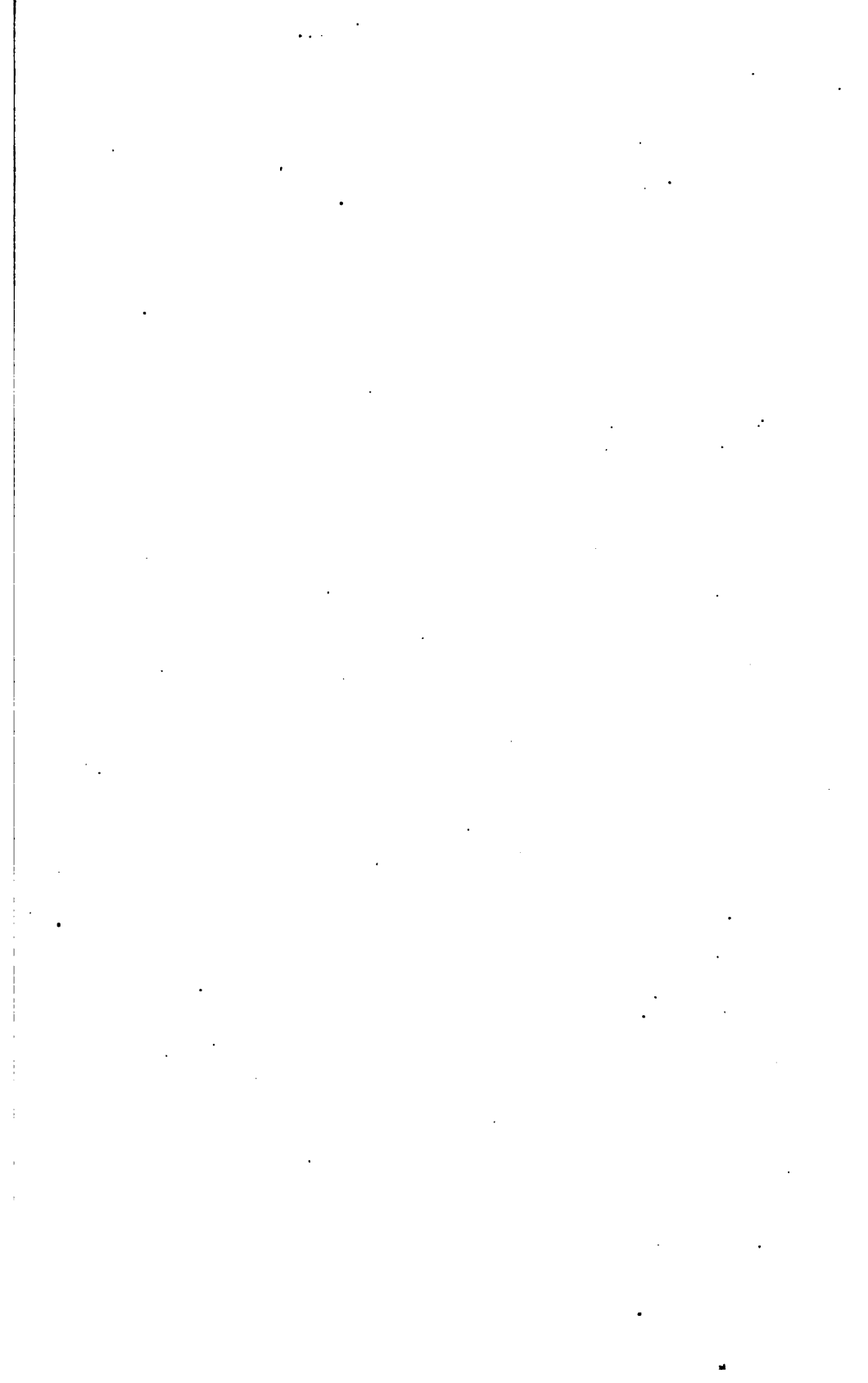
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**REPORTS OF CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME COURT**  
**OF THE**  
**TERRITORY OF NEW MEXICO**

**FROM**  
**JANUARY TERM, 1880, TO JANUARY TERM, 1883. INCLUSIVE**

**REPORTED BY**  
**CHARLES H. GILDERSLEEVE**  
**COUNSELOR AT LAW**

**VOLUME II**

**EXTRA ANNOTATED EDITION**

**CHICAGO:**  
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**1911**

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## **NOTE.**

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The volume herewith submitted to the profession contains briefs of counsel and opinions of the court in all the cases decided in the Supreme Court of the Territory of New Mexico during the years 1880, 1881, 1882, together with six cases decided by the same court in 1883. Lists of all attorneys admitted to practice in the courts of New Mexico, and of all the judges of such courts appointed since the organization of the Territory under the United States government, are also included. A full index has been appended, and will contribute materially to the utility of the book.

The reporter acknowledges with thanks the services of Mr. ADELBEET HAMILTON, of the Chicago bar, in the preparation and printing of the volume.

**APRIL 11, 1883.**





# LIST OF THE JUDGES

WHO HAVE BEEN APPOINTED FOR THE TERRITORY OF NEW MEXICO  
SINCE ITS ANNEXATION TO THE UNITED STATES.

---

JOAB HOUGHTON, Chief Justice,	} These Judges served as such under the Provin- cial Government in 1848.
CARLOS BEAUBIEN, Associate Justice,	
ANTONIO JOSE OTERO, "	
HORACE MOWER, Associate Justice, appointed in 1852.	
JOHN S. WATTS, Associate Justice, appointed in 1852.	
GRAFTON BAKER, Chief Justice, appointed in 1858.	
JAMES J. DEAVENPORT, Chief Justice, appointed in 1854. (Afterwards Chief Justice from 1859 to 1867.)	
KIRLEY BENEDICT, Associate Justice, appointed in 1854.	
PERRY E. BROCCUS, Associate Justice, appointed in 1855.	
W. T. BOONE, Associate Justice, appointed in 1859.	
WM. G. BLACKWOOD, Associate Justice, appointed in 1859.	
SYDNEY A. HUBBELL, Associate Justice, appointed in 1862.	
JOSEPH G. KNAPP, Associate Justice, appointed in 1862.	
JOAB HOUGHTON, Associate Justice, re-appointed in 1866.	
JOHN P. SLOUGH, Chief Justice, appointed in 1867.	
JOHN S. WATTS, Chief Justice, re-appointed in 1868.	
JOSEPH G. PALEN, Chief Justice, appointed in 1869.	
HEZEKIAH S. JOHNSON, Associate Justice, appointed in 1869.	
B. J. WATERS, Associate Justice, appointed in 1871.	
DANIEL B. JOHNSON, Jr., Associate Justice, appointed in 1872.	
WARREN BRISTOL, Associate Justice, appointed in 1873.	
HENRY L. WALDO, Chief Justice, appointed in 1875.	
SAMUEL O. PARKS, Associate Justice, appointed in 1878.	
CHARLES McCANDLESS, Chief Justice, appointed in 1878.	
L. BRADFORD PRINCE, Chief Justice, appointed in 1879.	
JOSEPH BELL, Associate Justice, appointed in 1882.	
SAMUEL B. AXTELL, Chief Justice, appointed in 1883.	



# JUDGES AND OFFICERS OF THE SUPREME COURT

OF THE

## TERRITORY OF NEW MEXICO,

DURING THE TIME COVERED BY THIS REPORT.

---

### FIRST DISTRICT.

HON. L. BRADFORD PRINCE, CHIEF JUSTICE.

HON. SAMUEL B. AXTELL, CHIEF JUSTICE (1883).

### SECOND DISTRICT.

HON. SAMUEL C. PARKS, ASSOCIATE JUSTICE.

HON. JOSEPH BELL, ASSOCIATE JUSTICE (1883).

### THIRD DISTRICT.

HON. WARREN BRISTOL, ASSOCIATE JUSTICE.

---

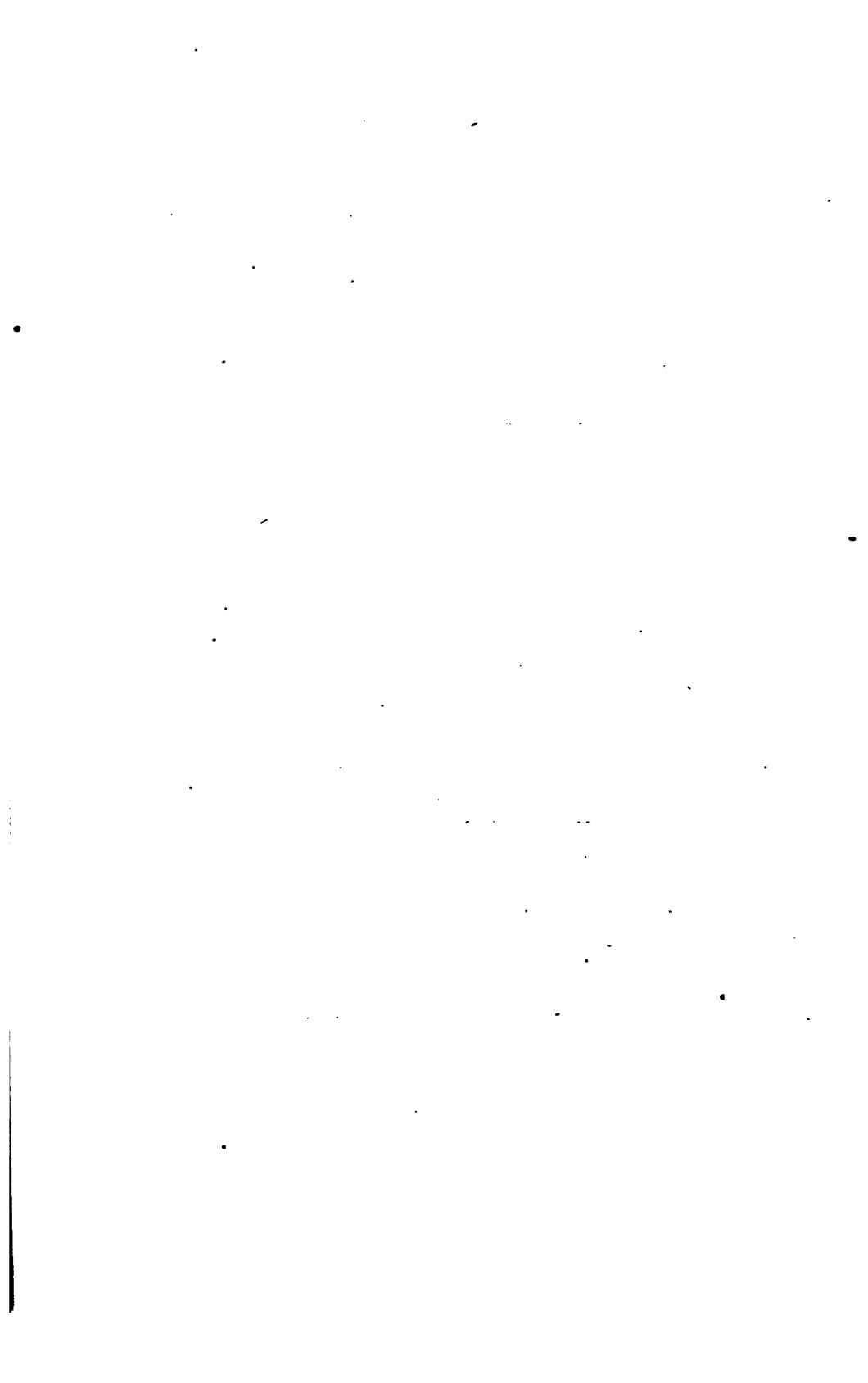
*U. S. District Attorney,* - - - HON. SIDNEY M. BARNES.

*Clerk,* - - - - - FRANK W. CLANCY.

*U. S. Marshal,* - - - - - JOHN SHEERMAN, JR.

*U. S. Marshal (1883),* - - - - A. L. MORRISON.

*Attorney General,* - - - - - WILLIAM BRENDEN.



# LIST OF ATTORNEYS

PRACTICING IN THE SUPREME COURT OF THE TERRITORY OF NEW  
MEXICO FROM THE ANNEXATION OF THE TERRITORY TO THE  
UNITED STATES UP TO THE YEAR 1892.

---

Allen, Samuel T.  
Ashurst, Merrill.  
Ball, John D.  
Barnes, Sidney M.  
Bartlett, Edward L.  
Bonham, Joseph Fenner.  
Breedon, Marshall A.  
Breedon, William.  
Catron, Thomas Benton.  
Caypless, Edgar.  
Chaves, J. Francisco.  
Childers, W. B.  
Clancy, Frank W.  
Clarke, Fred. W.  
Conway, Thomas Frederick.  
Crane, William F.  
Davis, William W. H.  
Downs, Francia.  
Dunne, Edmund F.  
Fiske, Eugene A.  
Fountain, A. J.  
Fox, George W.  
Fraser, John R.  
Gary, Joseph E.  
Gildersleeve, Charles H.  
Gwin, John M.  
Goodwin, Jesse C.  
Graves, William C.  
Hazledine, William C.  
Houghton, Joab.  
Hoyt, Abram G.  
Hubbell, Sidney A.  
Johnson, Henry C.  
Knaebel, John H.  
Lee, W. D.  
Lemon, George.  
Leonard, Ira E.  
McComas, Charles C.

Mills, Melvin W.  
Newcomb, S. B.  
Pillians, Palmer J.  
Posey, G. Gordon.  
Price, Edward V.  
Prichard, George W.  
Prince, L. Bradford.  
Quinn, James H.  
Reynolds, James R.  
Risque, John B.  
Ritch, William G.  
Russell, D. C.  
Rynerson, William L.  
Salazar, Miguel.  
Sena, Jose D.  
Shaw, James M.  
Skinner, William C.  
Sloan, Andrew.  
Sloan, W. B.  
Smith, Hugh N.  
Springer, Frank.  
Stevens, Benjamin.  
Stone, W. S.  
Sulzbacher, Louia.  
Terrill, William C.  
Thompson, F. A.  
Thornton, William T.  
Tompkins, Richard H.  
Trimble, L. S.  
Tuley, Murray F.  
Vander Veer, P. L.  
Waitman, Hanson.  
Waldo, Henry L.  
Warner, Milton J.  
Warren, Henry L.  
Watson, W.  
West, Elias B.  
Wheaton, Theodore D.



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CASES DETERMINED  
BY THE  
SUPREME COURT OF NEW MEXICO,  
JANUARY TERM, 1880.

---

GARLAND ET AL., Plaintiffs in Error, v. BARTELS BROTHERS,  
Defendants in Error.

*January 20, 1880.*

**APPEAL.** (1) *Description of parties: Replevin, judgment against sureties on replevin bond: Reformation of judgment upon appeal.*

**APPEAL FROM JUSTICE.** (2) *District court governed by what rules: Jurisdictional amount.*

**REPLEVIN.** (3) *Value of property and damages for detention must both be assessed.*

1. William Garland commenced an action of replevin before a justice of the peace against Julius Bartels and Gus Bartels as Bartels Brothers. He gave the sheriff a bond with B. H. Hopper and J. H. Hopper as sureties, and 900 ties were replevied of defendants. Julius Bartels appeared and a trial was had before the justice of the peace. It resulted in a verdict by the jury and an assessment of costs by the justice "against Julius Bartels," who appealed to the district court. In the record of that court Bartels Brothers are stated to be "appellants." Neither Garland, nor his sureties, appeared in the district court to contest the appeal, and, upon default, a jury was impanelled to ascertain the damages sustained by Bartels. It assessed them at \$270, for which sum, and \$46 costs, the district court rendered judgment in favor of "appellants," and against the plaintiff and his sureties.

*Held,* That the parties ought to have been described on appeal to the district court by the same name as in the action commenced originally before the justice of the peace. That in entitling the cause, rendering judgment or otherwise proceeding upon the appeal in the district court, it was irregular to describe the defendants merely by

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Garland et al. v. Bartels Brothers.

---

the firm name of Bartels Brothers, but that the judgment ought not to be disturbed for this irregularity, since it in nowise affected plaintiff, and that the judgment of the district court against the sureties was invalid for want of jurisdiction, they not appearing and never having been summoned; but that if there were no other irregularities, the supreme court might reform the judgment so as to obviate this error.

2. In the trial and determination of causes in the district court upon appeals from judgments rendered by justices of the peace the district court must be governed by the same rules that are prescribed by law for the government of courts of justices of the peace in like causes. The law provides that no justice of the peace shall have jurisdiction over a debt or damages in an amount exceeding \$100, and the verdict and judgment being for more than double (\$270 + \$46) this sum, they are erroneous.
3. In any action of replevin brought before a justice of the peace where the plaintiff fails to prosecute his suit to final judgment, a jury must be impanelled, and sworn to inquire and assess the value of the property replevied, together with the damages for the detention of the same, and the justice shall render judgment in favor of the defendant for such value and damages as assessed. Therefore, where the jury was sworn to assess damages only, the oath, as administered, did not include the assessment of the value of the property replevied, and the judgment was rendered for damages only, and not for the value of the property replevied. Such verdict and judgment were held erroneous. The value and damages should be stated separately, both in the verdict and judgment.

Error to the District Court, Colfax county.

William Garland, one of the plaintiffs in error, brought suit in replevin before E. F. Lancaster, justice of the peace in and for Colfax county, to recover certain property, a trial by jury was had and a verdict rendered in favor of the plaintiff. The defendants in error under the name of Bartels Brothers took an appeal to the district court for Colfax county, and on the 25th day of August, A. D. 1879, obtained judgment in said district court upon default of an appearance by said plaintiff Garland. Damages were assessed for said defendants in the sum of \$270, and judgment entered in favor of defendants for that sum against said William Garland and B. H. Hopper and J. P. Hopper, the plaintiffs in error, the last two as sureties on the replevin bond of said Garland.

---

Garland et al. v. Bartels Brothers.

---

*Louis Salzbacher and Breeden & Waldo*, for plaintiffs in error.

The judgment is erroneous because rendered in favor of the defendants by the name of Bartels Brothers and not by the names of the defendants in the original suit.

The judgment is erroneous because entered against the plaintiff William Garland and his sureties on the replevin bond. Such judgment was not authorized by statute and should have been against the plaintiff Garland alone, and the remedy against the sureties upon the replevin bond: Laws of New Mexico, 1875-6, sec. 54, page 85.

The verdict and judgment are erroneous because there was no finding of the value of the property replevied as required by law: Laws of New Mexico, 1875-6, sec. 53, page 84.

*M. W. Mills, Catron & Thornton and Frank Springer*, for defendants in error.

It appears by the transcript that the defendants Bartels Brothers were defendants in the original suit, and that the judgment in their favor was proper as to parties.

We concede that the judgment against the sureties was erroneous. The whole judgment should not for that reason be reversed, but it is competent for the supreme court to modify the judgment and affirm it against plaintiff Garland: Comp. Laws N. M., page 108, § 7.

The verdict of the jury, upon which the judgment in the district court was rendered against plaintiffs in error, was for the damages of the defendants by reason of the premises.

Defendants were entitled to have a judgment for the value of the goods and chattels replevied, and also for adequate damages for the detention of the same: Laws 1876, page 84, sec. 53.

They might waive either and take judgment for whichever cause they saw fit or could prove. When judgment was rendered by the district court for damages, the presumption is that it was the damages allowed by law to be adjudged in the action or proceedings disclosed by the record.

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Garland et al. v. Bartels Brothers.

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BRISTOL, Associate Justice: This case is here from the district court of the first judicial district for the county of Colfax by writ of error. Such of the facts as are necessary to an understanding of the case, are as follows:

William Garland, one of the plaintiffs in error, in April, 1879, instituted an action of replevin before a justice of the peace of said county against Julius Bartels and Gus Bartels, as Bartels Brothers, to recover the possession of nine hundred ties, the value of which is stated in his affidavit for a writ of replevin, to be \$90; a writ of replevin was issued by the justice of the peace and the sheriff of the county made return thereto that he served the same by taking the property described and delivering it to the plaintiff after taking bonds and reading the writ to defendant; what this bond was does not appear, neither does it appear that the sheriff caused the value of the property to be assessed as required by law, preparatory to taking a bond and delivering the property to the plaintiff. A jury trial was had before the justice of the peace, the plaintiff, William Garland, appearing, and Julius Bartels, one of the defendants, also appearing. The jury, over their signatures, found in writing the following verdict, viz.:

“OTERO, New Mexico, April 19, 1879.

“We, the jury in the case wherein William Garland is plaintiff and Julius Bartels is defendant, find a verdict in favor of William Garland and against Julius Bartels.” Whereupon the justice of the peace “assessed the costs of the suit against the said defendant, Julius Bartels.” From this judgment or determination, or whatever the ending of the proceeding before the justice of the peace may be called, an appeal was taken to the district court for Colfax county at the instance and request of the said defendant Julius Bartels. The style of the case as entered in the proceedings of the district court for Colfax county upon such an appeal, is:



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WILLIAM GARLAND  
 v.  
 BARTELS BROTHERS, *Appellants.* }

And so much of the proceedings in that court as relate to the judgment in this case which was rendered therein at the August, 1879, term thereof, is as follows:

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 v.  
 BARTELS BROTHERS, *Appellants.* } *Replevin—Appeal.*

"Now come the said defendants and appellants by their attorney, M. W. Mills, Esquire, and the said plaintiff and appellee, although three times solemnly called, comes not, but makes default.

"It is therefore considered and adjudged by the court that the said defendants and appellants ought to recover their damages by reason of the premises, but such damages being unknown to the court, it is ordered that a jury be impanelled to inquire thereof; and thereupon comes a jury, to wit: (Here follow the names of the jurymen), twelve good and lawful men of the body of the county, who being impanelled and sworn well and truly to assess the damages of the said defendants and appellants by reason of the premises upon oaths, assess the same at \$270.

"It is therefore considered and adjudged by the court that the said defendants and appellants recover of the said plaintiff William Garland and of B. H. Hopper and J. P. Hopper, his sureties on the bond heretofore filed herein, the sum of \$270 and their costs in this behalf expended taxed at \$46, and that they have execution therefor."

It is of this judgment rendered by the court below, under the circumstances and upon the facts hereinbefore recited, that the plaintiffs in error complain and assign as error therein as follows:

*First.* That the judgment is erroneous because entered in favor of the defendants by the name of Bartels Brothers, and not by the name of the defendants in the original suit.

*Second.* That the judgment is erroneous because entered

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against the plaintiff William Garland and his sureties in the replevin bond; and

*Third.* That the verdict and judgment are erroneous because there was no finding of the value of the property replevied as required by law.

There can be no doubt that the parties ought to have been described by name in the proceedings in the district court below in the same name as in the justice court wherein the action was originally brought. It was irregular to describe the defendants in the entitling of the cause, and that in all the proceedings in the court below, including the rendition of the judgment, merely by the firm name of Bartels Brothers. But as the plaintiffs in error can be in no wise affected by this irregularity, the judgment ought not to be disturbed at their instance on that ground.

The court below acquired no jurisdiction to render a joint judgment against William Garland and his sureties B. H. Hopper and J. P. Hopper, and under no circumstances arising in this action, could the court render a valid judgment against these sureties. In this respect there is manifest error in the judgment. If there were no other irregularities in the proceedings and judgment in the court below, we might perhaps under the statute be justified in reforming the judgment, or in rendering such judgment in this court as would be in conformity with the verdict, but in doing this, we must necessarily pass upon and be satisfied of the validity and sufficiency of the verdict. In the trial and determination of causes in the district court upon appeals from judgments rendered by justices of the peace, the district court must be governed by the same rules that are prescribed by law for the government of courts of justices of the peace in like causes: Session Laws N. M., Session 1876, p. 90, sec. 17. One of the rules prescribed by law for the government of courts of justices of peace as well by the act of congress organizing a territorial government for New Mexico, as by the statute law of such territory, is that no such court shall have jurisdiction over a debt or damages in an amount exceeding one

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hundred dollars. Another of such rules is, that in any action of replevin brought before a justice of the peace, where the plaintiff fails to prosecute his suit to final judgment, a jury must be impanelled and sworn, to inquire and assess the value of the property replevied, together with the damages for the detention of the same, and that the justice shall render judgment in favor of the defendant for such value and damages as assessed: Session Laws N. M., 22d Session, 1876, p. 84, sec. 53. It seems from an examination of the record, that neither of these rules, though applicable, were applied to this case by the court below.

The verdict and judgment for damages were for more than double the amount of which a justice of peace has jurisdiction.

The jury was sworn to assess damages only. The oath as administered did not include the assessment of the value of the property replevied. The judgment was rendered for damages only, and not for the value of the property replevied. Such value and damages should be stated separately, both in the verdict and judgment.

For the foregoing reasons, we are of the opinion that the judgment herein by the court below ought to be reversed, and the cause remanded to such court for a proper judgment of default, also for an assessment of the value of the property in controversy, as well as of damages for the detention of the same and for judgment thereon as hereby indicated.

And it is so ordered.

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CORNELIUS BENNETT ET AL., Appellants, v. JAMES ZABRISKI,  
Appellee.

*January 21, 1880.*

ATTACHMENT. (1) *Pleadings in, description of parties: Variance.*

SAME. (2) *Writ, allegations of, traversable.*

SAME. (3) *Same, amendment.*

1. The plaintiffs must be described in substantially the same way in the affidavit, writ, and declaration in attachment. If different descrip-

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tions are given in the affidavit and in the writ, it will not be presumed that the plaintiffs named in each are the same.

Thus, where the affidavit in attachment was in behalf of the firm of Bennett Bros. & Co., but did not show of what persons said firm was composed, and the writ of attachment was issued in favor of Cornelius Bennett, Joseph F. Bennett, and Henry Lesinsky, but did not show that these persons composed the firm of Bennett Bros. & Co., or any other firm, it was held that all proceedings founded upon such affidavit and writ were properly quashed upon motion by defendant.

2. A writ of attachment is traversable. Every material fact alleged in it may be denied, and trial had upon it without reference either to the petition or to the declaration, which cannot be relied upon to supply deficiencies in the writ.
3. In the absence of statutory authority so to do, a writ of attachment cannot be amended.

Appeal from the District Court, Grant county.

Plaintiffs sue defendant in an action of assumpsit, and sue out a writ of attachment which, among other things, states that the petitioners are Cornelius Bennett of Arizona, Joseph F. Bennett, of Grant county, and Henry Lesinsky, of Doña Ana county, in this territory. That said petitioners were doing business under the firm name and style of Bennett Bros. & Co., at Silver City in said county of Grant. And that the defendant James A. Zabriski, was a resident of the state of Texas.

The affidavit upon which the writ issued was as follows:

TERRITORY OF NEW MEXICO, } ss.  
 COUNTY OF GRANT.

This day personally appeared before me, the undersigned clerk of the Judicial District Court within and for the county and territory aforesaid, Joseph F. Bennett, of the firm of Bennett Bros. & Co., and being duly sworn, says: That James A. Zabriski is justly indebted to the firm of Bennett Bros. & Co. in the sum of one hundred and eight dollars and seventy-eight cents, after allowing all just offsets

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on account of goods, wares and merchandise sold and delivered, moneys lent and advanced, and account stated, and that the said James A. Zabriski is not a resident of, nor resides in, this territory.

J. F. BENNETT,

Sworn and subscribed.

Bond was given and approved. John P. Risque also made affidavit that the defendant was a non-resident of the territory.

Defendant entered a special appearance for the purpose of moving to quash the proceedings for the following reasons:

1st. The affidavit is made by one Joseph F. Bennett, but does not state for whom.

2d. It does not state to whom the defendant is indebted.

3d. It does not say that said indebtedness is due after allowing all just credits.

4th. It does not state that he has good reason to believe and does believe in the existence of the fact set forth as ground for issuing of attachment that the defendant is a non-resident.

5th. The writ does not set forth when, or where, or by whom the debts were contracted.

6th. The body of the writ does not set forth in what style the plaintiffs sue.

7th. And for other good and sufficient reason apparent upon the affidavit and writ.

This motion was by the court sustained, the writ of attachment quashed, the attachment dismissed, and judgment rendered on the merits of the case in favor of the plaintiffs.

*Conway & Risque* and *Catron & Thornton*, for appellants.

1st. Plaintiffs insist that the whole record can be examined to see for whom by whom the affidavit was made: Drake on Attachment, sec. 93. Failure to entitle the affidavit in the cause or failure to describe the persons who made it as plaintiffs, or the debtor named in it as defendant, does not make it bad: Drake on Attachment, sec. 92; *Chandler v. Riddle*,

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6 Ast. (1 Eng.), 480; *Kenney v. Heard*, 17 Ast., 397; *Pool v. Webster*, 3 Metcalf (Ky.), 278.

2d. The affidavit does state to whom defendant is indebted; it says to Bennett Bros & Co., and the petition shows that Bennett Bros. & Co. are the plaintiffs. It states that the amount sworn to was due after allowing all just offsets, which are the exact words of the statutory form. The statute has prescribed a form for affidavits in attachment (Compiled Laws, sec. 216, page 25); and this affidavit is a substantial compliance with that form. The writ is also in compliance with the statutory requirements, and is good.

PARKS, Associate Justice: This was a proceeding by attachment, and a motion was made at the return term of the writ by the defendant's attorney, who appeared specially and for that purpose alone, and moved to quash the proceedings for several reasons stated in the motion. It is necessary to notice but one of these reasons.

The affidavit in this case was made in behalf of the firm of Bennett Bros. & Co., and does not show of what persons said firm is composed. The writ of attachment was issued in favor of Cornelius Bennett, Joseph F. Bennett and Henry Lcsinsky, and does not show that said persons composed the firm of Bennett Bros. & Co., or any other firm.

It is laid down in Chitty's Pleadings, that, "It must be stated with certainty who are the parties to the suit, and therefore, a declaration by or against C., D. & Company, not being a corporation, is insufficient," and that, "Actions to be properly brought must be commenced and prosecuted in the proper Christian and surnames of the parties, and not in the name of the company or firm." By the statute of New Mexico the party bringing suit is required "to set forth the Christian and surname of both plaintiff and defendant." An affidavit in attachment is an important pleading. It is a declaration under oath by which property is taken

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from a defendant before a judgment is obtained against him. It is traversable and every material fact stated in it may be denied and a trial upon it.

It must be sufficient in itself. The trial is had upon it without reference to the petition or declaration and we cannot look to the petition or declaration to supply its deficiencies. We cannot presume that the plaintiffs in the declaration, affidavit and writ are the same: they must be described in all these papers. For aught we can know from the affidavit and writ in this case, the parties mentioned in them may be very different.

We have no statute authorizing the amendment of an affidavit in attachment, and the judgment of the district court in sustaining the motion to quash the proceedings in this case must be sustained.

Judgment affirmed.

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JESUS G. ABREN, Appellant, v. WEBSTER BROWN, Appellee.

*January 23, 1880.*

- REPLEVIN. (1) *Protest and allegations of innocence to be filed with whom.*  
 SAME. (2) *Affidavit, protest, and allegations of innocence considered as pleadings.*  
 SAME. (3) *Failure to file protest and allegations of innocence, whether judgment is valid.*  
 SAME. (4) *Protest and allegations of innocence, default in filing, waiver of, by going to trial.*

1. Whether the defendant in replevin is required to file the protest and allegations of innocence provided for by the statute (*Session Laws 1868, page 76*), with the clerk of the probate court, or the clerk of the district court, *quære*.
2. It would seem to be a fair construction of the statute (*Session Laws, 1868, page 76*), to hold that the plaintiff's affidavit in replevin should be treated as his verified declaration in replevin, and that the defendant's protest and allegations of innocence should be regarded as his plea in bar upon the merits.

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3. As to the statute (*Session Laws 1863, page 76*), providing that the default of the defendant in replevin in filing the protest and allegations of innocence as provided for in that statute, "shall be decreed an abandonment of all claims in the premises," it is queried. (1) By what tribunal such abandonment shall be decreed? and (2) If not by the district court, whether such determination of the right to personal property through the default of the defendant to file his protest and allege his innocence without any adjudication by a competent tribunal, is not a determination of the right to personal property without due process?
4. An affidavit being made and filed with him, the probate clerk of Colfax county issued a writ of replevin, which was served, and the property placed in possession of plaintiff. The defendant failed to file his protest and allegations of innocence within thirty days after the replevying of the property as required by statute (*Session Laws 1863, page 76*), thus making default. By the writ of replevin, the defendant was also cited to appear in the district court, and plead within a specified time long after the expiration of the thirty days. At such time plaintiff declared against the defendant in that court, and the defendant appeared and pleaded the general issue. Both parties then agreed to a continuance after the expiration of which the court, on motion of the plaintiff, struck the cause from the docket on the ground that defendant had defaulted in failing to file his protest and allege his innocence within the thirty days as required under the statute.

*Held*, That even if the statute in question was a valid law, the plaintiff by appearing, pleading, and consenting to a continuance after the default of defendant, in not filing his protest and allegations, waived such default. That the court acquired jurisdiction of both parties to the cause by the service of the writ with the citation therein contained, by the appearance of both parties, and by their submission to such jurisdiction long after the expiration of the thirty days, as well as by the filing of their respective pleadings, and by their agreement to a continuance. That the court having thus acquired jurisdiction, neither party was at liberty to withdraw without the consent of the other, so as to prevent a final determination of the right to the possession of the property as between them.

Appeal from District Court for Taos county.

This is an action wherein plaintiff sued out a writ of replevin from the clerk of the probate court, returnable to the district court for the county of Taos. The affidavit and



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bond do not conform to the statutes authorizing the probate clerk to issue writs of replevin. The papers were sent up to the district court, but no protest appears among them. The case was docketed, papers filed and plaintiff filed a petition in the case, to which the defendants pleaded, both observing the requirements of the statutes with reference to writs of replevin, and on motion of the plaintiff, by agreement of the parties, the cause was continued until the following term, at which time the plaintiff moved the court to strike it from the docket, which was done, defendant excepting. Defendant then moved the court to impanel a jury to assess the value of the property replevied and double damages for its detention. This motion was refused by the court, the defendant excepting. Defendant then appealed from both orders to this court.

———, for appellant.

It cannot be claimed that this suit is brought under the statutes of January 29, 1868, for the reason that neither affidavit nor bond nor writ comply with statute, but they do conform to the statute in the Compiled Laws governing writs of replevin: Act of January 29, 1868, page 76; Compiled L., page 242, secs. 8 and 4. Statutes for replevin, etc., must be strictly construed against the party using them.

If the statute is not followed by the plaintiff, can he take the defendant's property and hold him strictly to the statute? The first section of the law of January 29, 1868, gives general authority to probate clerks to issue writs of replevin subject to the same rules and restrictions of clerks of the district court and seems to be entirely independent of the rest of that statute. See sec. 1, and Comp. L., 342. This section can be left out and the statute of January 29th will be perfect.

If it was intended that the probate clerk's conduct should be governed by the remainder of the act, then why provide that his conduct should be subject to the rules and restric-

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tions governing clerks of the district court, which are different from the remainder of the statute of January 29, 1868?

If a protest was necessary, then the presumption is that it was filed. Officers are always presumed to do their duty, and the statute in this case, if applicable, prohibits the clerk from sending up the record to the district court. If the protest is not to be found, we must assume that it was filed.

Supposing that a protest is required and that none was filed, as required. The plaintiff waived it by voluntarily coming in and filing a petition and asking for a continuance, thus submitting to the jurisdiction of the court. This is a cause of which the court has general jurisdiction and irregularities can be waived so as to give the court jurisdiction of the person and property. In fact, being that the writ directly makes itself returnable to the district court, the sheriff could return it there only.

Can the plaintiff, after he has sued out a writ returnable to the district court, under the rules and forms of the district court and the statute of 1868, and after he has appeared and filed his petition whereby he admits regularity and has allowed a plea to be filed and has moved for and obtained a continuance, be permitted to deny jurisdiction, or to question regularity of the court proceedings, or of his own writ and returns? The plaintiff, by his acts, waived irregularities.

There is no means whereby the property of one person can be taken, legally, by another, without a judgment or without the consent of the person from whom it is taken.

This case seeks to take property from defendant by legal means, and yet to render no judgment against defendant. This is contrary to all legal principle and would overturn every right: Cooley Const. Limitation, 353 and 354; *Greene v. Bigg*, 1 Curtis, 311; *Lowry v. Rain*, Cam. L. Journal, vol. 10-29; *Taylor v. Porter*, 4 Hill, 140. The most that could be claimed is that defendant is in default, and judgment not entered: Potter's Dwaris on Stat., 395.

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Further, an appearance by attorney cures all irregularity of process. Having once appeared by attorney, the defendant cannot take advantage of irregularity in the process or its service: *Know v. Thomas*, 3 Cranch, 496.

The clerk may enter the appearance of the attorney-general in all cases of the United States at the first term in which he may move to take advantage of irregularity, but if he lets it pass for that term without objection, it is conclusive on him as to an appearance. The appearance cures all defects in process and service: *Tarrar v. U. S.*, 3 Pet., 459.

Where a court has capacity by its original jurisdiction to receive and try a given question, and the parties without compulsion submit such a question, it is too late to inquire how the question came there: 1 Ohio Digest, 717, sec. 14.

Jurisdiction over the party is acquired where he appears and pleads to the action, or does not object at first term: 43 Mo., 502; 60 Mass., 564; 42 Mass., 508; 48 Mo., 235.

*Frank Springer*, for appellee.

Every presumption is in favor of the validity of a law, and courts will not declare an act invalid except in case of the most clear and unequivocal violation of fundamental law: Sedgwick Const. Lim., 409, and cases cited.

The legislature has a right to establish methods of procedure, and to define the steps which must be taken by parties to preserve their rights. If notice is provided and time allowed, so that by following the prescribed course a party has opportunity to defend, it is perfectly competent for the legislature to declare that if he fails to do that which the law requires, he shall not be further heard: Sedgwick Const. Law, p. 481, citing *Webster v. Alton*, 9 Foster (N. H.), 384; *Empire City Bank*, 18 N. Y., 200, 215; Cooley Const. Limit., 403, and notes and cases cited.

Of this nature are statutes of limitation: Angell on Limit., § 22; Cooley Const. Limit., 364, *et seq.*

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For instance, the one year limitation in replevin.

Statutes, or rules of court, fixing the time within which parties are required to plead, belong to the same class, yet no one claims that they operate to deprive parties of property without due process of law.

The New Mexican statutes (Laws 1868, pp. 76, 80, § 4), require the party from whom the property has been replevied, to answer within thirty days, or forever keep silent. In other words, the law presumes, in default of such answer, that the property belongs to the plaintiff, and this presumption is made conclusive.

Suppose the plaintiff had taken no steps to prosecute his suit, and the defendant had taken a judgment against him and his sureties on the bond, would not this court have been bound to reverse the judgment on writ of error? Undoubtedly, because the plaintiff was not bound to prosecute his action after the default of defendant.

It was proper for the court to treat the case as abandoned, and to strike it from the files, if the plaintiff so elected. Or, it might have stricken defendant's answer from the files, and gone on and rendered judgment as in any case of default. If the first course was erroneous, it was without prejudice to defendant. It was no waiver of the benefits of the statute, and did not in any way cure defendant's default for the plaintiff to file a petition and ask a judgment. He was at liberty to pursue that course, or adopt another. The defendant had no right to be heard in either case at all. He had lost his day in court by his own laches.

Appellant is not entitled to be heard in his second assignment of error, because appeal was not allowed from the order denying his motion to impanel a jury and assess damages.

The appeal is not properly before this court, for the reason that the district court in and for the county of Taos had no jurisdiction to make an order *nunc pro tunc* in the case, or any order in it, in April, 1879. This case was on the docket

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in the Taos District Court, by virtue of the act of January 14, 1876, attaching the county of Colfax to the county of Taos for judicial purposes. Jurisdiction in the case was taken away by the absolute repeal of the act in January, 1878, without any saving clause as to pending causes. The court had no power to make any further order in the case: Sedgwick Const. Law, 108.

The appeal should for this reason be dismissed.

BRISTOL, Associate Justice: On the 22d day of December, 1876, Brown, the plaintiff below and appellee here, made the usual affidavit before the clerk of the probate court of Colfax county for a writ of replevin against Abren, the defendant below and appellant here, to recover the possession of two horses, valued at \$300, and damages.

The affidavit was on the same day filed in the office of the probate clerk, and a writ of replevin issued by him, under the seal of the probate court.

The sheriff made return to such writ that, on the 22d day of December, 1876, he served the same, took from Brown a bond, and delivered to him the two horses.

This writ, among other things contains a citation to Abren "to be and appear before the district court for the first judicial district, on the first day of the (then) next term thereof, to be begun and held within and for the county of Taos, at the court house of said county, on the first Friday after the fourth Monday of March, 1877, to answer unto Webster Brown for the wrongful detention of the goods and chattels aforesaid to the damage of the plaintiff \$300."

The making and filing the affidavit and bond, and issuing the writ under the circumstances, evidently were done in pursuance of the statute of the territory enacted in January, 1868: *Vide* Session Laws 1868, p. 76. This statute provides that the clerks of the respective probate courts of the

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territory are authorized to issue writs of replevin subject to the same rules and restrictions as are prescribed for the clerks of the district courts, upon the filing in the office of any such clerk of a probate court an affidavit and bond by the plaintiff as therein specified. Such statute further provides that the defendant may protest against the replevin by filing such protest within thirty days after the replevying of the property, and "alleging innocence in the premises against him," and this allegation shall bring in question, not only the legal ownership of the property, but also the illegal seizure and detention thereof. But a failure to file such protest within the thirty days, "shall be deemed an abandonment of all claim in the premises, and the said action shall be conclusive and the claimant shall not be bound for the prosecution of his suit in the district court."

Such statute further provides that any clerk of a probate court, before whom any such action of replevin shall have originated, shall file in his office all the papers and documents relative to the case, and shall transmit the same to the clerk of the district court, ten days before the commencement of the next term thereof in his county; provided such protest shall have been filed within the time prescribed; but if such protest should not be so filed, then the papers shall not be transmitted to the clerk of the district court, but remain in the office of the clerk of the probate court. The more this statute is considered by any one, the greater his perplexity is likely to be, as to how it can be legitimately applied to any judicial proceeding in the district court.

Upon filing with the probate clerk an affidavit and bond by the plaintiff, and the issuing and service of a writ of replevin, and before the plaintiff's petition or declaration is required to be filed in the office of the clerk of the district court, the defendant is required to file his protest and allege his innocence.

Where he is to file the same is not specified in the statute,

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there is nothing to indicate that he is to file the same with the clerk of the district court, and it is but an exceedingly remote inference that he is to file the same with the probate clerk; if so made and filed, then such protest and allegation of innocence shall bring in question the ownership of the property and the illegal seizure and detention thereof, that is, such proceeding shall raise the very issues to be tried in an action of replevin.

It would seem to be a fair construction of this statute that the plaintiff's affidavit should be treated as his verified declaration in replevin, and the defendant's protest and allegation of innocence should be regarded as his plea in bar upon the merits, and that the issues to be tried are in this way to be made up in replevin suits thus instituted before probate clerks; that, perhaps, would be well enough; it would only be creating an additional mode of procedure. But the strange feature of this statute is, that a default in filing this protest by the defendant, "shall be decreed an abandonment of all claim in the premises," etc.

Decreed by what tribunal? Certainly not by the district court, the only competent tribunal to make such a decree. Because, if the protest should not be filed, the case is not to be transmitted to that court for adjudication. The plaintiff in that contingency, after acquiring possession of the property under the writ, retains the same without being required to appear and prosecute the action in the district court to final judgment.

While we refrain from passing upon the validity of so much of this statute as relates to the determination of the right to personal property through the default of the defendant to file his protest, and allege his innocence as prescribed thereby, without an adjudication by a competent tribunal, yet we entertain very grave doubts of its validity or of its being due process of law.

The property in controversy was replevied on the 22d day

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of December, 1876. This is the date from which the thirty days within which the defendant was required to file his protest under the statute would begin to run.

The defendant below was cited in and by the writ that was served on him at the instance of the plaintiff, to appear at the district court "on the first Friday after the fourth Monday in March, 1877," and plead to the plaintiff's declaration. Such appearance would be long after the expiration of the "thirty days."

On the 2d day of April, 1877, the plaintiff below filed his declaration in the office of the clerk of the district court, which was of course long after the expiration of the "thirty days." It was also during the term of the district court at which the writ was returnable. On the 6th day of April, 1877, and at the term aforesaid, the defendant below filed his plea to such declaration, pleading thereby the general issue, and at the same term on the 10th day of April, 1877, the cause was continued to the (then) next ensuing term, at the cost of the plaintiff, and upon the agreement of both parties, and at the term next thereafter, both parties appearing, the court sustained a motion then and there made by the plaintiff, to strike the cause from the docket, on the ground that the defendant had failed to file such protest, and allege his innocence under such statute. Judgment was entered striking the cause from the docket, without further adjudication. The defendant excepted. Even upon the assumption that this statute in all respects is a valid law, there can be no doubt that the plaintiff could waive the default of the defendant in filing his protest and allegation of innocence, and that he could, notwithstanding such default, submit himself and his case to the jurisdiction of the district court in the ordinary mode, by personal appearance, and filing his declaration in replevin.

We are unanimous in our opinion that the plaintiff waived such default by his subsequent appearance, pleading and con-



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sending to a continuance. That the court below acquired jurisdiction as well of both parties of the cause, by the service of the writ with the citation therein contained, the appearances of both parties, and submitting to such jurisdiction long after the expiration of the "thirty days," as well as by the filing of their respective pleadings, and agreeing to a continuance. The court below having in this way acquired such jurisdiction, neither party was at liberty to withdraw without the consent of the other, so as to prevent a final judgment determining the right to the possession of the property as between them.

The judgment of the court below in striking the cause from the docket under the circumstances, was erroneous. It is ordered that judgment be entered, reversing the judgment below for appellant's costs, and remanding the cause to the court below, with directions to reinstate the same upon the docket, and to proceed therein by due course of law.

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JOHN R. MAGRUDER, Appellant, v. BERNARD WEISL,  
Appellee.

January 23, 1880.

**CAPIAS AD RESPONDENDUM.** (1) *Appearance by attorney to plead.*

1. A person arrested on a *capias ad respondendum*, who gives a bond to appear on the first day of a subsequent term of court, need not appear until the second day of such term, and then he may appear by attorney for the purpose of traversing the affidavit and pleading to the declaration; being only bound by law to render himself in custody to abide the judgment, order or decree of the court, he need not appear in person for any other purpose

This is an action of trespass on the case upon premises, commenced by the issuance of a writ of *capias ad responden-*

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*dum.* The sheriff executed the writ by arresting the defendant, and taking bond for his appearance "on the next July term of said court to be begun and held within and for the said county of Grant, at the court house of said county, on the second Monday of July, A. D., 1878, then and there to answer unto the said suit of the said Bernard Weisl," etc. Defendant failed to appear in person, but appeared by attorney, and by attorney asked to be allowed to contest the truth of the affidavit upon which the writ issued, and to plead to the merits of the suit. The court overruled the appearance by attorney, and refused to allow it for either purpose, and at the instance of the plaintiff gave judgment by default against defendant, and ordered a jury to come to inquire of plaintiff's damages. A verdict is returned and judgment made final and entered against defendant for the amount of the verdict of the jury. The court allowed a witness, C. E. Goldsmith, to give in evidence to the jury the plaintiff's books of account, without testifying that he kept the books, or in any way knew them to be correct, or laying any foundation whatever for their introduction in evidence.

The court, after forfeiting his bond, and rendering a judgment against defendant, ordered a *scire facias* to issue against defendant's bondsmen, although no assignment of the bond had been made by the sheriff, and no *ca. sa.* had issued and return thereon been made.

*Conway & Risque*, for appellant.

The statute authorizing suits by "capias" has been repealed by the act of February 15, 1878, "regulating practice in district courts," and if that did not repeal it it becomes wholly inoperative by the abolition of imprisonment for debt. The appearance at common law, was by giving bail above, or bail to the action. Defendant could then appear by attorney, and need never have put in an appearance at all. Bail above, or bail to the action, is unknown to the laws of New Mexico. and if defendant appears in person,

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the court cannot order him into custody, or hold him after rendition of judgment. The statute does not say what shall be an appearance, and as at the common law, bail above does not exist, there is no prerequisite to an appearance by attorney. Capias accomplishes nothing more now than a summons does, hence the legislature has by implication repealed it, by the act declaring by what process suits shall be commenced.

Defendant appeared there by his attorney and the default granted by the court was illegal. Defendant should have been permitted to be heard by his attorneys.

The statute says the denial of the affidavit shall be heard as in attachment cases, and no personal attendance of the defendant is necessary there.

The bond taken by the sheriff in this case is not in compliance with the statute; it must be strictly followed, and it only requires the bond should be conditional that the defendant shall render himself in custody to abide the judgment, orders or decree of the court; it shows no requirement of personal attendance and is suited only to the time when the court could imprison after judgment, and shows the law to be inoperative now. Even if the default was proper, the evidence submitted to the jury is plainly incompetent.

The issuance of the *scire facias* at that stage of the proceedings is wholly unwarranted; *ca. sa.* had to issue and be returned *non est inventus*, and the bond assigned by the sheriff before the bail could be proceeded against. Reference is made to the following authorities:

The capias law, page 204 Comp. Laws of N. M., has been repealed. See acts approved February 15th, 1878, "relating to the practice in the district courts:" Acts 1878, page 53. It provides that all suits at law shall be commenced by filing a declaration with the clerk, who shall at once make out a summons or subpoena to the defendant. The act is general in its terms, prescribes the proper process; it is imperative.

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The rule of law *expressio unius exclusio alterius* applies. This is a repeal of any other kind of process. "Even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first act \* \* \* it will operate as a repeal." It is in effect a revision: 11 Wallace, 92, and authorities cited, *Id.*, 656; 10 Wallace, 395.

Subpœna is appropriate writ for chancery suits, and summons for suits at law: See Bouvier's Law Dict., "Subpœna" and "Summons;" 3 Black. Comm., 280.

Capias becomes inoperative by the abolition of imprisonment for debt. No *capias ad satisfaciendum* can issue. Appearance at common law was putting in bail above. Then defendant could appeal by attorney; could send his bail bond without appearing himself: 6 Cal., 59; 4 Law Library, 400 and 373, *et seq.* (Petersdorf on Bail); Tidd's Practice, 1097 and 1107; Bacon's Abridgement, Art. "Bail" D; 3 Black. Comm., 416; 1 Chitty Pleadings; 3 Carnes Rept., 95.

There being no such thing as bail above in New Mexico, and the statute never having expressly changed the common law as to appearance (in fact it is wholly silent as to it), it follows that defendant could appear by attorney and defend without personal appearance: 3 Carnes Rept., 95; Bouvier's Law Dictionary, "Appearance;" 3 Black. Comm., 26, and authorities cited above.

The statute West, 3 C, 10, cited in 3 Black. Comm., 26, expressly provided "attorneys may be made to prosecute or defend any action in the absence of the parties to the suit." This statute is in force as a part of the common law of the U. S., antedating the second year of James I (1607).

The law never requires a useless or vain thing to be done, or charges for a failure to do it, and delivery of defendant would have been such, for he could not have been held, and his attorney could have done anything the defendant in person could: *Matron v. Elder*, 6 Cal., 59; 2 Mass., 481. Especially last page of the case.

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Sec. 8, Compiled Laws, N. M., 204, provides that defendant "may deny the truth of the affidavit by answer, without oath, and the same proceedings shall be had therein, as in cases of attachments." His personal attendance is wholly unnecessary.

The right to appear and defend by attorney is guaranteed by sec. 21 of the Bill of Rights, Comp. Laws of N. M., p. 642, sec. 21.

*Ca. sa.* had to be sued out against the principal and returned *non est inventus*, before the plaintiff could proceed to hold the bail. This can not be done now for obvious reasons, so giving a bond would be a mere form, and *capias* no more than a summons: 3 Johnson, 514; 2 Wend., 246; 3 Black. Comm., 416, and authorities cited above. The bondsmen were entitled to four days within which to summon the defendant, before they could be proceeded against: See authorities cited above.

An attorney is vested with all the necessary powers to defend the suit and carry into effect any order, judgment or decree of the court: See Bacon's Abridgment Act, "Attorney" B; Bouvier's Law Dictionary, "Attorneys and Appearance," and Waite's Digest of N. Y. Rep., "Attorney and Client," p. 205, sec. 43.

Appearance to deny the truth of the affidavit is special, and the court can not compel general appearance: "Attachment," Comp. L. of N. M., 212, sec. 16.

Appearance by attorney is appearance for all purposes, unless the statute expressly requires the attendance of defendant in person: Bouvier's Institute, vol. II, "Process" and "Appearance." The last clause of which is as follows: "When defendant has been arrested under a *capias*, the entry of special bail to the action is considered an appearance."

Filing an answer is an appearance: 21 Cal. Making a motion: 11 Wiscon., 401. Filing demurrer: 15 Indiana,

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874. Asking for a continuance: 11 Iowa, 45. See, also, 4 Johnson Ch. (N. Y.), 94; 6 Peters, 323, and Bouvier's Law Dictionary, "Appearance."

The bond taken in this case is not in compliance with the statute, and is therefore void: Comp. L. of N. M., p. 204; *Bernard v. Veile*, 21 Wend., 88.

It was error to forfeit the bond and order *scire facias* to issue. It was necessary to assign the bond to plaintiff first, and have *oa. sa.* issued against principal, and return *non est inventus*: *McDowell v. Morgan*, 33 Mo., 555; 2 Mass. Rep., 481; 3 Black. Comm., 416; Tidd's Practice, 1097 and 1107; Bacon's Abridgment, Art. "Bail" D., and cases cited in notes. Law Library, vol. 4, p. 400, and 313 *et seq.*; 3 Johnson, 514; 2 Wendell, 246.

It was necessary to lay a foundation to admit plaintiff's books in evidence; witness could not testify from them otherwise: 1 Greenleaf's Evidence, sec. 117, *et seq.*; *Hierrich v. McPherson*, 20 Mo., 310 and authorities cited; 23 *Ib.*, 544.

*S. B. Newcomb* and *Catron & Thornton*, for appellee.

*First.* The *capias* in the case is a sufficient summons, and would be good as an ordinary summons, and if not, it was waived by the defendant entering into bond to appear as he expressly agrees to do in said bond, as appears by reference to said bond.

It is a well established principle that a defendant can waive irregularities in a summons by accepting service. This bond is in effect an acceptance of service and an absolute agreement in writing to appear.

*Second.* Neither the bill of exceptions nor the record shows in what manner Conway and Risque offered to appear and plead for defendant, if they were permitted at all to do so. They should have moved the court in writing to enter their appearance for the defendant and should have tendered their pleas in writing to be passed upon.

If they were attorneys of the court there would have been

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no objection to filing pleas or traverses without leave, but the court, on objection, when filed without leave, would determine whether they were proper or properly filed. In the absence of such showing, this court cannot tell why the court refused to permit the appearance, even if the reason given was not a good one, yet if the attorneys were otherwise in default as to the proper manner of appearing, they cannot object, if the decision might otherwise be correct.

Besides, the *capias* proceeding seems to imply a personal appearance. This is especially so when defendant enters into bond to personally appear, and must plead under oath: Comp. L., p. —.

*Third.* There was no error in giving judgment by default although attorneys offered to appear, no appearance being actually had.

*Fourth.* The bill of exceptions does not pretend to contain all the evidence introduced, nor even all the evidence of the witness Goldsmith. The question as to defect in the evidence cannot be considered as other evidence might have been, and probably was introduced to supply all defects. It is a legal presumption that sufficient evidence was introduced, if the contrary is not duly shown.

*Fifth.* It is immaterial whether the bond was perfected or not, there is no final judgment on it nor any appeal from the judgment of perfection, nor are the parties to the bond made parties here.

*Sixth.* The statute of 1878 does not repeal any other statute regulating practice except when it directly conflicts with it.

Repeals by implication are to be discouraged.

PARKS, Associate Justice: On the 28th day of February, 1878, John R. Magruder was arrested for a debt of \$1,306, by the sheriff of Grant county on a *capias ad respondendum* sued out by Bernard Weisl, and gave bond for his

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appearance at the district court of said county on the first day of the July term thereof, to answer said suit.

On the second day of said term, Conway and Risque, attorneys for defendant, offered to enter the appearance of defendant for the purpose of traversing the affidavit and pleading to the declaration. The defendant not appearing in person the court refused to allow said defendant to appear by attorney; judgment by default was rendered against him, his bond forfeited and \$1,306 damages assessed against him by a jury and judgment rendered; other proceedings were subsequently had which are of no importance to the determination of this case. The case was brought into this court by appeal.

The first error assigned involves the construction to be given to act of Feb. 15, 1878, relating to practice in the district courts. The court are not agreed as to the construction to be given to that act, and such construction is not necessary to the decision of this case.

All of the other errors assigned follow from the second, which is as follows:

The court erred in refusing to permit defendant to appear by attorney and deny the truth of the affidavit and plead to the merits of the suit.

The defendant was not required by the statute to do anything until the second day of the term, and on that day he had as much right to appear by attorney in this as in any other case. He was only bound by law to render himself in custody to abide the judgment, order or decree of the court.

The fact that while under arrest he was required to give and did give bond for more than the law required did not change his legal rights.

The refusal of the court to permit him to appear by attorney and traverse the truth of the affidavit on which he was arrested and plead to the declaration, was error.



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For this error the judgment is reversed, and the case remanded to the court below for a new trial.

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BENJAMIN ZANZ V. ELIAS S. STOVER ET AL.

January 23, 1880.

TRIAL BY COURT. (1) *Finding not reviewable.*  
GARNISHMENT. (2) *Pleadings in.*  
SAME. (3) *Sworn answer: Pleadings.*  
GARNISHMENT. (4) *Case stated.*

1. Where a jury is waived and a trial had before the court, so far as its decision of questions of fact is concerned, its verdict will not be set aside, nor the judgment founded thereupon reversed, where there is any evidence whatever on which its finding of fact could have been based.
2. In a proceeding of garnishment the allegations, answers and denials are to be regarded and treated simply as pleadings. The allegations stand in place of the ordinary complaint or declaration; the answers in place of the ordinary answer or plea; the denial in place of the ordinary reply.
3. The answer of the garnishee, although sworn to by him, is not evidence; neither is any other pleading in garnishment.
4. The allegations of the plaintiff in a proceeding of garnishment stated that the garnishees were indebted to the judgment debtor for work, labor and services, in the sum of \$700 or some other sum. The answers stated that the garnishees composed a firm, that the judgment debtor had performed work, labor and services in their store, that he had performed such work for about twelve months, and that they had not paid him anything for such work. Upon the trial the plaintiff introduced evidence of the services rendered by the principal debtor and of their value, and rested. The garnishees introduced no evidence at all.

*Held*, that there was no evidence on which a jury, or a judge sitting in place of a jury, could find for the garnishees, and that a judgment in their favor under such circumstances, is erroneous

Benjamin Zanz, the plaintiff and appellant herein, on the second day of October, 1877, recovered judgment in the dis-

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strict court for the county of Bernalillo against William E. Talbott for the sum of \$54.50 damages and \$13.22 costs, on the fourth day of the same month, execution having been issued on said judgment, the defendants herein, Stover *et al.*, were summoned as garnishees of said Talbott, he being then working for them as clerk in and about their store and business in Albuquerque. At the return term of said writ of execution, being the May term, 1878, of said court, allegations and interrogatories were propounded by the plaintiff to the defendants, Stover *et al.*, who filed their answer thereto at the October term, 1878, of said court. By consent of parties, the trial by jury was waived, and the case was tried by the court on the law and facts.

In answer to plaintiff's interrogatories, the defendants admitted that Talbott, the execution debtor, had worked for them twelve months as clerk in and about their store and business, that they were paying nothing for his work, that they had never paid anything for said twelve months' work, and that they owed nothing for said twelve months' work.

Plaintiff denied the garnishees' answer that they owed Talbott nothing, and were not indebted for the value of said labor, and issue was joined between the plaintiff and defendants, Stover *et al.* Plaintiff thereupon proved the value of said work to be \$50 per month, and the defendants introduced no evidence whatever. Judgment was rendered by the court for the defendants, whereupon the plaintiff appealed to this court.

*C. H. Gildersleeve and F. B. Catron* for the appellant:

By Law of Dec. 31st, 1873, Session Laws of 1873-4, page 38, "Notice of garnishment shall have the effect of attaching all personal property, money, rights, credits \* \* \* or other choses in action, due or to become due from the garnishee to the defendant \* \* \* or charge, or under his control at the time of the service of the garnishment or which may come into his possession or charge, or

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under his control, of, for or on account of which he may become indebted to the defendant between that time (service of notice of garnishment) and the time of filing his answer.

The only conclusion to be drawn from the defendants' answers, which are evasive and not explanatory, is that Talbott worked for them twelve months for nothing. This creates a presumption of collusion and fraud between them, a debtor cannot defraud his creditors out of the proceeds of his skill and labor by working gratis; his creditors are entitled to the fruits of his labors; and Talbott himself could have compelled the defendants to pay the value thereof: Bump on Fraudulent Conveyances, pages 270, 271; *Preston v. Campbell*, 9 Ala., 934; *Allen's Adm'x v. Richmond College*, 41 Mo., 302; *Waddingham v. Loker*, 44 Mo., 182.

As defendants accepted the clerk's services for twelve months in and about their store and business, there arises a presumption of contract between them that the services so rendered should be paid for: Parsons on Contracts, vol. 1, page 445, and notes; *vide* vol. 2, page 46, and notes; *James v. Bizby*, 11 Mass., 34.

The plaintiff as against the garnishee occupies the same position as the execution debtor, and the garnishee stands in precisely the position he would occupy if the defendant had sued him: Drake on Attachment, secs. 452, 461, 463; a fair construction of sec. 19, Comp. Laws N. M., page 214, would lead to same conclusion.

The garnishee must answer fully and distinctly, and clearly explain the relations between himself and the debtor, for an evasive answer will be construed more strongly against him: Drake on Attachment, secs. 629, 630, 633 and notes 634-656a, 659, 672; *Bebb v. Preston*, 1 Iowa, 469; *Ormsbee v. Davis*, 5 R. I., 442; *Crain v. Gold*, 46 Ill., 293; *Kelley v. Bowen*, 12 Pick., 383; *Cleveland v. Clapp*, 5 Mass., 205; *Scott v. Ray*, 35 Mass., 361.

The garnishees' answer is not conclusive, or true and suffi-

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cient under the laws of New Mexico, if denied: Comp. Laws N. M., sec. 19, page 214, and is never conclusive unless made so by statute, and is not evidence in his own favor even: Drake on Attachment, sec. 654; *Smith v. Hendricks*, 39 Mo., 164; *Keep v. Sanderson*, 12 Wis., 363.

When from all the facts no other reasonable conclusion can arise but that the garnishee owes the execution debtor, he will be held, even though he denies any indebtedness: 40 Pa. State, 248; *Maimo v. Buford*, 3 Ala., 312; *Bebb v. Preston*, 1 Iowa, 469.

The confession in the garnishees' answer that Talbott worked for them twelve months without their having paid anything for said work, together with the proof by plaintiff that the value of said work was \$50 per month during said time, is sufficient to make out a *prima facie* case for the plaintiff, which the defendants should have rebutted on the trial; they must show enough to discharge themselves: *McCoy v. William*, 1 Gilm. (Ill.), 591.

*Breeden & Hazledine*, for appellees.

The judgment of the court below was correct, and should not be disturbed.

The answer of defendants garnishees is explicit and in no-wise evasive. They answer directly and unequivocally every interrogatory propounded to them. If there is a failure to get out all the facts, it is because the interrogatories of the plaintiff are defective, and not of a character to require explanation and detail from the defendants.

In order to recover against the garnishees, it was for the plaintiff to state affirmatively that the defendant garnishees were indebted to the judgment debtor Talbott, or had his property in their possession.

Indebtedness or liability of the garnishee will not be presumed: Drake on Attachment, sec. 461; 33 Iowa, 210.

The answer of the garnishees is to be taken as true, and it was for the appellant to disprove the same: Drake on

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Attachment, sec. 651; *Kegin v. Dawson*, 1 Gilm., 86; *McKey v. William*, 1 Gilm., 584; 14 Ill., 342; 27 Ill., 352; 52 Ill., 222.

No evidence was offered tending even to disprove the answer of the garnishees, and it does not show an indebtedness so far as appears from the answer (which is a full and explicit reply to the interrogatories). The judgment debtor Talbott may have been working out a prior indebtedness, or on account of a trust, or on an agreement with the garnishees to support and provide for his family, or he may have been a partner with the garnishees, general or special. Either hypothesis is consistent with the answer and the evidence, and in neither case would the garnishees be liable: Drake on Attachments, secs. 454 and 457.

When there remains a reasonable doubt of the garnishee's indebtedness, he is entitled to be discharged: *Morse v. Marshall*, 22 Iowa, 290; Drake on Attachment, sec. 659, subd. 7.

The finding in the case was equivalent to the verdict of a jury—a jury having been waived and the case tried by the court.

The answer of the garnishees was properly before the court at the trial, and it was for the court (as for a jury, if one had been called) to give it such weight as it deemed it to be entitled to: *Schwab v. Gingerik*, 13 Iowa, 697.

The case having been fairly tried and determined, there being facts before the court to justify a finding for the defendants, it was for the court which tried the case to decide upon the weight of the evidence, and this court will not disturb the finding.

PRINCE, Chief Justice: This is a case of garnishment, under the territorial statute.

The material facts are as follows: The plaintiff Zanz recovered judgment in the district court held in Bernalillo county, in October, 1877, against one William E. Talbott.

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Execution was issued, which was afterwards returned unsatisfied, and on October 4th, 1877, Elias S. Stover and Almaron M. Coddington were summoned as garnishees. At the May term of 1878, being the return term of the writ, written allegations and interrogatories were exhibited by the plaintiff, in pursuance of the statute, which the garnishees failed to answer, and their default was taken at the next term, October 9th, 1878. This default was subsequently opened, and Stover filed answers to the interrogatories during the same term, on October 14, Coddington not having answered. Judgment by default was taken against him on October 15th, and on the same day the plaintiff filed a denial of portions of the answers of the garnishee Stover, and issue was thereupon joined.

The case came on for trial on the issues so made upon the 19th day of October, whereupon the parties agreed to waive a trial by jury and try the same before the court. The plaintiff introduced the record of judgment in Zanz against Talbott, the execution issued thereon, and the summons to the garnishees, with proof of service. He called one witness, John A. Hill, who testified that he had been a clerk for the garnishees for seven months past in their store at Albuquerque; that Talbott had been working for them from Oct. 4th, 1877, down to the present time, clerking, and doing other work for them in and about the store and business, and that, to the best of his knowledge and belief, said work was worth \$50 per month.

This was all the evidence introduced on said trial, the defendants not introducing any whatever. The court gave judgment for the defendants, to which the plaintiff excepted and appealed to this court.

The court having acted in this case as a jury, so far as its decision on questions of fact was concerned, its verdict should not be set aside, nor the judgment thereon reversed, in a

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case where there is any evidence whatever, on which it could be based.

In the case before us, no evidence at all was produced on the part of the defendants, and the plaintiff introduced sufficient to make out his case *prima facie*. To sustain the decision in their favor under these circumstances, counsel for defendants have argued that "the answer of the garnishee is to be taken as true, and it was for the plaintiff to disprove the same," and further say that "the answer of the garnishee was properly before the court at the trial, and it was for the court (as for a jury, if one had been called), to give it such weight as it deemed it entitled to."

These arguments are based on the idea that the answers of the garnishee to the allegations and interrogatories of the plaintiffs are evidence in the case. But there is nothing in the law of this territory to sustain such a view.

It is clear from a reading of the statutes that, however the law may be in other states and territories, here the allegations, answers and denials are to be regarded and treated simply as pleadings. The proceedings are distinctly set forth on page 214 of the Compiled Laws (General Laws, 139).

"The plaintiff may exhibit in the cause written allegations and interrogatories touching the property, effects and credits attached in the hands of any garnishee.

"The garnishee shall file his answer thereto on oath.

"The plaintiff may deny the answers of the garnishee in whole or in part, and the issue shall be tried as ordinary issues between plaintiffs and defendants."

This seems so plain as to require no argument to show that the various papers filed are to be regarded as ordinary pleadings. The allegations stand in place of the ordinary complaint or declaration; the answers in place of the ordinary answer or plea; the denial in place of the ordinary

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reply, and the issue thus framed "shall be tried as ordinary issues between plaintiffs and defendants."

All the incidental proceedings tend to the same conclusion.

"In default of an answer by the garnishee to the interrogatories propounded, the plaintiff may take judgment by default against him." (Sec. 17.)

"If the answer of the garnishee be not excepted to or denied, it shall be taken to be true." (Sec. 19.)

It seems, then, that the allegations, answers and denials are to be considered and treated as pleadings in ordinary actions; and it only remains, therefore, to inquire how the particular case before us is affected by this principle. The allegations state that the garnishees are indebted to the judgment debtor for work, labor and services in the sum of \$700, or some other sum.

The answers are partially denied and partially not. The part thereof not denied, and therefore standing as confessedly true, is embraced in the answers to the 1st, 3d, 4th and 7th interrogatories, and is to the effect that (1st.) The garnishees compose the firm of Stover & Co. (3d.) Talbott has performed work, labor and services in the garnishees' store at Albuquerque. (4.) He has performed such work continuously since October 4th, 1877, being twelve months. (7.) The garnishees have not paid anything for such work since October 4th, 1877.

The case, therefore, comes up as one in which a plaintiff in his complaint alleges that a defendant owed him a sum of money for services, and the defendant, in his answer, alleges that the plaintiff has worked for him for twelve months, and that he has paid him nothing. Thereupon, the plaintiff introduces evidence of his services and their value, and rests; the defendant introduces no evidence at all.

In such a case there would be no evidence on which a jury



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could find for the defendant, and, consequently, none on which a judge sitting in place of a jury could so find.

Under the provision of the statute (Sec. 19), that the answers of the garnishee, if not excepted to or denied, shall be taken to be true, we may consider that any part of such answers not so excepted to or denied, should be considered as true; in other words, such undenied parts of the answers are equivalent to evidence in the case; and if there had been in the undenied portions of the answers in this proceeding any statements which, if they had been regularly in evidence, could have justified a verdict or decision for the defendant, the decision and judgment herein should be sustained, but as no such statements appear, it is not possible so to sustain them.

The judgment must be reversed, and the case remanded to the district court of the second district for a new trial.

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CLARENCE P. KIDDER v. JOSEPH F. BENNETT ET AL.

*January 24, 1880.*

NO WRIT OF ERROR IN CHANCERY.

In New Mexico, a writ of error does not lie in chancery cases. Such cases taken up on writ of error will be dismissed upon motion.

Writ of Error to the District Court for the county of Grant.

This is a motion to dismiss a writ of error in a proceeding in chancery.

—, for defendant in error.

The first authority with reference to writs of error is the organic act, which says: Writs of error, bills of exception, and appeals, shall be allowed to the supreme court, in all causes from the final decisions of said district courts, under such regulations as may be prescribed by law. Organic Act, sec. 10, page 10.

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Our statutes state that the supreme and district courts shall have power to issue all writs granted by law to the circuit and district courts of the United States, and the supreme court to establish all rules and forms of proceedings touching such writs in conformity with the known general principles, usages and objects of such process: Comp. Laws, p. 102, sec. 70. Also the said supreme and district court, in the exercise of chancery jurisdiction arising in all cases and matters of equity, shall conform in their decisions, decrees, and procedure to the laws and usages peculiar to such jurisdiction in this territory and the supreme, circuit and district courts of the United States: Comp. Laws, page 102, sec. 9.

The law also provides, that hereafter no writ of error shall be allowed by the supreme court of this territory, except within one year after the rendition of the judgment on which said writ of error is based, and that said supreme court shall make rules for the government of the practice in writs of error in common law cases: Stat. June 9, 1874, p. 44.

Under the above law the supreme court adopted the rules of Jan. 27, 1874, with reference to writs of error. See amendments to rules, etc.; 1, 2, 3, 4, 5, 6.

It is a well recognized fact that writs of error at common law only were allowed in common-law cases, and appeals in chancery cases: Tomlin's Law, etc., Title Appeal, vol. 1, p. 81. The above principle is well recognized.

In the court of the United States appeals only lie in chancery cases, writs of error only in common-law cases: *McCullum v. Eager*, 2 How., 61.

If a writ of error was proper under our rules, this transcript is not sufficient: Rule 6, "Writs of Error." Clerk may make return to the same by transmitting a true copy of the record and of all proceedings in the cause: Rule 6, Article, "Writs of Error."

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In this case the clerk does not certify that the pretended transcript is a true copy of record.

There must be a *placita*, or hearing, otherwise the writ will be dismissed.

PRINCE, Chief Justice: This is a chancery case originating in the county of Grant. The defendants demurred to the complaint, and after a hearing at the December term, 1876, the demurrer was sustained, and the complaint dismissed. To this the plaintiff excepted.

On December 19, the plaintiff's attorney moved for a writ of error, which motion was granted, and the writ of error allowed.

By said writ of error, the case came into this court.

At the opening of this term counsel for respondents moved to dismiss the cause and strike the same from the docket for seven assigned reasons, mentioned in the motion papers. Of these it is not necessary to refer to but one, that is, "because a writ of error does not lie in chancery cases.

However much it is to be regretted that technical differences as to methods of appeal, now abrogated in many states, should continue to exist in New Mexico, yet that does not change the law and practice of the territory, which make certain important distinctions between proceedings in law and equity. Under our practice it is true that "a writ of error does not lie in chancery cases."

The motion, therefore, is granted, and the writ of error dismissed.

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Brannin v. Bremen.

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STANTON S. BRANNIN, Appellant, v. MARTIN W. BREMEN,  
Appellee.

REPLEVIN. (1) *Dismissal by plaintiff: Defendant's right to verdict and judgment.*

SAME. (2) *Informality in verdict not fatal to judgment: Assessment of "damages" instead of "value."*

WRIT OF ERROR. (3) *Record, no objections entertained to matters outside.*

REPLEVIN. (4) *Double damages.*

1. The plaintiff in a replevin suit cannot by a discontinuance of the action or by suffering a non-suit, prevent a judgment being rendered against him for damages or for a return of the property. Therefore, where a plaintiff in replevin moved to dismiss the suit at his own costs, and the court ordered the case to be dismissed except to assess the value of the property and the damages and to render judgment for the defendant, it was *held* that such a "dismissal" amounted merely to an abandonment of the case by the plaintiff with the consent of the court, and that it did not affect the defendant's right to a verdict and judgment in his favor, nor deprive the court of jurisdiction of the suit.
2. A party will not be deprived of a recovery merely because of a bare informality in a verdict. Thus, while a verdict by a jury in a replevin suit that they "do assess damages of the property mentioned in the declaration at \$825, and the actual damages of the defendant at six per centum per annum to be \$24.75," is not well expressed in that the word "damages" is used with reference to the property instead of the word "value," a correct judgment rendered upon it will not be set aside. Such a verdict is not objectionable for non-conformity to the law which requires the "value" of the property to be assessed.
3. Objections to a bond which is not made part of the record, brought up on error, will not be considered.
4. Double damages may be assessed in replevin by a jury, for the detention of the property.

Appeal from the District Court for Grant county, BRISTOL, J.

This is an action of replevin brought to recover possession of four tons of ore, more or less, to the possession of which plaintiff alleged he was entitled, and that the same was de-

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posited at the quartz mill of the defendant. The suit was regularly brought according to the statute, and the writ was executed by taking the ore and delivering the possession of it to the plaintiff.

When the case came on to be heard, plaintiff, by his attorneys, filed a written dismissal of the same at his own costs. The court, therefore, made an order "that the said action be dismissed, except for the purpose of assessing the value of the property mentioned in the declaration and for damages, and for judgment in favor of the defendant, and the jury being required to assess the damages herein, it is ordered that a jury come to inquire thereof." Thereupon a jury came and were sworn to well and truly assess the damages. The jury found a verdict assessing "the damages of the property mentioned in the declaration at \$825, and the actual damages of the defendant at six per centum per annum to be \$24.75." The court thereupon gave judgment against the plaintiff and the sureties on his replevin bond for the said "sum of \$825, the assessed value of the property mentioned in the declaration, and the further sum of \$49.50, double damages assessed by the jury aforesaid, for the detention of the same," and it was ordered by the court that if said property was not returned by the plaintiff, and accepted by the defendant, within thirty days, that execution issue for said sums of money, together with costs.

*Conway & Risque*, for appellant.

Appellant insists that when the cause was dismissed by his attorneys, it was no longer in court for any purpose; that the proper judgment to have been rendered against plaintiff was one for costs, and that the defendant's proper remedy was a suit upon the replevin bond.

Appellant further insists that even if the proper course is to give judgment then and there upon the bond, the verdict of the jury in this case was not the proper one; that it was not in accordance with the law. It should have been for the

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assessed value of the property, instead of the damages thereof. No judgment could be rendered on the verdict as found, and the judgment rendered does not conform to the verdict found.

The judgment rendered is greater than twice the amount of the alleged value of the property. The law only required a bond for that amount, and the legal presumption is that the officer took the proper statutory bond. The transcript does not contain any bond at all, or show in any way what the amount of any bond taken was.

The presumption that the officer took a proper bond is, at least, equally as strong as any intendment in favor of the judgment.

Unquestionably the court could not give judgment against the sureties for an amount greater than the bond. The clerk certifies that the transcript is a correct transcript of all the proceedings in the case; it shows no ground whatever upon which to base a judgment against the sureties. Against any presumption there may be in favor of the judgment, we have both the clerk's certificate and the presumption that the officer serving the writ did his duty properly, and that plaintiff would not have given a greater bond than the law required.

The dismissal of this case divested the court of any power to give judgment against plaintiff for anything but costs. The sixth section of the replevin act provides, that the defendant may plead that he is not guilty of the premises charged against him, and this plea will put in issue not only the rightful ownership of the property, but also the wrongful taking and detention thereof. No such plea was filed, and no such issue raised in this case, yet defendant gets a judgment for the value of property, the ownership of which he has never, according to the forms of pleading, claimed.

Our own supreme court has decided that such a judgment cannot be rendered in the absence of such a plea, the plaintiff not prosecuting. See manuscript opinion of court in case

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of *Elsburg & Amburg v. Fritze & Generette*, delivered at the January term, 1867: Comp. Laws of New Mexico, page 244, sec. 6.

Discontinuance disposes of the whole of a suit: *Matthias v. Cook*, 31 Ill., 83.

Defendant must elect whether he will take a return of the property or its assessed value, before damages can be assessed: *Wheelock v. Wilkins*, 19 Mich., 78.

When the verdict in an action of replevin is for the defendant, judgment cannot be rendered against the principal and sureties for damages: 10 Iowa, 226; *Beale v. Dale*, 25 Mo., 301.

Double damages against sureties is improper: *Collins v. Hough*, 26 Mo., 149; Comp. Laws of N. M., page 242, sec. 4.

At common law both plaintiff and defendant become "actors." The defendant by becoming avowant. He sets up claim by plea to the property. Writ of inquiry was introduced by statute: 9 Wendell, 149.

The court ought not to permit a dismissal of a suit until the value is assessed; if it does, it follows that value cannot then be assessed, but defendant must have recourse to his bond: 45 Mo., 111.

*S. B. Newcomb*, for appellee.

The first error assigned by appellant is "that after the court allowed the cause to be dismissed, it had no jurisdiction to render a judgment against plaintiff for anything but costs." In the first place it will be perceived that the court did not allow a full dismissal of this cause. It simply allowed the plaintiff to abandon his right or claim to the property in question; this the court could not prevent. It could not command or force the plaintiff to contend for this property against his will, but the court had the right and was bound to protect the rights of the defendants under the statute.

The 6th and 7th sections of our replevin law, Compiled

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Laws of New Mexico, page 244, are exact copies of sections of the laws of Missouri passed in 1845. The plaintiff in a replevin suit cannot by a discontinuance of the action, or by suffering a nonsuit, prevent a judgment being rendered against him for damages or for a return of the property." *Smith v. Winston*, 10 Mo., 190-1-2; *Berghoff v. Heekwolf*, 26 Mo., 511; 1 Tidd, 575; 11 Archbold's Q. B. Practice, 6, 1084; *Collins v. Hough*, 26 Mo., 151-2-3.

As to the second error, that the verdict of the jury does not conform to the law. The verdict does substantially comply with the law. It is true the word damages is used when value would be more appropriate, but this is a mere clerical error, it does not vitiate the verdict. The jury say they "assess the damage of the property mentioned in the declaration at \$825, and the actual damage of the defendant at six per centum interest per annum to be \$25.75." The words "damage of the property" were evidently written by the clerk in the record by mistake, and in any event cannot affect the finding of the jury, as the value of the property is clearly distinguished in their verdict from the actual damage of the defendant. The law nowhere says that the jury shall use the identical word "value" in their verdict; they must assess the value of the property; this they did, and they were at liberty to use any word to express this act; and taking the whole verdict together their meaning is sufficiently apparent and certain.

As the verdict of the jury is substantially correct, the judgment of the court is supported by the verdict of the jury.

The law says that judgment shall be given for the assessed value of the property, not the value the plaintiff may see fit to put upon it when he sues out his writ of replevin. If the latter proposition were the law, a plaintiff could take a \$1,000 worth of property from a defendant by valuing it at \$100, and the defendant would be without remedy.



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The appellant has seen fit to inject into his brief a cause of error other than he has assigned. We contend that the court should not take cognizance of this error.

The appellant contends that because the defendant did not plead as the statute says he may do, therefore no judgment could be rendered against the defendant, and he cites the case of *Elsburg & Amburg v. Fritze et al.*, S. O. N. M., January Term, 1867.

The learned judge who rendered the decision in that case, bases his decision on false premises. He says "there can be no trial without an issue, and no issue without pleadings on the part of the parties litigant." Now there were no parties litigant. The plaintiff had abandoned his case, gave up his claim to the property by his failing to appear and prosecute his suit, therefore no trial could be had. Nothing was to be done but to assess the value of the property and the damages under the statute. If that is to be called a trial then trials can and constantly do take place without an issue and without a plea. When judgment is rendered against a defendant by default or for want of a plea in cases of tort or unliquidated damages, a jury must come to assess the damages, and a trial in this sense is had and the defendant can even appear and cross-examine witnesses.

The supreme court of Missouri say that "in actions of this kind the defendants' right to a judgment for affirmative relief in no wise depends upon the shape of his answer, but alone (where the plaintiff has possession of the property) upon the plaintiffs' failure to prosecute his action with effect." If a plaintiff having got possession of property by means of his suit, should before answer filed, voluntarily dismiss his suit, can there be any doubt that the defendant would in such case be entitled to have an assessment and judgment for the property taken or its value: *Fallon v. Manning*, 35 Mo., 274.

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PARKS, Associate Justice: This was an action of replevin brought into this court by writ of error from the county of Grant.

The record shows that the plaintiff filed a motion to dismiss the suit at his own cost; that the court ordered the case to be dismissed, except for the purpose of assessing the value of the property replevied, and for damages and for judgment in favor of the defendant; that a jury came "to assess the value of the said property and the damages sustained by the defendant;" that the jury say in their verdict, that they "do assess the damages of the property mentioned in the declaration at eight hundred and twenty-five dollars, and the actual damages of the defendant at six per centum per annum, to be twenty-four and  $\frac{1}{10}$  dollars," and that the court gave judgment against plaintiff, and the sureties on his replevin bond for "the said sum of eight hundred and twenty-five dollars, the assessed value of the property mentioned in the declaration, and the further sum of forty-nine  $\frac{1}{10}$  dollars, double damages assessed by the jury as aforesaid for the detention of the same."

The first error assigned is, "that after the court allowed said cause to be dismissed, it had no jurisdiction to render a judgment against plaintiff for anything but costs, but it ordered a jury to come and inquire of plaintiff's damages and gave a judgment therefor."

The supreme court of Missouri in construing their statute on replevin, from which ours was copied, say, "the plaintiff in a replevin suit cannot by a discontinuance of the action or by suffering a nonsuit prevent a judgment being rendered against him for damages or for a return of the property."

We approve this construction of the statute and adopt it as the law of this case. The dismissal of the suit as described in the record, amounts to just this: that the plaintiff abandoned his case and the court consented to that abandonment. It is not material in what form of words these facts are set

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forth, nor does this (so called) dismissal affect the defendant's right to the verdict and judgment in his favor. So far as his rights were concerned, the court had no power under the statute to dismiss the suit, and in fact it did not do so. The intention of the law was carried out by the court, and there is no material error in the manner in which it was done if indeed there is any error at all.

In fact the greater part of the record which sets forth the dismissal of the case might perhaps be regarded as surplusage under our statute, as it amounts to nothing beyond showing that the plaintiff had abandoned his suit as already stated.

The second error assigned is that "the verdict of the jury does not conform to the law in that it finds the damages of the property instead of its assessed value," and the third error is substantially the same as the second. The verdict is certainly not well expressed, but the jury are not required by the statute to use any particular form or words. It would have been better if they had used the word value, or some equivalent word instead of the word damages. But the meaning of the jury is plain. It was certainly understood at the time it was given, to be substantially right and sufficiently clear, as the court rendered a correct judgment upon it. The use of the word damages complained of, may be a mere clerical error. The rule adopted by some of the courts, that "when on the whole record, we see that injustice has not been done a defendant, it would be going too far to deprive a plaintiff of a recovery upon no better grounds than the bare informality of a verdict" is correct, and is in principle applicable to this case.

The fourth error assigned grows out of the replevin bond, but as the bond has not been before us in any form, we cannot very well consider this objection. In fact it seemed to be abandoned in the argument before this court.

The double damages complained of seem to be expressly

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authorized by our statute. See Compiled Laws of New Mexico, p. 244, sec. 7.

Upon this whole record we see no ground of reversal, and the judgment of the district court must be sustained.

Judgment below affirmed.

CASES DETERMINED  
BY THE  
SUPREME COURT OF NEW MEXICO,  
JANUARY TERM, 1881.

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IN THE MATTER OF THE ATTORNEY-GENERAL OF NEW  
MEXICO.

TERRITORY OF NEW MEXICO v. JOSEPH STOKES AND  
WILLIAM MULLEN.

*January 13, 1881.*

CONSTITUTIONAL LAW. (1) *Special act of congress not necessary to annul territorial statute.*

SAME. (2) *What is the constitutional law of a territory.*

SAME. (3) *What classes of official vacancies governor of territory can fill without consent of council.*

OFFICE OF ATTORNEY-GENERAL. (4) *What is not a vacancy in, "from resignation."*

SAME. (5) *Governor cannot fill without consent of council.*

SAME. (6) *Incumbent does not "hold over" in case no successor named.*

SAME. (7) *Nature of.*

SAME. (8) *Vacancy in, power of court to appoint some one to perform duties.*

SAME. (9) *Held vacant.*

1. It is not true that because a territorial statute has never been directly abrogated by act of congress, it is, therefore, certainly valid. Action by congress in annulling territorial statutes is rare, and only takes place where they are not void of themselves, but simply improper or 'inexpedient without being illegal, *per se*. The usual way of declaring a territorial statute which is inconsistent with the higher law of

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congress inoperative, is through the courts, just as in states statutes would be adjudged unconstitutional.

2. In a territory the constitution and laws of the United States, and especially the organic act of the territory itself, stand exactly in the relation that a state constitution occupies in a state.
3. Congress having, in the law of 1872, relating to appointments by the governor (Rev. Stat., U. S., sec. 1858), distinctly designated two classes of vacancies which the governor can fill without the consent of the council, the maxim "*expressio unius est exclusio alterius*," and the legal construction as well as the reasonable interpretation of this enactment is to exclude the governor from filling any other kind of a vacancy than these two, without the consent of the council, as fully as if he were expressly excluded in terms from so doing.
4. Where one incumbent of the office of attorney-general of New Mexico resigned, and the vacancy thus created was filled by the governor whose appointee held until the expiration of the term and then the office became vacant, owing to the failure of the territorial council to confirm the governor's nominee for the next term, *held*, that such vacancy was not a vacancy "from resignation," because founded originally on the resignation of an incumbent of the office.
5. The governor of the territory of New Mexico has no authority conferred upon him to make any appointment to the office of attorney-general without the concurrence of the council, after the organization of the territory, except to fill vacancies occurring during the recess of the legislative council, from resignation or death.
6. The incumbent of the office of attorney-general does not "hold over" in case his term expires and no person is appointed to succeed him.
7. The attorney-general of New Mexico is not a township, district, or county officer, but a territorial one. He is the legal adviser of the governor and all other territorial officers.
8. In case a vacancy in the office of attorney-general, the court has power, as occasion arises, to appoint some suitable person to represent the territory in the prosecution or defense of cases before it.
9. The office of attorney-general of New Mexico is vacant, the term of the late incumbent having expired by operation of law, and the governor having no power to fill vacancies, except those occasioned by death or resignation, without the concurrence of the council.

At the expiration of the legislative session of 1880 a controversy arose as to the office of attorney-general of the territory. Hon. Henry A. Waldo had been holding that office for nearly two years under an appointment made by the gov-

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ernor to fill a vacancy occurring while no legislature was in session. On February 14, 1880, Eugene A. Fiske, Esq., appeared in the district court in the first district claiming said office by virtue of a commission from Governor Wallace dated on that day, the legislative term having expired the evening before.

The following authorities and acts of Congress and of the Legislative Assembly of New Mexico were cited by Mr. Fiske: Organic Act N. M., Sept. 9, 1850 (9 U. S. Stats., p. 449); Rev. Stats. U. S., secs. 1858, 1841, 1850 and 1857; Const. of the U. S., art. 2, sec. 3; Pascal's Annotated Const. U. S., p. 182; Act Rel. to Jesuits, 20 U. S. Stats., p. 280; Pascal's Annotated Const. of U. S., p. 174, note 198; Rev. Stats. N. M., sec. 23, Act Feb. 28, 1862, pages 86, 88; secs. 4 and 5, art. 6, chap. 10, pages 82, 84; Session Laws N. M., Act Jan. 8, 1874, sec. 2, p. 16; Rev. Stats. N. M., Act 1854, pages 628, 744; *U. S. v. Kirkpatrick*, 9 Wheat., 734; *Id.*, 4 Sawyer, 593; *Cate v. Ross*, 2 Duval (Ky.), 244; *People v. Bain*, 6 Cal., 509; *Peppin v. State*, 2 Sneed, 45; 4 Op. Attorney-General U. S., p. 523; *Olinton v. Englebrecht*, 13 Wal., 446; *Miner's Bank v. Iowa*, 12 How., 8; 5 Op. Attorney-General, 525; *Beebe v. Robinson*, 52 Ala., 74.

The chief justice, before whom the matter was thus presented, invited expressions of opinion on the subject from members of the bar, as *amici curiæ*, and arguments were made by several counsel. The discussion was adjourned to February 23d, in order to have all views thoroughly heard, and on that day various arguments were made and authorities produced. On the succeeding day Chief Justice Prince delivered the following opinion, which is given entire, as it contains a synopsis of the arguments advanced on all sides of the question. Although this opinion was rendered in the district court, its importance and the thoroughness with which it discusses the subject seem to warrant its insertion here. Below will be found the opinion of the supreme court in relation to the same matter, delivered in the case of the *Territory of New Mexico v. Stokes and Mullen*, *infra*, p. 63.

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PRINCE, Chief Justice: On the morning of February 14th, 1880, two gentlemen appeared in the district court then sitting in and for the county of Santa Fe, each claiming to be attorney-general of the territory and asking recognition as such. The one was Hon. Henry L. Waldo, who for a considerable time previous had filled the office of attorney-general, and the other was Eugene A. Fiske, Esq., who presented a certificate of appointment by the governor, dated on that day.

A formal motion, as attorney-general, was made by one, and objected to by the other on the ground that the former was not rightfully filling that office, in order that the matter might be brought before the court; and thereafter both parties were heard at length on the subject, and by request a number of the counsellors of the court also stated their views, and produced authorities bearing on the question. The material facts, with regard to which there is no dispute, are briefly as follows:

Judge Waldo was appointed attorney-general in the year 1878, to fill a vacancy occasioned by the resignation of Col. Breeden, the previous incumbent; said resignation and the appointment of Judge Waldo both being subsequent to the adjournment of the legislature of that year. No legislature convened in 1879. The Legislative Council of 1880 finally adjourned about midnight on February 13th, having failed to confirm the nomination for attorney-general sent to it by the governor. On the morning of Feb. 14th, the governor, alone, appointed Mr. Fiske as attorney-general.

Three views have been presented to the court, and enforced by argument.

1. That the governor, alone, had power to appoint Mr. Fiske to fill the vacancy created by the expiration of the term of Judge Waldo; and that Mr. Fiske is now attorney-general.

2. That the governor has no power to appoint without the advice and consent of the council, except to fill vacancies resulting from death or resignation; and consequently could



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not appoint in this case, and that under the circumstances Judge Waldo, as last incumbent, "holds over" until an appointment is legally made.

3. That the governor has no power to appoint under the circumstances; but that Judge Waldo's term is absolutely limited by statute and has expired; that, consequently, a vacancy exists.

Let us examine, in the first place, the statutes which relate to the office of attorney-general.

The organic act, which established the territorial government, provides as follows:

"**Sec. 8.** All township, district and county officers not herein otherwise provided for, shall be appointed or elected, as the case may be, in such manner as shall be provided by the governor and legislative assembly. \* \* \* The governor shall nominate, and by and with the advice and consent of the legislative council, appoint all officers not herein otherwise provided for; and in the first instance the governor alone may appoint all said officers, who shall hold their offices until the end of the first session of the legislative assembly."

This section is substantially re-enacted in the U. S. Rev. Statutes, being there made applicable to all territories, in section 1857. No such an officer as attorney-general is named or "otherwise provided for" in the organic act. He is not a township, district or county officer, but a territorial one. As such, therefore, he comes within the scope of the latter half of sec. 8 of the organic act (or Section 1857 of the Revised Statutes), and within that alone. It was suggested in the argument that he was a "district officer," but the view can hardly be seriously entertained. Under the act of 1859 (Compiled Laws, page 82) the great part of which is still in force, he was the public prosecutor throughout the whole territory, besides being the legal adviser of the governor and other territorial officers. Subsequently (1862 and 1863) district attor-

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neys were provided for, to act in certain districts, but the general duties of the attorney-general as official adviser, etc., have never been disturbed.

The legislature, in conformity with the organic act, provided (see Compiled Laws, page 84, sec. 7) that he should be appointed by the governor by and with the advice and consent of the legislative council; and added that he shall hold his office for two years, and until his successor should be appointed and qualified.

(It is to be observed that the attorney-general mentioned on page 82 of the Compiled Laws, was an officer created by the Kearney Code, before the organic act, forming the territory, was passed, and not the present official of that name.)

It is plain, then, that under section 8, of the organic act, which is the fundamental law of the territory, this officer had to be nominated by the governor, and by and with the advice and consent of the legislative council, appointed. There is but one exception to the strictness of this law, and that is the case of a new territory, in which, *in the first instance*, the governor alone may appoint all said officers, who shall hold their offices until the end of the first session of the legislative assembly.

The statement of this one case in which the governor can act alone, emphasizes the requirement under other circumstances of the concurrence of the council.

In 1854, the legislature of New Mexico passed an act, which is reprinted in the "Compiled Laws," on page 627, which provides that "in all cases wherein the governor is or may be authorized by law to make appointments by and with the advice and consent of the council, he is hereby authorized to make such temporary appointments during the recess of the legislative assembly, to continue until the meeting of the same."

It has been discussed at much length, in the argument, whether this law was within the power of the legislature to

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pass or not, it being held on the one side that it was not in contravention of any provision of the organic act, and on the other that the organic act having stated distinctly the way in which such appointments were to be made, and particularized one single exceptional case in which the governor could appoint without the council, that it was not competent for the territorial legislature to designate a different way, or to add another case in which the executive could act alone.

It seems, however, that this discussion becomes comparatively unimportant in view of the subsequent congressional action in 1872. Down to that time the only law as to appointments of such officers as attorney-general had been in the organic act; there was no congressional provision for the filling of any vacancies during the legislative recess, and there was but the single exception previously referred to—that of the “first instance”—to the requirement that the council should concur in order to make a valid appointment.

On June 8, 1872, congress enacted the following law (now section 1858 of the Revised Statutes) giving power to the governors of territories to make appointments in certain cases :

“In any of the territories whenever a vacancy happens from resignation or death during the recess of the legislative council in any office which, under the organic act of any territory, is to be filled by appointment of the governor, by and with the advice and consent of the council, the governor shall fill such vacancy by granting a commission, which shall expire at the end of the next session of the legislative council.”

It will be observed that the class of officials herein referred to is exactly that which includes the attorney-general of this territory.

Here then was an explicit expression of the supreme will with regard to the filling of vacancies; and if the appointment now in question had been made to fill a vacancy occur-

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ring from death or resignation there could be no doubt of the power of the governor to make it, alone, without the necessity of concurrent action by the council.

But the vacancy in this instance, if there is one, has occurred by expiration of term.

It may be noted here that Judge Waldo was appointed as attorney-general under this very section, in 1878. And the language is very explicit, that such terms "shall expire at the end of the next session of the legislative council."

It seems certain, at all events, that no vacancy exists from either death or resignation. It is true that one counsel has taken the ground in argument that this is a vacancy "from resignation," because it is founded originally on the resignation of Col. Breeden; and he held that all vacancies that may occur until there is a regular appointment by the governor and council for a full term, will relate back to that event and be vacancies arising from it, and therefore vacancies "happening from resignation." But this I do not think is tenable. We may safely assume, then, that this is not one of the two classes of vacancies referred to in this section. If there is a vacancy it is because of the expiration of Judge Waldo's term under the provisions of this very law. The question then arises, whether, since the passage of this act of 1872, the governor, alone, can appoint to fill a vacancy occasioned by expiration of term.

The attention of congress was evidently called to this subject of filling vacancies by appointment by the governor alone, or the law of 1872 would not have been enacted. It gives that power distinctly in two cases, and no more. It stops there.

Now no maxim of law is of more general and uniform application than "*expressio unius est exclusio alterius*," "the expression of one thing excludes others." Broom in his "Legal Maxims," p. 664, says this maxim is "never more applicable than when applied to the interpretation of

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a statute." On the same subject Sedgwick in his "Constitutional and Statutory Law," says, "If a new power be given by an affirmative statute to a certain person, all other persons are in general excluded from the exercise of the power, since '*expressio unius est exclusio alterius*:'" See p. 30.

In Iowa the same idea is expressed in these words: "Where a statute limits a thing to be done in a particular form, it includes in itself a negative, viz.: that it shall not be done otherwise" (7 Clarke, 265); and in Connecticut it is held that "a statute that prescribes that a thing shall be done in a particular way, carries with it an implied prohibition against doing it in any other way:" 36 Conn., 373.

This general principle is so fundamental and well understood that it requires no argument to enforce it, the only question being whether it applies to the case in hand.

In the law of 1872 (Revised Statutes, sec. 1858.), congress, having the whole subject before it, distinctly designated two classes of vacancies which the governor can fill without the consent of the council. It seems clear that by designating these two, they have excluded all others. If not, why designate any classes of cases at all? Why not have said that "whenever a vacancy happens, the governor shall fill," etc.? But they carefully particularized two kinds of vacancies and two only.

It appears to me that the legal construction, as well as the reasonable interpretation is to exclude any other kind of a vacancy, as fully as if it were excluded in terms.

This is the only law of congress which gives to the governor authority in any case to act by himself in making such appointment, except at the first organization of each territory. If the power to fill the vacancy in question is not to be found here, it does not exist anywhere in congressional law. This law was passed long after the territorial statute of 1854, and if the latter even was valid, it is controlled and modified now by the expression of the superior power.

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It has been argued in this case, that because the law of 1854 was never directly abrogated by act of congress, therefore it was certainly valid. But this does not at all follow.

In a territory the constitution and laws of the United States and especially the organic act of the territory itself, stands exactly in the relation a state constitution occupies in a state. All territorial enactments not consistent with them are null and void. This is stated in terms in 1 Utah Reports, p. 75 ; in 20 Wallace, 375, and other places, but we do not need any such exposition for the proposition is obvious from the language of the organic act, from sec. 1851 of the Revised Statutes, and self-evident from the very nature and constitution of a territory.

Action by congress in annulling territorial statutes is rare, and usually only takes place in cases where they are not void of themselves, but simply improper or inexpedient without being illegal *per se*. The usual way of declaring a territorial statute which is inconsistent with the higher law of congress, inoperative, is through the courts, just as in the states similar enactments would be adjudged to be unconstitutional.

It is not even presumptive, therefore, far less conclusive evidence, that the territorial law of 1854 was originally valid, or if so, has continued in force since the enactment by congress of sec. 1858 in 1872, because it has not been formally annulled by congress. Each law of congress annuls or modifies every territorial statute with which it conflicts, because it is superior, and overrules it ; and it is not necessary that it shall contain a special repealing clause.

In two territories there have been adjudicated cases with regard to territorial laws which provided for a different method of appointing officials from that fixed by the organic acts, and in both cases the supreme court of the territory has declared such laws to be void ; though in neither case had congress acted in annulling them. One of these cases was in

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Utah, where the legislature had provided for a territorial officer known as a marshal, who came within the same class as our attorney-general under the organic act, and consequently should have been appointed by the governor and council. The Utah law provided for his election by a joint vote of the legislative assembly. The court decided that the part of the law creating the office was legal, but the portion fixing the method of his selection was void. They recited the language of the organic act as to such appointments and they say, "The Utah statute in so far as it conflicts with the province of the organic act is null and void." "They could neither appeal or override an important provision of the organic act:" 1 Utah, 89.

This decision is important as distinguishing between the legal and the illegal part of the territorial statutes; and thereby answers the argument made with much force in this matter during the first day's hearing, that the legislature had created the office of attorney-general and therefore had equal power to regulate the method of filling it.

The case in Montana was analogous. The officer in question was the auditor, and the legislature had passed an act making him elective by the people. The court decided that this provision was in contravention of the organic act and of no force: 1 Montana, 250.

The last mentioned case has another phase, which makes it important in the discussion of the subject before us. The governor had appointed an auditor without the concurrence of the council. This was decided to be illegal. The language is so appropriate that I quote it *verbatim*:

"Being an office created by the legislature of the territory, the appointment to which comes under that clause of section 7, of the organic act, (Sec. 8, of New Mexico) of officers not therein otherwise provided for, and which the governor is empowered to nominate and by and with the advice and consent of the legislative council appoint, we are of the opinion

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that the commission given by the governor to the plaintiff, purporting to appoint him to the office of territorial auditor without the advice and consent of the legislative council, does not confer the right to the possession and emoluments of the said office."

The arguments which have been made at a considerable length on this hearing as to the general power of the executive to appoint, under the clause which makes it his duty to "see that the laws are faithfully executed," or under the doctrine of *ex necessitate*; are, I think, shown not to be controlling, by the decision in this same Montana case, in which they are discussed fully.

It appears then, from a consideration of all the statutes and decisions affecting the matter, that the governor has no authority conferred upon him to make any appointment to the office of attorney-general, without the concurrence of the council, after the first organization of a territory, except to fill vacancies occurring during the recess of the legislative council, from resignation or death; and the present circumstances not falling within that limitation, that he had no power to make the appointment of Mr. Fiske on February 14.

This brings us to the second question, viz.: If the governor has no power to appoint, under the circumstances, does Judge Waldo, the late incumbent, "hold over?"

In favor of this proposition, language of the Compiled Laws, page 84, sec. 7, is quoted:

"The governor by and with the advice and consent of the legislative council shall appoint an attorney-general who \* \* \* shall hold his office for two years, and until his successor shall be appointed and qualified."

And also a section on page 514, as follows: "All officers appointed or otherwise, shall continue in office and in the discharge of their duties until others are appointed or elected



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and qualified according to law," as well as certain California decisions.

The first section cited, however, does not seem to apply to an official appointed by the governor to fill a vacancy; and the latter, which was adopted in 1851, was shown to have reference in all probability only to persons then in office and to the peculiar circumstances of that time.

In opposition to the California decisions, others from the same state, together with some from different sources, and the opinions of distinguished annotators on the constitution, were produced.

But the plain language of section 1858, under which Judge Waldo was appointed, really seems to leave little to conjecture in the matter.

It says distinctly that the commission in such cases "shall expire at the end of the next session of the legislature;" and the reason of this in case of appointments made under such circumstances, seems plain. The appointee was never confirmed by the council, and the obvious intention is that he shall not continue in office longer than the exigency occasioned by the vacancy requires, without their concurrence.

The language is so distinct that it cannot well be misunderstood or explained away, and I think makes it clear that the term of Judge Waldo expired with the end of the session of the legislative council, on the night of February 13th last.

This leads to the conclusion that a vacancy exists in the office, which, under existing laws, can only be filled by the nomination by the governor and confirmation by the council; and it is urged that no council session is soon to be held, and that the existence of such a vacancy is most unfortunate. As to this there can be little question, but it is not a matter with which the court has to do, or which it can remedy. In this connection I quote the language of the opinion in the *Montana case* previously referred to. "In reply to the queries of counsel, that if the governor has not the power of

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appointment to fill vacancies during the recess of the legislature, who has? We would say \* \* that it is not the province of the court to legislate for a contingency."

It is certainly very desirable that some provision should be made for the filling of such vacancies, and this, of course, can only be done by congress. In the act of 1872 they either supposed that they had covered every possible case that could occur, when they designated the two kinds of vacancies that might be filled, or else they intentionally withheld the power in other instances. In either view, it seems right that their attention should be called to the inconvenience arising from the inability to fill such a vacancy as that now before us, under existing laws.

It is true that the court has power to appoint some suitable person, as occasion arises, to represent the territory in the prosecution or defense of cases before it; and this it will endeavor to do in each instance until a lawful attorney-general appears, in such a manner as best to subserve the public interests in the locality where the emergency may arise; but this covers but a part of the duties of an attorney-general, and was never intended to be more than a temporary expedient.

It is earnestly to be hoped that congress will take some action to meet such cases before the summer term of our courts.

The decision of the court is that the office of attorney-general of New Mexico is vacant, the term of the late incumbent having expired by operation of law, and the governor having no power to fill vacancies, except those occasioned by death or resignation, without the concurrence of the council.

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contravention of the spirit, policy and object of the law. And that the general grant of power to the governor to "take care that the laws be faithfully executed," was not intended to cover cases of this kind.

Mr. Fiske claims title to the office upon still another ground, which is that the governor had authority to appoint him under the circumstances, by virtue of the act of congress of 1872 (U. S. Rev. Stat., sec. 185), which provides as follows:

"In any of the territories, whenever a vacancy happens from resignation or death during the recess of the legislative council, in any office which under the organic act of the territory is to be filled by appointment of the governor by and with the advice and consent of the council, the governor shall fill such vacancy by granting a commission which shall expire at the end of the next session of the legislative council."

This act covers the office of attorney-general.

It is contended in behalf of Mr. Fiske's appointment, that inasmuch as the recess appointment of Mr. Waldo was to fill the vacancy occasioned by the resignation of his predecessor, such vacancy continued after the expiration of Mr. Waldo's commission, and that by reason of such continuation into the recess commencing at the end of the last session of the council, the governor had the authority to fill such vacancy by Mr. Fiske's appointment under such act of congress.

This construction of the provisions of that act cannot be upheld.

"The governor shall fill such vacancy by granting a commission," etc., is the language of that act.

If the vacancy was so filled by the appointment of Mr. Waldo, and he was thereby *de jure*, as well as *de facto*, constituted an attorney-general, of which there can be no doubt, then there could be no further continuance of that particular vacancy. So far as filling that vacancy was concerned, the

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neys were provided for, to act in certain districts, but the general duties of the attorney-general as official adviser, etc., have never been disturbed.

The legislature, in conformity with the organic act, provided (see Compiled Laws, page 84, sec. 7) that he should be appointed by the governor by and with the advice and consent of the legislative council; and added that he shall hold his office for two years, and until his successor should be appointed and qualified.

(It is to be observed that the attorney-general mentioned on page 82 of the Compiled Laws, was an officer created by the Kearney Code, before the organic act, forming the territory, was passed, and not the present official of that name.)

It is plain, then, that under section 8, of the organic act, which is the fundamental law of the territory, this officer had to be nominated by the governor, and by and with the advice and consent of the legislative council, appointed. There is but one exception to the strictness of this law, and that is the case of a new territory, in which, *in the first instance*, the governor alone may appoint all said officers, who shall hold their offices until the end of the first session of the legislative assembly.

The statement of this one case in which the governor can act alone, emphasizes the requirement under other circumstances of the concurrence of the council.

In 1854, the legislature of New Mexico passed an act, which is reprinted in the "Compiled Laws," on page 627, which provides that "in all cases wherein the governor is or may be authorized by law to make appointments by and with the advice and consent of the council, he is hereby authorized to make such temporary appointments during the recess of the legislative assembly, to continue until the meeting of the same."

It has been discussed at much length, in the argument, whether this law was within the power of the legislature to

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The restriction here as to consistency with the constitution would include the laws of congress warranted by the constitution.

The foregoing provisions of the organic act contain all the powers granted to the legislative branch of the territorial government, so far as the office of attorney-general was concerned, at the time these appointments were made.

The office of attorney-general is a territorial, and not a township, county or district office. And when we consider the fact that congress has invested the legislative branch of the territorial government with ample power to provide by law for filling any vacancy that may occur in a township, county or district office, and has withheld such power as regards territorial offices, and instead thereof has provided by express law how such territorial offices shall be filled, it follows by necessary and unavoidable implication that the territorial legislature has no power to provide by law any other or different mode of filling a vacancy in the office of attorney-general.

And such act of the territorial legislature would be inconsistent with the provisions of the organic act, and thereby excluded from its present legislative powers.

The law passed by such legislature on the subject, and above referred to, therefore is null and void and conferred no authority on the governor to appoint Mr. Fiske under the circumstances: 1 Montana Reports, 252.

Mr. Fiske claims title to the office on another ground, which is that the governor had authority to appoint him under the circumstances by virtue of that provision in the organic act which makes it his duty to "take care that the laws be faithfully executed." The answer to this is:

1st. The office of attorney-general, though no doubt a convenience, is not a necessary incident to the executive department of the territorial government, and

2d. Such appointment is in contravention of the law.

If the principle here contended for in favor of sustaining

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this appointment be maintained, then the governor has the whole matter of appointments of this description in his own hands.

The appointment of Mr. Fiske being without authority of law, and therefore void, Mr. Waldo comes in and claims title to the office upon the sole ground that in the absence of express affirmative provisions by statute, giving appointees like himself the right to hold over beyond the expiration of their commissions, he has, on sound principles of law, based upon public majority, the right to so hold over until his successor shall have been appointed by the governor, with the advice and consent of the legislative council, there being no other legal mode of appointing his successor.

In support of this proposition the cases of *Stratton v. Oulton*, 28 Cal., 44, and the *People v. Stratton*, 28 Cal., 383, with the cases therein referred to as recited authority.

The broadest application that can be made of the principles contended for, as enumerated by these California decisions, is that when a statute in general terms provides that the regular term of an officer shall be a certain period of time, and contains no express provisions that the incumbent may hold over at the expiration of his term until the office be filled by his successor, then such incumbent if elected or appointed as contemplated by law for and during such regular term, may, *ex necessitate*, hold over until his successor is so elected or appointed.

If, for instance, the law fixing the regular term of office of auditor-general at two years contained no provision that the regular appointee for any such term might hold over, and if under such a law Mr. Waldo, instead of holding the office under a recess appointment, had been appointed by the governor with the advice and consent of the council, for the regular term, then a failure of an appointment in like manner of a successor at the end of the term, he might hold over *ex necessitate*.

But this salutary principle of law, based upon public

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necessity, can have no application to a recess appointment like that of Mr. Waldo's under said act of congress.

In the case of *McCall v. Byram Manufacturing Co.*, 6 Conn., 427, where this subject is discussed at length, the principle was affirmed and cited with approval in these California decisions, that a statute might be so restrictive by the expression or implication of a negative as to terminate the holding of an office at a specified time.

The act of congress under which Mr. Waldo was appointed is a statute of this description.

The language of the act is, "The governor shall fill such vacancy by granting a commission which shall expire at the end of the next session of the legislative council."

What language could be employed that would be more restrictive by the implication of a negative; or would more clearly express on the part of congress that the incumbent should not hold over upon the expiration of his commission?

The object and policy of the law as expressed in the act of congress aforesaid, and the provisions of the organic act regarding this class of officers, are obvious.

Except in the two contingencies specified they are to be filled by the joint concurrence of the governor and council.

But if an incumbent holding an office of this kind under a recess appointment has the right to hold over, then, the governor making any such appointment has it in his power to keep the office filled by neglecting to make any nomination to the council, or otherwise conferring with that body on the subject.

It was, no doubt, the intention of congress to prevent this by so restricting the patronage of the governor that the recess appointments he is authorized to make shall, unconditionally, terminate at the end of the next session of the legislative council, and that he shall have no authority to make recess appointments to offices of this description except when vacancies occur by death or resignation.

We all concur, therefore, in the opinion that neither Mr.

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that the commission given by the governor to the plaintiff, purporting to appoint him to the office of territorial auditor without the advice and consent of the legislative council, does not confer the right to the possession and emoluments of the said office."

The arguments which have been made at a considerable length on this hearing as to the general power of the executive to appoint, under the clause which makes it his duty to "see that the laws are faithfully executed," or under the doctrine of *ex necessitate*; are, I think, shown not to be controlling, by the decision in this same Montana case, in which they are discussed fully.

It appears then, from a consideration of all the statutes and decisions affecting the matter, that the governor has no authority conferred upon him to make any appointment to the office of attorney-general, without the concurrence of the council, after the first organization of a territory, except to fill vacancies occurring during the recess of the legislative council, from resignation or death; and the present circumstances not falling within that limitation, that he had no power to make the appointment of Mr. Fiske on February 14.

This brings us to the second question, viz.: If the governor has no power to appoint, under the circumstances, does Judge Waldo, the late incumbent, "hold over?"

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and qualified according to law," as well as certain California decisions.

The first section cited, however, does not seem to apply to an official appointed by the governor to fill a vacancy; and the latter, which was adopted in 1851, was shown to have reference in all probability only to persons then in office and to the peculiar circumstances of that time.

In opposition to the California decisions, others from the same state, together with some from different sources, and the opinions of distinguished annotators on the constitution, were produced.

But the plain language of section 1858, under which Judge Waldo was appointed, really seems to leave little to conjecture in the matter.

It says distinctly that the commission in such cases "shall expire at the end of the next session of the legislature;" and the reason of this in case of appointments made under such circumstances, seems plain. The appointee was never confirmed by the council, and the obvious intention is that he shall not continue in office longer than the exigency occasioned by the vacancy requires, without their concurrence.

The language is so distinct that it cannot well be misunderstood or explained away, and I think makes it clear that the term of Judge Waldo expired with the end of the session of the legislative council, on the night of February 13th last.

This leads to the conclusion that a vacancy exists in the office, which, under existing laws, can only be filled by the nomination by the governor and confirmation by the council; and it is urged that no council session is soon to be held, and that the existence of such a vacancy is most unfortunate. As to this there can be little question, but it is not a matter with which the court has to do, or which it can remedy. In this connection I quote the language of the opinion in the *Montana* case previously referred to. "In reply to the queries of counsel, that if the governor has not the power of

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Waldo was appointed and commissioned as attorney-general to fill the then existing vacancy in the office occasioned by the resignation of his predecessor, Hon. William Breedon. That said Waldo is still alive and has never resigned.

2d. That at the then next session of the legislative assembly of the territory, which was the last session, and on the last day thereof, the governor of the territory nominated said Fiske for the office of attorney-general to the legislative council. That the said council on that day voted upon the question of confirming said nomination and thereby voted against and refused to confirm the same.

That thereafter, upon the same day, and after a consideration of said vote, said council again voted upon the question of confirming such nomination, and thereby again voted against and refused to confirm the same.

And that thereafter, on the same day, the governor again nominated said Fiske for said office to said council, but such nomination did not come before said council in executive session, and said assembly adjourned on that day, *sine die*, without any action having been taken by such council upon said last nomination.

3d. That thereafter, and after the termination of the said session of the legislature, the governor of the territory on his sole authority, executed and delivered to said Fiske a commission purporting to authorize and empower him to hold and perform the duties of said office.

By neglecting to nominate any one to the council to fill a vacancy, he might by his own act create the contingency wherein he could fill the office under all circumstances independently of the council, and in this way entirely ignore the provisions of law placing restrictions upon his patronage; or he might create such a contingency by repeatedly nominating the same candidate whom the council refuse to confirm, and then after the adjournment of the legislature appoint the rejected candidate.

We do not hesitate to say that all this would be in direct

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contravention of the spirit, policy and object of the law. And that the general grant of power to the governor to "take care that the laws be faithfully executed," was not intended to cover cases of this kind.

Mr. Fiske claims title to the office upon still another ground, which is that the governor had authority to appoint him under the circumstances, by virtue of the act of congress of 1872 (U. S. Rev. Stat., sec. 185), which provides as follows:

"In any of the territories, whenever a vacancy happens from resignation or death during the recess of the legislative council, in any office which under the organic act of the territory is to be filled by appointment of the governor by and with the advice and consent of the council, the governor shall fill such vacancy by granting a commission which shall expire at the end of the next session of the legislative council."

This act covers the office of attorney-general.

It is contended in behalf of Mr. Fiske's appointment, that inasmuch as the recess appointment of Mr. Waldo was to fill the vacancy occasioned by the resignation of his predecessor, such vacancy continued after the expiration of Mr. Waldo's commission, and that by reason of such continuation into the recess commencing at the end of the last session of the council, the governor had the authority to fill such vacancy by Mr. Fiske's appointment under such act of congress.

This construction of the provisions of that act cannot be upheld.

"The governor shall fill such vacancy by granting a commission," etc., is the language of that act.

If the vacancy was so filled by the appointment of Mr. Waldo, and he was thereby *de jure*, as well as *de facto*, constituted an attorney-general, of which there can be no doubt, then there could be no further continuance of that particular vacancy. So far as filling that vacancy was concerned, the

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governor's authority had been exercised and exhausted by Mr. Waldo's appointment.

Under the circumstances, therefore, this act of congress conferred no authority on the governor to support Mr. Fiske.

Upon the foregoing facts we are asked to declare the law applicable to the question involved.

One of the grounds upon which Mr. Fiske claims title to the office is that the governor was duly authorized to appoint and commission him under the circumstances, by virtue of a law passed by the territorial legislature in the year 1854, which provides:

"That in all cases wherein the governor is or may be authorized by law to make appointments, by and with the advice and consent of the council, he is hereby authorized to make such temporary appointments during the recess of the legislative assembly to continue until the meeting of the same."

The terms of this act are broad enough to cover every conceivable contingency under which a vacancy might occur, and to authorize the governor, during a recess of the legislature, to make an appointment filling the same.

But was this territorial law, or any part of it, ever within the legislative powers granted by congress, and therefore valid?

The act of congress providing for a territorial government for New Mexico, commonly called the organic act, provides that "all township, district and county officers, not herein otherwise provided for, shall be appointed, or elected, as the case may be, in such manner as shall be provided by the governor and legislative assembly.

"The governor shall nominate, by and with the advice and consent of the legislative council, and appoint all officers not herein otherwise provided for."

The organic act further provides as follows:

"The legislative power of the territory shall extend to all rightful subjects of legislation consistent with the constitution of the United States, and the provisions of this act."

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The restriction here as to consistency with the constitution would include the laws of congress warranted by the constitution.

The foregoing provisions of the organic act contain all the powers granted to the legislative branch of the territorial government, so far as the office of attorney-general was concerned, at the time these appointments were made.

The office of attorney-general is a territorial, and not a township, county or district office. And when we consider the fact that congress has invested the legislative branch of the territorial government with ample power to provide by law for filling any vacancy that may occur in a township, county or district office, and has withheld such power as regards territorial offices, and instead thereof has provided by express law how such territorial offices shall be filled, it follows by necessary and unavoidable implication that the territorial legislature has no power to provide by law any other or different mode of filling a vacancy in the office of attorney-general.

And such act of the territorial legislature would be inconsistent with the provisions of the organic act, and thereby excluded from its present legislative powers.

The law passed by such legislature on the subject, and above referred to, therefore is null and void and conferred no authority on the governor to appoint Mr. Fiske under the circumstances: 1 Montana Reports, 252.

Mr. Fiske claims title to the office on another ground, which is that the governor had authority to appoint him under the circumstances by virtue of that provision in the organic act which makes it his duty to "take care that the laws be faithfully executed." The answer to this is:

1st. The office of attorney-general, though no doubt a convenience, is not a necessary incident to the executive department of the territorial government, and

2d. Such appointment is in contravention of the law.

If the principle here contended for in favor of sustaining

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this appointment be maintained, then the governor has the whole matter of appointments of this description in his own hands.

The appointment of Mr. Fiske being without authority of law, and therefore void, Mr. Waldo comes in and claims title to the office upon the sole ground that in the absence of express affirmative provisions by statute, giving appointees like himself the right to hold over beyond the expiration of their commissions, he has, on sound principles of law, based upon public majority, the right to so hold over until his successor shall have been appointed by the governor, with the advice and consent of the legislative council, there being no other legal mode of appointing his successor.

In support of this proposition the cases of *Stratton v. Oulton*, 28 Cal., 44, and the *People v. Stratton*, 28 Cal., 383, with the cases therein referred to as recited authority.

The broadest application that can be made of the principles contended for, as enumerated by these California decisions, is that when a statute in general terms provides that the regular term of an officer shall be a certain period of time, and contains no express provisions that the incumbent may hold over at the expiration of his term until the office be filled by his successor, then such incumbent if elected or appointed as contemplated by law for and during such regular term, may, *ex necessitate*, hold over until his successor is so elected or appointed.

If, for instance, the law fixing the regular term of office of auditor-general at two years contained no provision that the regular appointee for any such term might hold over, and if under such a law Mr. Waldo, instead of holding the office under a recess appointment, had been appointed by the governor with the advice and consent of the council, for the regular term, then a failure of an appointment in like manner of a successor at the end of the term, he might hold over *ex necessitate*.

But this salutary principle of law, based upon public

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necessity, can have no application to a recess appointment like that of Mr. Waldo's under said act of congress.

In the case of *McCall v. Byram Manufacturing Co.*, 6 Conn., 427, where this subject is discussed at length, the principle was affirmed and cited with approval in these California decisions, that a statute might be so restrictive by the expression or implication of a negative as to terminate the holding of an office at a specified time.

The act of congress under which Mr. Waldo was appointed is a statute of this description.

The language of the act is, "The governor shall fill such vacancy by granting a commission which shall expire at the end of the next session of the legislative council."

What language could be employed that would be more restrictive by the implication of a negative; or would more clearly express on the part of congress that the incumbent should not hold over upon the expiration of his commission?

The object and policy of the law as expressed in the act of congress aforesaid, and the provisions of the organic act regarding this class of officers, are obvious.

Except in the two contingencies specified they are to be filled by the joint concurrence of the governor and council.

But if an incumbent holding an office of this kind under a recess appointment has the right to hold over, then, the governor making any such appointment has it in his power to keep the office filled by neglecting to make any nomination to the council, or otherwise conferring with that body on the subject.

It was, no doubt, the intention of congress to prevent this by so restricting the patronage of the governor that the recess appointments he is authorized to make shall, unconditionally, terminate at the end of the next session of the legislative council, and that he shall have no authority to make recess appointments to offices of this description except when vacancies occur by death or resignation.

We all concur, therefore, in the opinion that neither Mr.

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Waldo nor Mr. Fiske is entitled to the office of attorney-general, and that the office is vacant.

The application of each to appear as that officer is denied.

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EUGENE A. FISKE V. WILLIAM BREEDON.

January 20, 1881.

ATTORNEY-GENERAL. (1) *Office of, vacant.*

1. Ever since the adjournment of the last session of the territorial legislature, the office of attorney-general has been, and still is vacant.

*Held*, therefore, that no action can be maintained by one who claims to be, but is not, attorney-general, against one who is alleged to have been wrongfully introduced into such office and to have wrongfully received fees as such officer.

Appeal from the District Court of Santa Fe county.

The facts appear in the opinion of the court.

*Eugene A. Fiske, pro se.*

1. The plaintiff was at the time this cause accrued, attorney-general of New Mexico: Organic Act of New Mexico, Sept. 9, 1850 (9 United States Statutes, p. 449); Rev. Statutes U. S., secs. 1858, 1841 and 1857; Art. 2, sec. 3, Constitution of the United States; Pascal's Annotated Constitution U. S., p. 182; Act relative to Jesuits, 20 U. S. Stats., p. 280; Pascal's Annotated Constitution of United States Statutes, p. 174, note 198; Rev. Statutes of New Mexico, sec. 23, Act February 28, 1862, pp. 86, 88; *Id.*, secs. 4 and 5, art. 6, chap. 10, pp. 82, 84; Session Laws N. M., sec. 2, Act Jan. 8, 1874, p. 16; Rev. Statutes N. M., Act 1854, pp. 628, 744; *United States v. Kirkpatrick*, 9 Wheaton, 734; *United States v. Kirkpatrick*, 4 Sawyer, 593; *Cate v. Rose*, 2 Duval (Ky.), 244; *People v. Bain*, 6 Cal., 509; *Peppin v. State*, 2 Sneed., 45; 4 Op. Atty.-Genl. U. S., p. 523; *Clinton v. Englebrecht*, 13 Wall., 446; *Miners' Bank v. Iowa*, 12 How., p. 8; 5 Op. Atty.-Genl., 525; *Beebe v. Robinson*, 52 Ala., p. 66.



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2. It is admitted that plaintiff was present in court and offered to perform the duties of attorney-general at the time the cause of action accrued to plaintiff.

3. The performance of the duties of an office by an intruder, does not impair the right of the true incumbent to the emoluments of the office. The salary of an office is incidental to its title and not its occupancy. An officer *de jure* can collect fees received by an officer *de facto*, though the latter performs the services. Payment to an officer *de facto* is no bar to recovery by the party legally entitled: *Carroll v. Siebenthaler*, 37 Cal., 193; *People v. Miller*, 84 Mich., 458, 9 Am. Reps., 131; *State v. Tate*, 70 N. C., 161; *Dorsey v. Smyth*, 28 Cal., 21; *Mayfield v. Moore*, 53 Ill., 428, 5 Am. Rep., 521; *Mayor and Aldermen of Memphis v. Woodward*, 60 Tenn., A. D. 1874; *Dodd v. Weaver*, 34 Tenn. (2 Suced.), 673; *Pearce v. Hawkins*, 2 Swan (Tenn.), 80; *People v. Tann*, 3 Barb., 193.

*T. B. Catron* and *H. L. Waldo*, for appellee.

The appellant relies upon the claim that he is attorney-general of the territory of New Mexico, and as such is entitled to recover the fees and compensation received by appellee for services (such as are usually performed by the attorney-general), performed by appellee under an appointment by the court below. Appellant is not, and was not attorney-general, or entitled to any fees or compensation as such: Opinion of Chief Justice Prince, *ante*, p. 49; *Fiske v. Rogers*, 1 Mont., Revised Statutes U. S., secs. 1857 and 1858.

If the appellant was the attorney-general, he still would have no cause of action against the appellee. The fees and moneys received by appellee were for services performed by him upon an appointment by the court; he did not assume or claim to be attorney-general; he was not an usurper of or intruder into that office. He was simply appointed to perform certain services, on account of which the appellant has no claim. There was no privity between the appellant and

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appellee upon which to base an action of assumpsit by the appellant against the appellee: 1 Chitty, 99.

BRISTOL, Associate Justice: Eugene A. Fiske, the appellant, was the plaintiff below, and William Breeden, the appellee, was the defendant below.

The plaintiff below sued the defendant in an action of assumpsit to recover the value of certain fees which the plaintiff claimed the defendant had received as attorney-general by appointment of the court, the plaintiff claiming that he was attorney-general, and entitled to the fees aforesaid, on the ground that the defendant had wrongfully received said fees as attorney-general, as he had been wrongfully introduced into the office by means of such appointment.

The material facts were agreed upon between the parties as evidence, and submitted to the court below for judgment thereon, and judgment was entered in favor of the defendant.

In the case of *The Territory v. Joseph Stokes and William Mullen*, ante, p. 49, in which the question as to who, if any one, was attorney-general, we decided at a previous day of this term among other things that said Fiske was not attorney-general, and in effect that ever since the adjournment of the last session of the territorial legislature, the office of attorney-general has been and still is vacant. The facts agreed upon in that case and this case, so far as the right of said Fiske to the office is concerned are substantially the same.

These facts are specifically stated in the opinion of the court in that case, and will not be repeated here.

For the reason stated in the opinion of the court in that case, based upon said facts, we hold in this case that the said plaintiff is not entitled to recover, and that the judgment for the defendant in the court below ought to be sustained.

Judgment below affirmed with costs.

## Territory of New Mexico v. Dwenger.

## THE TERRITORY OF NEW MEXICO v. DORA DWENGER.

*January 22, 1881.*

**MURDER, EVIDENCE, ADMISSIONS.** (1) *Competency of, how affected by time of making admissions, and by time of occurrence of facts admitted.*

**SAME.** (2) *Accessory, guilt of principals to be established.*

**SAME.** (3) *Evidence of guilt of principals and of accessory.*

**SAME. SAME.** (4) *Instruction limiting application of such evidence.*

**SAME. SAME.** (5) *Admission held admissible.*

1. The time when an admission is made does not affect its competence as evidence, even though it be made years after the commission of the crime to which it relates. The time of the occurrence of the facts admitted is of more consequence, however, and if remote from the date of the crime, a serious question might be raised as to the competence of the admissions concerning them. But not so, if the facts occurred within a short while after the crime was committed.

*Held.* That where, within a day after the murder was committed, the prisoner said: "You need not blame the boys for robbing him of his clothes;" that "in Germany there was a case of the kind where a man was murdered and the body was identified by the clothing," and that that was the reason why she sent the sack along to bring the clothes home, both the admissions and facts were sufficiently proximate to the murder to be competent evidence. So also, an admission by the prisoner as to the concealment of the coat in a quilt, was held competent.

2. In the trial of a person as accessory to a murder committed by several, the guilt of the principals, or of some one of them, must first be established by competent testimony.
3. In such a case there is no distinction between the competency of evidence as to the guilt of the principals and of evidence as to the guilt of the accessory. Any testimony which is competent evidence regarding either branch of the case is admissible.
4. But where certain evidence relates wholly to the principals, perhaps an instruction may be framed requiring the jury to limit the application of that evidence to them alone, and requiring the jury not to consider it with reference to action or complicity of the accessory.
5. An admission by one of the principals, a son of the accessory, that "my mother and Mr. Young put up the job that we were to kill him; the plan was made at the breakfast table the morning we went

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out to kill him," relates not only to the guilt of the principals but also to the guilt of the accessory, and is competent as to both issues. An instruction which would exclude this admission from the jury is erroneous.

Appeal from the District Court for Doña Ana county, Bristol, J.

The facts appear in the opinion of the court.

*Bail & Garrison*, for appellants.

The indictment in this case is in the form used for indictments of accessories before the fact to murder at common law. The court below treated it as an indictment for murder in the fifth degree under our statute, holding that the common law crime of accessory to murder before the fact, was, under our statute, nothing more nor less than murder in the fifth degree. We regard this as the correct view; at all events the evidence to convict must be the same in either case.

The court, in charging the jury, has properly laid down the law as to the two propositions to be passed upon. It is in the application of the evidence of which we complain.

The jury, no doubt, assumed (and was warranted in so doing under the instructions given by the court) that all the confessions and declarations of the several parties, as detailed by the witnesses for the prosecution, were proper and competent evidence to be considered in the determination of both of the above propositions.

From this we dissent. This was error. We therefore maintain that the sixth, seventh and eighth instructions asked for by the defendant ought to have been given.

The eighth instruction asked for by the defendant states the law as applicable to this case, correctly: Bishop Crim. Law, sec. 67, and the authorities there referred to; Wharton Crim. Law, sec. 703; Roscoe Crim. Ev. (side page), 54; Roscoe Crim. Ev. (side page), 222.

When an accessory before the fact to murder was tried, after the principal had been tried and executed, Parke, B.,

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ordered the proceedings to be conducted in the same manner as if the principal was then on his trial, and the evidence against the accessory was not gone into until the case against the principal was concluded: Ratcliff's case cited by Roscoe Crim. Ev. (side page), 222. The guilt of the principal felon, in the case before the English judge, was treated as an independent consideration, and was not blended with the guilt of the accessory as was done in the case at bar. This English case cannot, as we conceive, be distinguished from the one at bar, and the proper mode of conducting cases of this character is in that case clearly marked out.

The principal felons were on trial in this case, and are in all cases of this character. The guilt of the principal felons, or some one of them, must first be established by competent testimony. This is the first proposition. This being proven, the second proposition is to be established: Did the defendant by her act or procurement cause such murder to be committed? Now, if it be conceded that the confessions of the principal felons are competent evidence to go to the jury in determining their guilt, are not such confessions improper when the jury come to consider the second proposition—that is, the defendant's guilt? Her guilt, if guilty at all, consists in her having by some means procured the murder—to be committed; and not in the commission of it.

It must be borne in mind that the defendant was not in this case indicted jointly with the principal felons. The court below held, that the confessions and declarations of the principals were competent and legal evidence to establish both the propositions laid down in the charge—or rather, that such confessions were proper evidence to be considered by the jury. From this view we dissented at the trial of the case, and we still dissent, and we insist that the eighth instruction asked for by the defendant should have been given: That these confessions were not legal evidence tending to

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establish either of the foregoing propositions—and certainly not the second, as to what part she had in the killing of the deceased, and whether or not it was done by her act or procurement. The instruction might have been differently worded, and the line between these legal propositions might have been more sharply drawn. The jury had not only to consider whether or not the principal felons were guilty as charged in the indictment, but it was also necessary to find whether she was guilty in the manner charged against her in the same indictment. That is to say, whether or not such homicide was committed by her act or procurement. She could not be guilty and they innocent. The converse, however, is not true. They might be guilty and she innocent; and this instruction, as we understand it, asks that the jury in considering her case—as to whether or not such murder was influenced by her act or procurement—the jury should not give these confessions any weight, as tending to prove the charge as alleged against her in this indictment. This is the idea embraced in the eighth instruction. If incorrect at all, it is too narrow and to the defendant's prejudice. The territory cannot complain.

Under the charge and instructions given by the court, the jury was misled. The jurors were substantially informed by the court, that these confessions were not only proper evidence for them to consider in determining the question as to whether the principals or one of them, did murder the deceased, Henry F. Dwenger, as charged in the indictment, but that the said confessions were likewise legal and competent evidence for their consideration in determining whether such murder was committed by the principal felons through or by the act or procurement of the defendant. This was error.

The principle of law which makes the confessions and declarations of a conspirator evidence against his co-conspirator cannot have any application in this case. First, because it was

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not shown, by any competent evidence in the trial of the case, that any conspiracy existed between the defendant and the principals, before the killing of the deceased, Henry F. Dwenger; and secondly, the object of such conspiracy, if any ever existed, had long since been accomplished before any confessions were made by any of the accused parties: 3 Greenleaf Ev., sec. 94; 1 Greenleaf Ev., secs. 110, 111; 2 Bishop Crim. Procedure, 229, 230; Roscoe Crim. Ev. (side page), 414 *et seq.*

The court erred in refusing the sixth and seventh instructions asked for by the defendant.

The rule is laid down by Mr. Roscoe, in his work on Criminal Evidence (4th American edition; and this is the edition which is cited by us)—side page 94, thus: "It may be thought that collateral facts, occurring soon after the offense, with which the prisoner is charged, may sometimes afford as reasonable a presumption of guilty knowledge, as when the facts occurred at some time before the offense; but it would seem from the cases that where evidence is given of collateral circumstances to show the prisoner's guilty knowledge, it must in general appear that those circumstances occurred previously to the commission of the offense with which he is charged," etc.

All the admissions and declarations of the defendant bearing upon her guilty knowledge were made after she had been arrested, and more than two months after the commission of the murder. Her admissions, taken altogether, while they show that she did attempt to hide and cover up the homicide at the same time, negatives the idea that she knew anything of it until after its consummation. Her denials of this fact, in connection with her subsequent knowledge must have some weight with the jury, if properly instructed on this point. But we maintain that all her acts and doings in the way of secreting the clothing of the deceased, subsequent to the homicide, does not raise the slightest presumption of her

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guilt as charged in this indictment. This species of evidence, while it would undoubtedly be proper under an indictment against her, as accessory after the fact, is exceedingly dangerous and improper for the consideration of a jury in passing upon the guilt or innocence of a person who is being tried substantially as an accessory before the fact.

*S. B. Newcomb*, for appellee.

The appellant admits that the learned judge below properly laid down the law upon the only two propositions to be passed upon.

This was all the court was called upon to do; in fact, it was all he was allowed to do by our law. See Session Law of 1880, page 51, sec. 23.

The two propositions to be passed upon by the jury were:  
• *First*. Did William Young and William H. Dwenger, or either of them, murder Henry F. Dwenger?

*Second*. Did this defendant incite, move, procure of the said Young and William H. Dwenger, or either of them, to commit this murder?

Now, in order to convict defendant, the guilt of the principal felons had to be first established, and their confessions were proven and given as evidence for that purpose, and no other, and was competent legal evidence for that purpose; but we go farther and say it was proper testimony against defendant upon another ground, namely, conspiracy.

The learned counsel for defendant assume that there was no evidence of a conspiracy, but a slight examination of the facts will disclose abundant evidence thereof.

It will be remembered that the defendant was the wife of the murdered man; that his murderers, William Young and William H. Dwenger, lived in the same house with defendant and her husband; that, on the morning Young and Wm. H. Dwenger took the old man out into the mountains and killed him; just before they started on their murderous



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expedition, Young and defendant were seen engaged in an earnest conversation outside of their house.

The defendant's declaration that she sent the sack along for the boys to bring home the old man's clothes.

The fact that deceased possessed considerable property, which was after his death divided up between Young and William Dwenger and defendant; that they did all continue to live together until they were arrested and lodged in jail.

The defendant's contradictory statements as to the old man's whereabouts; all tend to the irresistible conclusion that a deep-laid plot and vile conspiracy had been formed by these three villains to take the life of old man Dwenger, to get rid of him, so they could get possession of and enjoy his property.

Conspiracy is generally proved from circumstances. No direct evidence need be given of the fact of conspiracy; it may be collected from the circumstances of the case: Chitty's Criminal Law, vol. 8, p. 1143; Greenleaf's Evidence, vol. 3, p. 81, sec. 93.

The appellant does not deny but that the evidence in this case clearly proved her guilt. No pretense here of insufficiency of evidence to support the verdict.

The guilt of the principal felons has been established by no less than three juries. It will be observed that this defendant did not go on the stand, or in any way attempt to show her innocence.

Human life is not at stake here; unfortunately, the law does not permit of her being hanged. Justice has only failed in this case by the law providing a too light punishment.

As to defendant's confessions being made after the fact not being admissible, the counsel for defendant confuses the mere act of confessing with the fact of confessing to acts that occurred after the fact.

Now, surely it will not be contended that a confession

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made after the act was committed of a fact that took place before said act was committed is not competent evidence, as, for example, in this case, the sending the sack with the murderers to bring back the clothes of the man they are taking out to murder. Confessing to an act or circumstance that took place after the crime was consummated may not be competent to prove conspiracy; but, confessing to the same act or circumstance if it had been committed, or had taken place before the crime was committed, would be good evidence, although the mere act of confessing had been done after the commission of the crime; but it will be remembered that defendant's admissions were not proven in the case to establish a conspiracy, but to prove the commission of the crime of murder in the fifth (5th) degree, or of an accessory before the fact to murder; to which case we do not think the instructions applied to conspiracy has any application.

The learned judge's charge in this case is very full, and quite as favorable to the defendant as the nature of the case would permit.

The only complaint here is that the judge should have taken from the jury, as to a part of the case evidence that was properly in the case; this, we think, he was not obliged to do—the evidence was for the jury alone. There was no evidence before them but legal, competent and proper testimony. The law, it is admitted, was properly laid down and given to the jury. This was all the court could be asked to do; and as there cannot be a shadow of doubt as to defendant's guilt, no injury has resulted to defendant, substantial justice has been done, and the judgment should be affirmed.

PRINCE, Chief Justice: This is an appeal from the judgment of the third district court, sitting in Doña Ana county.

The defendant, who is the appellant, was indicted by the

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grand jury of Grant county, at the July, 1879, term, as an accessory before the fact to the murder of Henry F. Dwenger, William Young and W. H. Dwenger being indicted as principals.

The defendant having applied for and taken a change of venue to the county of Doña Ana, her trial was had at the March, 1880, term, in that county, the principals having been first tried and convicted.

The court held that, under our territorial law, the offense charged was murder in the fifth degree, and the jury brought in a verdict of guilty of murder in that degree, and assessed the punishment at ten years' imprisonment. Before sentence, the prisoner's counsel moved for a new trial on various grounds, which motion was denied by the judge presiding. Thereupon the defendant appealed to this court.

The matters for our consideration are, fortunately, narrowed down to a small number. It is conceded by the defendant's counsel that the action of the court below in treating a case of this nature as murder in the fifth degree under our statute was correct; and that, in the charge to the jury, the two propositions for that body to pass upon in determining the facts were properly laid down. On the motion for a new trial five specific causes were assigned, besides the formal ones. These five consisting of alleged errors in the admission of testimony, and in refusals to give instructions to the jury which were requested; but in the brief and argument of counsel for the defendant, they have confined themselves to the refusal of the court below to give to the jury the sixth, seventh and eighth of the instructions requested by them at the trial; and these substantially include the matters of evidence stated in the motion for a new trial, and are all that we have to consider. These are as follows:

*Sixth.* "The jury is further instructed to disregard all the evidence in this case purporting to be the admissions or confessions of the defendant, Dora Dwenger, made by her after

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such killing, relating or pertaining to any act or thing done by her subsequent to the homicide of the said Henry F. Dwenger, with the view of concealing such homicide, or for the purpose of enabling the perpetrators thereof to elude punishment."

*Seventh.* "And the jury are further instructed that all confessions and admissions made by the defendant under the circumstances and in the manner detailed by the witnesses for the prosecution tending to prove her concealment of such homicide, ought not to be considered by the jury as proving or tending to prove that the defendant incited, procured, hired, counselled, moved, aided or commanded the said Wm. Young and William H. Dwenger, or either one of them, to kill the said Henry F. Dwenger, as charged in this indictment."

*Eighth.* "The jury are further instructed that the confessions or declarations made by William Young, or by the said Wm. H. Dwenger, as stated by witnesses for the prosecution, are not legal or competent evidence in this case against the defendant, and ought not to be considered by the jury in their deliberations as to the guilt or innocence of the defendant, unless the jury shall further believe from the evidence that the defendant was present when such confessions or declarations were made and assented thereto."

It was argued by counsel for the defendant that the sixth and seventh instructions should have been given, because the admissions of the defendant were made two months after the commission of the murder, and also because they related to events occurring after that commission. The time when the admission is made, however, can be of no importance; if years after the crime in question, it would have just as much weight and be just as binding as evidence. The time of the occurrence of the acts admitted is of more consequence, and if remote from the date of murder would raise a serious question. But in this case they occurred within a very short time after the murder, and as to one act of special import-

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ance, it is impossible to tell from the evidence whether it occurred before or after. This is the admission of the defendant testified to by the witness Hoffman, as follows :

“You need not blame the boys for robbing him of his clothes. I sent a sack along to bring the clothes home. She said in Germany there was a case of the kind where a man was murdered and the body was identified by the clothing, and that was the reason why she sent the sack along to bring the clothes home ; she did not state the time, whether before or after the killing.”

Sheriff Whitehill testified substantially to the same statements by the defendant, and adds, “she said she had sent the sack for them ; at the time she spoke I thought she had sent the sack up at the time he was killed, but since then they have all told me that the clothing was brought in the next day.”

So at the farthest, this was an action of the defendant on the next day after the murder, and directly connected with the murdered man and his death, and as such it is admissible to be considered by the jury in connection with the other evidence in coming to their conclusion.

Of a similar character is the evidence (in the form of admission by the defendant), as to the concealment of the coat in the quilt. While not conclusive in itself, it is yet so connected with the murder that it was proper to go before the jury as a circumstance for their consideration. We think, therefore, that there was no error in the admission of this testimony, nor in the refusal to give the sixth and seventh instructions as regarded by the defendant's counsel.

This brings us to the eighth instruction. The defendant's counsel concede that the judge rightly stated to the jury in his charge, the two questions which were involved in the case, and which they were to decide. The first of these was as follows :

“That William H. Dwenger and William Young, or one

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of them, actually and intentionally killed Henry F. Dwenger, without justification or excuse, in the county of Grant, in November, 1878. That they or one of them, so killed Henry F. Dwenger by means of a fatal gunshot wound inflicted by them or one of them."

The same is briefly stated in the defendant's brief in these words: "The guilt of the principal felons or some one of them, must first be established by competent testimony."

Whatever testimony then tended to prove such killing by the principals, was competent as evidence in the case; such testimony indeed was absolutely essential, because if the jury did not find that the first proposition was proven and that the principals were guilty, there would be no case against the defendant as accessory. The defendant's counsel in their brief, endeavored to raise a distinction between the competency of this evidence as proof of the first proposition (as to the guilt of the principals), and as proof of the second proposition (as to the guilt of the defendant).

With regard to this, it may be said that any testimony which was proper as evidence regarding either branch of the case was of course admissible and could not have been excluded without error.

It may be that if the confessions and declarations of the principals had related wholly to the first proposition submitted to the jury, an instruction might have been framed limiting the application of that testimony to that proposition, and stating that it did not apply to the second proposition as to the action or complicity of the defendant before the commission of the crime as an accessory.

But firstly, the confessions and declarations to go beyond the subject of the first proposition, and secondly, the eighth requested instruction is not so framed. One of the statements of William H. Dwenger, testified to by the witness Watts, is as follows: "My mother and Mr. Young put up the job that we were to kill him; the plan was made at the

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breakfast table the morning we went out to kill him." This clearly goes beyond the question of the guilt of the principals and directly affects that of the defendant.

Again, the eighth instruction is much too broad for the distinction drawn in the defendant's brief, even if all the confessions and declarations of the principals as testified to had been strictly confined to their own guilt. The judge was asked to charge that those confessions and declarations "are not legal or competent evidence in this case against the defendant, and ought not to be considered by the jury in their deliberations as to the guilt or innocence of the defendants. Had he given this instruction, the jury would naturally have believed that they were precluded from giving to those confessions and declarations any consideration whatever in the case. The distinction is not clearly drawn, if drawn at all, between the two propositions submitted. To have given the instruction under the circumstances would not only have been error, because part of that testimony directly bore on the guilt of the accused, but because it would have misled the jury as to their right to consider these confessions and statements in any part of the case.

Without considering then the points as to "conspiracy," presented in the briefs, we think that the judge could not properly have given this eighth instruction and was right in declining to adopt it.

*This covers all points raised by the defendant. The judgment of the court below is affirmed.*

*All concur.*

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Herrera v. Chaves et al.

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YGNACIO HERRERA, Appellant, v. ANTONIO JOSÉ CHAVES AND  
MARIA DE LA LUZ GARCIA DE CHAVES, Appellees.

January 23, 1881.

ASSUMPSIT. (1) *Instruction of jury to find for the defendant.*

PRACTICE. (2) *Nonsuit, district court cannot order peremptorily.*

1. In an action of assumpsit it is proper for the court to instruct the jury to find a verdict for the defendants where no evidence is adduced tending to prove either an express or implied obligation or promise by defendants, or either of them, as the plaintiff alleged in his declaration.
2. The district courts have no power to order a peremptory nonsuit against the will of the plaintiff. PARKS, A. J., dissenting.

Appeal from the District Court, Bernalillo County.

This was an action of assumpsit brought by the plaintiff in error, plaintiff below, to recover damages from the defendants alleged to have been sustained by reason of the defendants' failure to pay a debt alleged to have been contracted by one of the defendants, Maria de la Luz Garcia de Chaves, as a *feme sole*, on account of the maintenance of two children by a prior marriage. The action was brought against the defendants as husband and wife. In the court below issue was formed, a jury impanelled, and the evidence on the part of the plaintiffs introduced, and the case submitted under the instruction of the court to the jury to find for the defendant. The jury failed to agree upon a verdict, and the court thereupon ordered that the plaintiff be nonsuited. Bills of exception were framed and sealed, and the case now comes here by appeal.

*Breeden & Hazledine* for appellant.

The action was properly brought: Tyler on Infancy and Coverture, 333; 2 Chitty, 573; Ohio Form, 106. Parents are liable for the maintenance of infant children: 16 Bass, 135-140; 4 N. H., 86; 16 Bass, 272-274; 13 John., 480; Tyler on Infancy and Coverture, 101.



A father or mother, after the death of husband or wife, cannot divest him or herself of the duties and responsibilities of the paternal relation by a verbal or parol agreement; such a result can only be accomplished by the solemnity of a deed. A verbal or parol agreement of the character mentioned can be revoked at any time: 44 N. H., 321; Schouler Dom. Relations, 343; 3 M., 225; 31 M., 240.

After the death of the father the mother is head of the family, and is bound to support minor children: Reeves Dom. Relations, 74; 16 Mass. 140.

A husband is liable for debts of wife contracted *dum sole*: Reeves Dom. Relations, 66; Tyler on Infancy and Coverture, 332.

The court had no right to order a nonsuit: 1 Peters, 471-476; 6 Peters, 598; 8 Mo., 685, side paging; 7 Ala., 528; 16 Ala., 422; 14 Howard, 218; 23 Howard, 183; 6 Pick., 118.

*Barnes & Chaves*, for appellees.

*First.* The action was not properly brought; the declaration does not show that defendants are husband and wife; this being true, as we conceive, defeats the plaintiff in his right to recover or reverse this case, and justified the court below in entering a nonsuit: Tyler on Infancy and Coverture, pp. 333 and 334; 21 Wendell, p. 20. *Secondly.* The evidence, in the case, offered upon the trial shows beyond question that there was no contract, express or implied, proven against the female defendant, to pay for the support and maintenance of her children named in the suit, but upon the contrary, it is clearly shown that said children were given to the plaintiff, their uncle, absolutely and forever, and that he supported and maintained them without any expectation on his part, or on the part of their mother and father, that he should be paid; the circumstances forbid the idea of a contract to pay; the attempt to recover in this case is an afterthought. See 2 Parsons on Contracts, pp. 46, 47, and

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authorities cited; 16 Vermont, p. 150; *Fitch v. Peckham*; *Weir v. Weir*; 3 Ben Monroe (Ky.), 647; 3 Esp. 3, and 15 Pickering, 130; 1 Parsons on Contracts, 298, and authorities cited; 17 Vermont, 350; 1 J. J. Marsh, 433-4; 3 Bush, 613.

The authorities cited by appellant's counsel in reference to liability of parents to maintain their infant children, and as to the mother being the head of the family, and bound to support minor children, do not apply to the case now before the court.

The position assumed by the counsel for appellant, as to the liability of the husband for the debts of the wife, contracted *dum sole*, may be conceded as a general principle. Yet we say that there is no liability or debt of the wife, or female defendant shown by the record in this case, and there should have been no finding against the defendants or either of them.

The court did not err in instructing the jury to find for the defendants, and afterwards entering or directing the clerk to enter a nonsuit; because, *First*, The plaintiff's declaration upon its face showed no cause of action against the defendants. The averment therein made does not show that defendants were husband and wife. *Secondly*, The whole of the proof taken together and offered by the plaintiff upon the trial, and as presented in this record, showed conclusively that plaintiff had no cause of action against the defendants. The motion of the defendants to instruct the jury to find for defendants was proper; it was in the nature of a demurrer to the whole of the evidence; and the instructions of the court to the jury to find for the defendants was nothing less than a proper decision of the court that the plaintiff had no cause of action; and, was in law a verdict by the court for defendants; and the jury not having retired from the bar of the court, and two of them, in the presence of the court, refusing to obey the court, and

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plaintiff not asking any instructions, or to have the jury sent out, the court did right in directing a nonsuit; there was no injustice done to the plaintiff, and he should not be heard to complain here.

The plaintiff did not move for a new trial, or file grounds for a new trial, and hence he cannot, as we respectfully suggest, ask the court to view the pretended errors complained of in this case.

Upon the whole case, the action, ruling and findings of the court below, were right and proper, and the judgment below should not be disturbed. We therefore ask for an affirmance. See 14 Bush, 316; 13 Bush, 298; 5 Bush, 206; 7 Bush, 236; 4 Bush, 289.

**BRISTOL, Associate Justice:** This is a case of assumpsit brought by the appellant Ygnacio Herrera, the plaintiff below, against Antonio José Chaves and Maria de la Luz García de Chaves, the defendants below, to recover the reasonable value of boarding, lodging, clothing, schooling, etc., of certain two minor children, at the instance and request of said Maria, one of the defendants, while she was the widow of the father of said children, and sole and unmarried, she being the mother of said children and being also the wife of said Antonio, the other of said defendants at the time of the commencement of this action, as well as during the progress of the proceedings therein.

The general issue was pleaded to the declaration and the cause brought to trial before a jury.

After the plaintiff had presented all his evidence and rested, the court below, at the request of the defendants, instructed the jury to find for the defendants on the ground that there was no evidence sufficient to support the plaintiff's declaration. To this instruction the plaintiff excepted. Two of the jury refused to obey said instruction to find for the defendants, while ten of the jury assented thereto.

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Whereupon, and before said jury left their seats, the court, in the presence of the jury and against the will of the plaintiff, peremptorily ordered a nonsuit to be entered and the jury discharged, which was accordingly done, together with judgment for the defendants for their costs. To which order and entry of judgment the plaintiff excepted. A bill of exceptions presenting these facts and including all the evidence is before this court as parts of the record.

Upon this statement of the case, several questions are presented by the briefs of the respective counsel for the parties, none of which do we consider it material or necessary to notice except those arising on the plaintiff's exceptions already stated.

The instruction of the court to the jury to find for the defendants was clearly proper under the circumstances, as there was no evidence deduced on the trial tending to prove either an express or implied obligation or promise on the part of the defendants, or either of them, as the plaintiff had alleged in the declaration.

As to the question whether the court below, under the circumstances, had any authority to order a peremptory nonsuit against the will and consent of the plaintiff, we meet with difficulty in arriving at a satisfactory conclusion from the conflicting decisions on the subject by the courts of the various states.

In the state of New York the appellate courts have always held that the courts of original jurisdiction, not only had the power, but that it was their duty, to direct a nonsuit even against the will of the plaintiff, when upon the trial he failed to present any evidence in support of his claim: *Pratt v. Hull*, 13 John., 134; *Allgro v. Duncan*, 24 How. (N. Y.) Pr., 210.

But whatever may be the preponderance of authority among the different states in favor of recognizing and exercising this judicial authority, we are constrained to regard

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the decision of the U. S. Supreme Court as conclusive, if they cover the case before us. The reason being that an appeal or writ of error lies from the final decrees or judgments of the supreme court of a territory, directly to the U. S. Supreme Court.

The first case in which the identical question we are now considering arose in that court in the case of *Elmore v. Grymes*, 1 Pet., 469.

That case went to the U. S. Supreme Court from a U. S. Circuit Court, over which Associate Justice Johnson of the supreme court presided as circuit judge. Judge Johnson, as such circuit judge, had peremptorily ordered the plaintiff to be nonsuited against his will because the evidence on the trial was inadequate to maintain the suit.

The case went to the U. S. Supreme Court on this point alone; no evidence was before the supreme court. That court, Chief Justice Marshall delivering the opinion, held "that the court below had no power to order a peremptory nonsuit against the will of the plaintiff. That the plaintiff had a right to have his case submitted to a jury."

Associate Justice Johnson, who had directed the nonsuit in the circuit court, gave an elaborate dissenting opinion with some degree of asperity, in which he reviewed the whole subject. His reasoning is certainly strong, and as it would seem, conclusive, yet the supreme court adhered to its decision. They adopted the old English *nisi prius* practice on this subject, which was that "the plaintiff is in no case compellable to be nonsuited, and if he insist upon the matter being left to the jury, they must give in their verdict: 2 Tidd's Practice, 869.

Since the decision of *Elmore v. Grymes*, *supra*, the U. S. Supreme Court have repeatedly referred to and affirmed that decision: 1 Pet., 476; 6 Pet., 598; 23 How., 172; 1 Wal., 359.

The matter may therefore be considered as settled, so far

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as that court is concerned, and that the same is conclusive upon us.

We hold, therefore, that the court below erred under the circumstances in ordering a peremptory nonsuit against the will of the plaintiff.

The judgment of the court below is reversed, and a trial *de novo* granted.

PARKS, Associate Justice, dissenting: I submit to the decision which has just been read, but. I am not satisfied that it is correct. The opinion of a majority of the court in *Elmore v. Grymes*, 1 Pet., 471, upon which this opinion is founded, was announced by the court in very few words, and no attempt is made to sustain it by reason or authority. On the contrary, the dissenting opinion of Judge Johnson in the same case is fortified by the weight of authority both in England and this country, and is supported by reason and legal principle. He shows that it is not the perfection of reason to hold that a court may indirectly put an end to a trial where there is no evidence, by directing a verdict for defendant, but that it may not do the same thing directly by ordering a nonsuit. The power conceded to the court is greater than the power denied it. So far as I am advised, the opinion of Judge Johnson has never been answered. It has happened, not infrequently, in the history of the law, that a doctrine has long obtained, supported by real or supposed authority, which when thoroughly discussed and examined, could not be sustained.

In our opinion, cited in another case pending in this court, it is stated substantially that the doctrine that an award alone was a bar to an action, was long held in England, and till Lord Tenterden exposed its fallacy. And similar instances might be cited, where judges distinguished for ability, learning and integrity, have upheld principles or practices which subsequent investigation have proved erroneous.

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I adopted the rule in this case in the second judicial district, because I was assured by experienced attorneys that it had long been the practice in this territory, and because I believed it to be right in principle and sometimes necessary, as in this case, to vindicate the authority of the court.

If New Mexico were a state, this question should be examined and decided upon its merits.

As it is, I can only acquiesce in the decision of a majority of this court.

THE TERRITORY OF NEW MEXICO, Appellee, v. WILLIAM  
YOUNG ET AL., Appellants.

January 24, 1881.

GRAND JURY. (1) *Prisoner need not be brought into court when grand jury impanelled in order to challenge.*

SMALL JURY. (2) *Jurors need not be absolute "owners" of fee of real estate.*

SMALL JURY. (3) *Erroneous acceptance of juror cured by peremptory challenge.*

MURDER. (4) *Instruction held not a comment by judge upon weight of evidence: Instruction as to degree.*

1. Under the statute (sec. 3, Act February 7, 1854) providing that a person held to answer a charge "may challenge the panel of the grand jury, or an individual grand juror," it is not necessary to bring persons accused of crime, and incarcerated in jail, into court at the time of impanelling the grand jury to enable them to exercise such right of challenge, and a failure to do so will not invalidate an indictment.
2. Under the law requiring a juror to be the "owner" of real estate, it is not necessary that jurors shall be absolute owners of the fee. The statute is to be construed liberally, and the requirement of ownership is met, if the juror be in possession of, or have a qualified interest in real estate.
3. An error of the court in refusing to exclude a person from the jury, upon the ground of non-citizenship, is cured by the party objecting to such juror, peremptorily challenging him.
4. In a murder case a statement by the judge to the jury that "there is no evidence before you tending to show that the killing of Henry

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F. Dwenger is murder in any other degree than the first degree of murder" is not erroneous, as being a comment by the judge upon the weight of the evidence before the jury. It is a statement that there is no evidence; but if, in fact, there was evidence of the kind named, such a statement would be erroneous, and it is not improper for the judge to designate the degree of murder which the evidence shows was committed.

Appeal from the Third Judicial District, Doña Ana county, Bristol, J.

The facts appear in the opinion of the court.

*Edward V. Price*, for appellant.

The first point complained of by the defendant in this case is: That being incarcerated in the county jail at the time of the impanelling of the grand jury, and not having been produced in court, he was thereby deprived of his statutory right of challenging that body. See Compiled Laws of New Mexico, chapter 69, page 500, sec. 3.

Where a person is held to answer to an indictment in a capital case (the same not beingailable), it is the duty of the prosecutor to produce said person in court, before the grand jury is sworn, in order that he may have an opportunity to view said body and interpose his challenges, if any he may have, and the defendant can no more waive this statutory right, than any other statutory or common-law right, in a capital case, unless he is produced in court and given an opportunity to assert his right.

The second cause of complaint is, that the court should have sustained the challenge to Albino Samanego interposed by the defendant, on the ground that he was not the owner of real estate, one of the qualifications of a petit juror prescribed by the act of the legislature of 1879, 1880. The evidence which has been preserved by a bill of exceptions, and now on file in this court, shows conclusively that the proposed juror was at the time of challenge only a squatter on the public domain, and not the "owner" of the land he pro-



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fessed to occupy according to the true legal signification of the word "owner."

Mr. Bouvier, in his Law Dictionary, defines the word "owner," thus: "The owner is he who has dominion of a thing real or personal \* \* \* which he has the right to enjoy and to do with as he pleases, even to spoil or destroy it."

"The right of the owner is more extended than of him who has only the use of the thing. \* \* \* He may commit what would be considered waste if done by another:" 2 Bon. Dict., p. 276, ed. 1860.

It has been repeatedly decided by the supreme court of the United States, that the *status* of a squatter simply, on public lands, is that of a tenant by sufferance only.

The third error complained of is—that the challenge to the competency of Pedro Provencio, on the ground that he was not a citizen of the United States, should have been sustained. It was and probably will be maintained by the territory that the father of the proposed juror became a citizen by force of Article V. of the treaty proclaimed June 30th, A. D. 1854, and commonly known as the Gadsden treaty, to be found on page 503 of the Revised Statutes of the United States relating to the "District of Columbia, post-roads and public treaties." But the territory should have shown affirmatively, that the father of the juror had not under the provisions of Articles VII. and VIII. of the treaty Guadalupe Hidalgo, "within one year made his election to retain the title and rights of a Mexican citizen," or that he had remained without making his election for one year next succeeding the date of the exchange of ratifications of the Gadsden treaty, to wit, the 30th day of June, A. D. 1854, within the ceded territory. See Articles VII. and VIII., Guadalupe Hidalgo treaty, pp. 495-6; Same, Revised Statutes.

The fourth cause of complaint consists in the court's re-

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fusal to permit the defendant to prove and offer in evidence the verdict of the jury on the trial of William Dwenger, the principal of the first degree.

And it is maintained that it is illogical and contrary to sound reason to suppose that a person whom the evidence points out to be guilty (if at all) of only being present, aiding, abetting, etc., a principal in the second degree, can be guilty of any grade of the offense higher than the principal of the first degree.

Fifth—The court exceeded its power and authority in instructing the jury that their verdict should be “guilty of murder in the first degree, or not guilty.”

The laws of this territory provide, that “all issues of fact in a criminal case shall be tried by a jury, who shall assess the punishment in their verdict and the court shall render judgment accordingly:” Compiled Laws of N. M., sec. 22, page 372. What particular issues of fact were involved in the trial of the case at bar? I answer: 1st. The *corpus delicti*—that a human being had been unlawfully killed by the hand of another. 2d. Whether or not the defendant had been instrumental in producing the death. 3d. If he was, then what were the circumstances attending the commission of the crime; and this clearly involves in the case at bar, the necessity of ascertaining as a conclusive effect, the particular degree of which the defendant is guilty (if at all), and why?—for the plainest reason in the world, viz.: That it would be an absolute impossibility for the jury to “assess the punishment” until they had first ascertained the degree of the crime charged. See *State v. Kirkland*, 14 Rich. (S. C.), 230; 5 Ga., 441; 10 Ga., 101; 12 Wright (Penn.), 396; 29 Ga., 594; *Beaudien v. State*, 8 Ohio State, 634 (marginal page).

Sixth—It is also maintained by the defense that the defendant's motion for a new trial was improperly overruled by the court.

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1st. Because the evidence in the case clearly establishes the fact that the defendant, if guilty at all, is guilty of having been an accessory after the fact only; a fact of itself that is fatal to the verdict.

It follows then, the jury being satisfied that the defendant was guilty of some grade of the offense, were compelled by the instruction of the court either to convict of a higher grade of crime than the evidence warranted, or accept the other horn of the dilemma and turn a man loose that had clearly violated the laws of his country.

And here it also follows, that the verdict is contrary to law, being evidently based upon a misconceived statement of the law governing the case. See same cases last above cited.

*S. B. Newcomb*, for appellee.

The first point made by defendant is not well taken.

That before a grand jury can be impanelled all the prisoners in the county jail must be brought into court and given an opportunity to challenge that body, is certainly a novel proposition.

We have no statute commanding this, and certainly it has never been the practice in this or any other country.

The right to challenge a grand jury is denied by "Joy on Challenge to Jurors," and other English authorities, but it is recognized generally in America.

Mr. Proffatt, in his work on Jury Trial, cites but one case where a prisoner was brought into court that he might have his challenges, but that was a case where the state was allowed to challenge in the first instance.

The question raised by the second ground of error is of great importance in this country (although, as we shall hereafter show, it can have no weight in this case) from the fact that in some counties, at least, nearly all the owners or occupiers of the land, hold by the same tenure as the juror Samanego; they have no title to their lands beyond a mere

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possessory one—and should the court hold that insufficient, the result will be enough jurors cannot be had in many counties to try a capital case.

We think all the legislature intended by the words “owner of real estate” was, that a man should be in possession of land, cultivating and occupying it, holding it by a title good as against every one except the government.

If this legislature intended a juror should hold his lands in fee simple it would have so declared.

As to the juror Provencio, mentioned in the third ground of error, we think the evidence shows conclusively that he is a citizen of the United States, but whether he is, or is not, is not at all material to this case.

The defendant absolutely waived his right to object to the rulings of the court, as to both of these jurors, by peremptorily challenging them.

The defendant did not exhaust all his peremptory challenges, having challenged but eight jurors peremptorily. See *Stewart v. State*, 13 Ark., 720; *McGowan v. State*, 9 Yerger, 184; *Freeman v. People*, 4 Denio, 61; *Carroll v. State*, 3 Humph., 315; *Whalen v. Queen*, Q. B. Canada; *State v. Elliott*, (45 Iowa) 2 Am. Crim. Law Repts., 322; *Erwin v. State*, *Id.*, 251, 423.

PRINCE, Chief Justice: This is an appeal from a judgment of the third district court, sitting in the county of Doña Ana.

The defendant was indicted, together with Dora Dwenger and William H. Dwenger, at the July (1879) term, in Grant county, for the murder of Henry F. Dwenger.

Defendant demanded a separate trial, and also moved for a change of venue to another county, both of which were granted, and the venue changed to the county of Doña Ana. Before the change of venue, the defendant moved to quash the indictment, which motion was denied, and the defendant

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excepted. The trial took place at the April (1880) term in Doña Ana county.

In the selection of jurors, the defendant challenged Albino Samanego, on the ground that he was not an owner of real estate. The court overruled such challenge, and the defendant excepted. Thereafter the defendant peremptorily challenged said proposed juror. The defendant also challenged Pedro Provencio, on the ground that he was not a citizen of the United States. The court overruled such challenge, and the defendant excepted; thereafter the defendant peremptorily challenged said proposed juror. The defendant used eight only of the twelve peremptory challenges, to which he was entitled.

After the delivery of the judge's charge, and before the jury retired, the defendant duly excepted to certain specified parts of said charge.

After the rendition of the verdict, the defendant moved the court to set aside the verdict, and grant a new trial, which motion the court denied, and the defendant excepted. The jury having rendered a verdict of guilty of murder in the first degree, the court pronounced sentence of death, and thereupon the defendant appealed to this court and obtained a stay of proceedings.

Counsel for defendant states five grounds on which he claims that the judgment below should be reversed. We will consider these *seriatim*. The first is, that the defendant "being incarcerated in the county jail at the time of the impanelling of the grand jury, and not having been produced in court, he was thereby deprived of his statutory right of challenging that body."

This claim is made under section 8 of the act of February 7, 1854, which provides that "a person held to answer a charge, may challenge the panel of the grand jury, or an individual grand juror." While this law has been of the statute book nearly twenty-seven years, it has never been the practice to

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bring persons held to answer charges, into court at the time of the impanelling of the grand jury; nor do we know of any single instance in which that course has been adopted. It would obviously be a great inconvenience, and it is difficult to see what greater right a man already held to answer a charge has to be heard as to the composition of the grand jury, which is primarily to consider his case, than one whose case is brought before the same body during their session, without his having been previously held to answer.

No case has been cited showing that in any state or country has it been considered an absolute right on the part of an accused person in confinement, thus to be brought into court, so that the failure so to bring him would invalidate the further proceedings. The furthest that any of the cases mentioned goes, is to say that it was the practice in California thus to produce such prisoners.

In the absence of any law containing such requirement, and in view of the uniform practice in this territory, we do not think that this point presents an error which invalidated the indictment, and on account of which it should have been quashed. We cannot fail to recognize the wide distinction between a grand and a petit jury as to their functions and methods of procedure. The action of the former is simply preliminary; it is an inquiry by the grand inquest as to whether there is such probability from the statements made before them, which are usually *ex parte* of the guilt of a certain person, that he ought to be placed on trial. The importance of the feeling or action of any individual member, is not only less on account of this preliminary character of the proceedings, but also because a unanimous vote is not necessary in reaching a conclusion. It is not expected that in every instance, each grand juror shall be free from all previous knowledge of the cases, or even of the precise circumstances of the cases coming before them for official action; on the contrary, it is stated in the statute as to their

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powers and duties which is required by law to be read to every grand jury as a part of the charge of the court (chap. 70, sec. 9, General Laws), that, "If a member of the grand jury knows that an offense has been committed which is triable in the county, he must declare the same to his fellow jurors."

The second cause alleged for reversal is that the court should have sustained the challenge to Albino Samanego, interposed on the ground that he was not an owner of real estate. Upon the examination of this juror, he said, "I am the owner of a piece of real estate and house in the town of Colorado;" that as he was informed, his brother had entered the land at the land office at Las Mesilla; that under a general agreement among the people, one man entered a quarter section, and each quarter was divided in five parts, and each person took one-fifth part; that the justice of the peace divided up this quarter section, and gave him the part he occupied and claimed; that he had cultivated it for a number of years, had it now sown, and was in undisputed possession of it. He further testified, "The lot upon which the house I live in is built, belongs to myself; it (the house) is a jacal; I built it myself; it is not on the land I have mentioned, but is inside of the town of Colorado." With this uncontradicted evidence as to the ownership of the house and lot, we do not see from the record, how any question can arise as to the qualification of this juror as an owner of real estate; if there is anything to invalidate the testimony, the record fails to show it. Even were this not so, it would be far from clear that the juror was incompetent; the practice has been throughout the courts of the territory to construe the words "owner of real estate" quite liberally in this connection. The word "owner" does not necessarily imply that the person should be the holder of a fee simple. It is frequently used as equivalent to "possessor," and to designate the person in actual possession and control of

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property. In proceedings for street openings and others of a similar character where the consent or action of a majority of the "owners" of the real estate affected was required, it has been held almost, if not quite uniformly, that the entire ownership of the fee was not necessary to constitute a person such as an "owner." In certain counties of New Mexico, owing to the large areas covered by land grants, or the fact that the land is nearly all owned by the United States, it would be practically impossible to obtain juries in many instances, if it was an essential qualification that each juror should be the owner in fee simple, by an absolute title of record, of real estate. This fact has always been patent, and well known to the legislatures of the territory, and we have a right, therefore, to consider it in endeavoring to arrive at a conclusion as to the legislative intent in the use of the word "owner." The object of the law was evidently to place upon juries those who were to some extent established in and identified with the territory, and who had a stake in the community. The possession of real estate was perhaps as good a criterion, with regard to their qualifications as could be suggested. But an absolute fee simple was not necessary for this, and the legislature certainly could not have intended to apply such a test in counties where through the peculiar situation of the land, it was practically impossible for many persons to obtain such a title. All the requirements embraced in the reason of the law are met by the actual occupation and undisputed possession of real estate, and this, we think, is the extent to which this qualification should be pressed, or the law requires. In the case before us, however, the statement of the juror, under oath, that the lot upon which the house in which I live is built, belongs to myself, uncontradicted and unimpeached, seems to settle the point that the challenge was rightfully overruled, even according to the strict interpretation of the law. The fact that the juror was



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afterwards peremptorily challenged, it is, therefore, not necessary to consider in this connection.

The third error assigned is the overruling of the challenge interposed against Pedro Provencio, a juror, on the ground that he was not a citizen of the United States. We do not consider it necessary to discuss the subject of the citizenship of Provencio, although there seems but little doubt that he was competent, so far as that was concerned, because, even if he were not, the error was cured by the subsequent peremptory challenge of the proposed juror by the defendant, taken in connection with the fact that on the completion of the jury defendant had not exhausted his peremptory challenges. The law with regard to this seems to be pretty well settled, and is founded on common sense.

Some decisions go much beyond this and declare that even in case the defendant had not challenged the juror peremptorily, and such juror had therefore remained and acted on the jury, yet if the defendant had not exhausted his peremptory challenges, the juror was so remaining and acting by defendant's voluntary act, and so he was not prejudiced: *State v. Davis*, 41 Iowa, 811; *State v. Elliot*, 45 Iowa, 486.

Other decisions of highly respectable courts are to the effect that in case the defendant peremptorily challenges a juror, no previous action of the court in overruling a challenge of such juror for cause, can be ground for exception on appeal, even if the defendant may have exhausted all his peremptory challenges before the jury was completed. This is put on the ground that "the prisoner had the power and the right to use his peremptory challenges as he pleased, and the court cannot judicially know for what cause or with what design he resorted to them: *People v. Bodine*, 1 Denio, 310. He was free to use or not use them, as he thought proper, but having resorted to them, they must be followed out to all their legitimate consequences:" *Freeman v. People*, 4 Denio, 31; *Stewart v. State*, 13 Ark., 732, etc.; *Whelan*

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v. *The Queen*, Canada Q. B., 28. Without going so far as either of these classes of decisions would lead us (for it is unnecessary in the present instance), there can be no doubt that in a case like that before us, where the defendant does not exhaust his peremptory challenges, and so is no way injured, by using the peremptory challenge for the proposed juror in question, if he chooses, after his challenge for cause has been overruled, to challenge peremptorily, he thus virtually and effectually wipes out any error which may have been committed in such overruling. He has ceased in any way to be prejudiced by the action of the court, and so has no reason for complaint.

The fourth error assigned by the defendant is "that the court exceeded its power and authority in instructing the jury that their verdict should be guilty of murder in the first degree or not guilty." The court so charged almost in the precise words above, and also stated to the jury, "there is no evidence before you tending to show that the killing of Henry F. Dwenger is murder in any other degree than the first degree of murder."

Had the court the right under the law so to charge? Sec. 23 of the recently enacted "Practice Act" (chap. 6, Laws of 1880), says: "The court shall not comment upon the weight of the evidence," and in the charge in this case, the court recognized this provision by instructing the jury: "You are the exclusive judges of the weight of the evidence and of its sufficiency to satisfy your minds as to the defendant's guilt." Is language such as is objected to by the defendant a "comment on the weight of evidence?" We think not. It is clearly competent for the court, at the end of the testimony for the prosecution, to say to the jury: "There is no evidence to sustain the indictment." If there is the least evidence, it becomes the province of the jury to take it into consideration and judge of its weight. They may give it credit or not; they may consider it of more importance than

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the opposing evidence or not; they are the judges of the value to be attached to it and the weight it should have in determining their verdict. But if there is no evidence at all, there is nothing for them to consider and weigh. The statement by the court below that the verdict should be "guilty of murder in the first degree or not guilty," was exactly equivalent to the other statement, "There is no evidence before you tending to show that the killing is murder in any other degree than the first." Under our law, there are five degrees of murder, included in each of the degrees except the first and fifth, are several distinct kinds of homicide. No less than three different offenses, varying greatly in their character, equally constitute the crime of murder in the second degree, with different punishments; and the third degree includes no less than five distinct definitions. The reading of the entire law as to homicide to the jury in each case, would not only be useless, and as to some of the sections, absurd, but would tend to confuse their minds, and make it almost impossible for them to distinguish what the real crime as proved is, and to agree on a proper verdict. In case of a homicide in a street brawl, to read to the jury the law as to assisting in a suicide, killing an unborn infant child, acting as second in a duel, or administering drugs while intoxicated, would be palpably absurd; and in case of a murder by an ordinary pistol shot, to include in the charge, the sections as to killing in a cruel and unusual manner, would simply confuse and mislead. The judge has to discriminate somewhat, and the question is simply as to where the line should be drawn. It is within the power, and we think it is almost the duty of the judge presiding, to simplify and make clear the duties of the jury as far as possible, by eliminating from these degrees, which are in effect made by our law distinct crimes, any which the case certainly is not. He has the right to say when the evidence warrants, "There is no evi-

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dence of the homicide charged being murder in the first degree," or "in the second degree," etc., as the case may be.

And it is the same thing virtually to say, "There is no evidence introduced tending to show murder in the second, third and fourth degrees," as to say, "This case, under the evidence, is either one of murder in the first or the fifth degrees." One form simply names the degrees which the alleged crime is not; the other the degrees which under the evidence it may be. Of course, the judge who thus excludes certain degrees from the consideration of the jury, does so at his peril, that is to say, he should be absolutely certain that there is no testimony whatever which would make a verdict of one of these degrees possible, for if there is the least vestige of evidence, it is for the jury to determine its weight and effect; and the slightest mistake of that kind would be error for which the appellate court would have to grant a new trial. But judiciously and carefully administered, such guidance by the court, is certainly advantageous to the administration of justice, especially under our complex murder law. In this case, we have carefully examined the evidence to ascertain whether there was anything whatever, however slight, on which a verdict of guilty of murder in any degree but the first could have been sustained, but find none. The instruction of the court below was warranted by the facts in the case as proved, and was not error.

It was suggested by counsel for the defendant that the law which provides that the jury shall "assess the punishment" in criminal cases, made this instruction improper. But that law has no bearing on this case whatever. That provision is simply to enact that the jury and not the judge shall fix the punishment to be inflicted within the limits established by law, where the law has left any option as to its extent. In nearly all of the older states this is done by the court. In such case the verdict of the jury simply states the offense of which they find the defendant guilty, as for example, "guilty

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of murder in the fifth degree," and it would be for the judge, after considering all the circumstances, to assess the punishment of fine or imprisonment, as he thinks the ends of justice require, within the limits fixed by statute for that offense. But in this territory the legislature chose to leave the assessing of the punishment, within those limits, to the jury instead of the judge, so that the verdict has to include not only a statement that they find the accused guilty of such a crime or degree of crime, but also, added thereto, the punishment within the statutory limits, which they have thought it proper to impose in cases where it is not absolutely freed by the law itself. This is a matter whether done by judge or jury, that comes after the determination of the degree of crime of which the accused is guilty, and is subject to the limitation of law as to punishment for that degree, so the fact of its being devolved upon the jury in this territory rather than upon the judge, cannot have any influence upon the rights, duties and powers of either judge or jury in finding a verdict as to the crime itself.

The fifth point of the appellant's counsel is, that the motion for a new trial was improperly overruled, for the reason that the defendant, if guilty at all, was guilty only as an accessory after the fact. We see nothing in the testimony on which to base this argument, even if there is such a crime known to our law in this territory, as that of being "accessory after the fact" to a murder. Believing that no error has been shown in the proceedings, the judgment of the court below must be affirmed.

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Territory of New Mexico v. Valencia.

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**THE TERRITORY OF NEW MEXICO, Appellee, v. LUIS VALENCIA,  
Appellant.**

*January 24, 1881.*

**JUSTICE OF THE PEACE.** (1) *Jurisdiction of, limited, and must appear affirmatively.*

**SAME.** (2) *Complaint before, must show jurisdictional and substantial facts.*

**CRIMINAL CASE.** (3) *Dismissal of appeal from justice of the peace by district court, need not be ordered until indictment found or information filed.*

1. The jurisdiction of a justice of the peace is inferior, special and limited by statute to specific territorial boundaries, established by law as a county, town, or incorporated city, and to specific subject matters, such as assault and battery, suits to recover debts where the amount claimed does not exceed \$100, etc. Such jurisdiction must appear affirmatively from the record of the proceedings; it cannot be presumed.
2. In a complaint for a misdemeanor before a justice of the peace, all the technicalities of an indictment need not be observed. If there be a substantial statement of the offense, it will be sufficient. But the facts conferring jurisdiction upon the justice must appear, and where a complaint for an assault and battery failed to show where the offense was committed, except that it was done upon the property of the prosecuting witness (not showing the county in which that property was situate, or that it was within the jurisdiction of the justice), the prosecution under such complaint should be dismissed on appeal to the district court.
3. But if it appears by evidence, that the misdemeanor complained of was committed by the defendant, the appeal from the justice of the peace may remain undisposed of in the discretion of the district court until the prosecuting attorney shall have filed an information, or the grand jury found an indictment, when the proceedings under the appeal may be dismissed and the district court take original jurisdiction of the offense and proceed to trial while the defendant and witnesses are present in court.

Appeal from the First Judicial District, Taos county.  
PRINCE, J.

The appellant in this case is charged with assault and battery. The case originated before a justice of the peace

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within and for Tacos county ; was appealed to district court, where defendant was found guilty. It is brought here on appeal.

*Conway & Risque*, for appellant.

Appellant claims that, from errors manifest on the face of the record, neither the justice of the peace nor the district court had jurisdiction. 1st. The complaint is a species of legal nondescript attempting to charge assault and battery, and at the same time seeking to recover damages for injuries alleged to have been done to the field of prosecuting witness by cattle of defendant—a proceeding utterly foreign to our law, and, we believe, to any system of jurisprudence. 2d. There is no venue laid in the sworn declaration or complaint. As to venue, see Archibold's Criminal Pleading, pp. 46, 47 and 49.

3d. There is no charge or crime known to the laws of this territory made out in the sworn declaration. The proceeding is brought under sec. 11, p. 360, Compiled Laws, 1865, but does not in any manner follow the language of the statute, and the word "unlawfully" is not used at all.

The supreme court of this territory, in the case of \_\_\_\_\_, has decided that the omission of the word "unlawful" is a fatal defect in an indictment.

4th. For the reasons above stated, the court below erred in overruling motions for new trial and in arrest of judgment.

*C. H. Gildersleeve*, for appellee.

In this case there is no bill of exceptions showing the evidence adduced on the trial of said cause, or the charge of the court to the jury. The defendant's ground of appeal is based solely on alleged want of jurisdiction in the district court, apparent on the record, on account of informalities in the justice's court.

The complaint is based on sec. 16, p. 362, Compiled Laws, N. M. By sec. 15, Compiled Laws, p. 206, all appeals

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from inferior tribunals shall be tried anew on their merits, as if no trial had been had below.

In criminal proceedings before justices of peace for misdemeanors, technical accuracy is not required: 4 Ohand. (Mich.), 148; 10 Me. (1 Fairf.), 473; 25 Ala., 221; 19 Ala., 11; 3 Ill. (2 Scam.), 7.

Sufficient appears on the face of the complaint before the justice of peace to show that an assault and battery was committed in a "rude and insolent manner," and that the accused violated a criminal law of the territory, and was tried for that offense.

The appellate court should try an appeal from a justice of the peace according to justice, regardless of any defect in the warrant, summons, or other proceedings of the justice: *Berry v. Brown* (Minor), Ala., 57; *Gayle v. Turner*, 204.

BRISTOL, Associate Justice: This is a criminal prosecution for assault and battery commenced by the territory against Luis Valencia, the defendant below and appellant here, before a justice of the peace of Taos county.

The defendant was tried by a jury, convicted and sentenced in the justice's court to pay a fine of \$10, and judgment was rendered in that court for such fine and costs.

The complaint on which the defendant was arrested, tried and convicted before the justice of the peace is as follows:

"TERRITORY OF MEXICO, }  
COUNTY OF TAOS. }

"According to and under the oath of Julian Martinez, this 11th day of the month of September, 1879, about 10 o'clock in the morning, and under his oath and affirmation declares and says that to-day, the 11th of September, 1879, about 7 o'clock in the morning, a certain Luis Balencia, in a rude and insolent manner assaulted and beat Manuel Martinez on his own property, and further, the same Julian Martinez



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claims of the accused Luis Balencia \$40 forty dollars for damages suffered in his field by animals of said Valencia."

"Now, therefore, I entreat justice in the name of the territory of N. M., that it assist me, so help me God.

"Ranch of Taos, N. M., Sept. 11, A. D. 1879.

"JULIAN <sup>His</sup> ~~+~~ MARTINES  
<sub>MARK.</sub>

"Sworn to and subscribed before me, in }  
my office, Precinct No. 8, in said }  
county, to-day, Sept. 11, A. D. 1879. }

"JOSE MIGUEL NIGEL,

*"Justice of the Peace."*

It appears from the docket entries of the justice that the parties interested settled the matter of damages mentioned in the complaint, and that the justice only took cognizance of the charge of assault and battery. It also appears from said docket entries that the defendant moved a dismissal of the cause, which was overruled by the justice before the jury was called.

The verdict of the jury on the trial, before the justice, was as follows:

"We, the jury, are unanimously of opinion that we find the accused guilty according to the law and the evidence."

Upon this verdict the justice assessed the punishment at a fine of \$10, and gave judgment therefor and costs.

From this judgment the defendant appealed to the district court in and for said Taos county. The case was brought to trial before a jury in that court, at the last September term thereof, the defendant at the time interposing no objection thereto. The jury found "the said defendant guilty in manner and form as charged in the complaint herein." The defendant interposed a motion for a new trial, also for arrest of the judgment, assigning various grounds, among which was that the court below had acquired no jurisdiction to proceed against the defendant in the premises on the complaint aforesaid of Julian Martinez. The motions were

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overruled and the district court assessed the "punishment of the defendant at a fine of \$10, and rendered judgment for such fine and costs." The case is here by appeal from this judgment.

No bill of exceptions appears of record; no evidence adduced on the trial is before this court, and the only question raised upon the record which we can consider, is whether the court below had jurisdiction.

The jurisdiction of a justice of the peace is inferior, special and limited by statute to specific territorial boundaries established by law as a county, town, or incorporated city, and to specific subject matters as assault and battery suits to recover debts where the amount claimed does not exceed \$100, etc. Such jurisdiction must appear affirmatively from the record of the proceedings; it cannot be presumed: *Reeves v. Clark*, 5 Ark., 27; *Stranham v. Inge*, 5 Ind., 157; *Bigelow v. Steanes*, 19 John., 39; *Bridge v. Ford*, 4 Mass., 641. This principle is laid down as law in all the books on the subject.

It has been held that a conviction before a justice will be quashed, if the record thereof does not show the place where his court was held, on the ground that it must appear of record that the justice acted within the sphere of his jurisdiction: *Brackett v. The State*, 2 Taylor (Vt.), 167. It is true that in a complaint for a misdemeanor before a justice all the technicalities of an indictment will not be observed. If there be a substantial statement of the offense, it will be sufficient: 4 Wis., 148. But even in this respect it has been held that if in a complaint for larceny before a justice the goods alleged to have been stolen be described in a schedule annexed to the complaint, and not in the body thereof, the complaint will be bad: *Cummings' Case*, 3 Me. (3 Greenl.), 51. That there must be some kind of substantial statement covering all the essential elements of the offense, also covering the facts conferring jurisdiction, is quite evi-

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dent, in order to constitute a criminal prosecution before a justice, due course of law.

The district court, under our statute, could not assume a more enlarged jurisdiction on appeal than was conferred on the justice. In the complaint in this case there is no statement as to where the assault and battery was committed, except that it occurred on the property of Manuel Martines; in what county the property was situated does not appear. The language of the verdict is, "the jury find the said defendant guilty in manner and form as charged in the complaint herein."

The meaning of the verdict therefore is, that on the 11th of September, 1879, about 7 o'clock in the morning, Luis Valencia, in a rude and insolent manner, assaulted and beat Manuel Martines on his own property.

The territorial jurisdiction of the justice in criminal prosecutions was limited by law to the county of Taos. It does not appear affirmatively or otherwise, on the record, that the offense complained of was committed in that county. We have no right to presume that it was. In dismissing the prosecution thus commenced, it by no means follows that there need be a failure of justice in the district court. If it appears by evidence that an offense of this kind was committed by the defendant, the appeal may remain undisposed of, in the discretion of the court, until the prosecuting attorney shall have filed an information, or the grand jury found an indictment, when the proceedings under the appeal may be dismissed and the district court take original jurisdiction of the offense and proceed to trial, while the defendant and witnesses are present in court. There can be no doubt that this course would be better and more conformable to law than to sustain a record so defective as this.

The jurisdiction of the justice not appearing from the record of the proceedings, it follows that the judgment below ought to be reversed and the prosecution dismissed.

And it is so ordered. All concur.

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Territory of New Mexico v. Romine.

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THE TERRITORY OF NEW MEXICO, Appellee, v. RICHARD ROMINE, Appellant.

January 25, 1881.

TRIAL BY JURY. (1) *Whether trial by a jury who speaks only Spanish is.*

INSTRUCTIONS. (2) *Written in English, but translated orally to Mexican Jury.*

PRACTICE. (3) *Translation of proceedings to other languages.*

MURDER. (4) *Instruction as to degree.*

SAME. (5) *Same as to justifiable homicide*

SAME. (6) *Verdict, should name degree.*

SAME. (7) *Verdict assessment of punishment in.*

SAME. (8) *Instruction as to fourth degree.*

SAME. (9) *Same as to weight of defendant's testimony.*

SAME. (10) *Malice and premeditation, proof of.*

1. The defendant in a criminal case took a change of venue from a county where the English element largely predominated, to one where the Spanish population is very largely in the majority. The jurors who sat in the trial were all Mexicans, and none of them understood the English language, in which the proceedings at the trial took place.

*Held*, that this was a sufficient "trial by jury," and that there is no law in New Mexico requiring the jurors to speak any particular language.

2. The instructions were written in English and translated orally to the jury.

*Held*, that the object of the law requiring instructions to be written was simply to enable them to be preserved in the files, so as to be available for exception or on appeal, and that the oral translation of them to the jury did not render them violative of the law, as being oral instructions.

3. In all counties where the jury contains members representing each language, or where the persons speaking each are before the court, all the proceedings are to be translated by a sworn interpreter, into the other language from that in which they originally take place.
4. It is not error for the court to instruct the jury in a murder case, that the killing in question was either murder in the first degree, murder in the fourth degree, or justifiable homicide, where there is no evidence in the case which could bring the case within the definition of any degree not given.
5. Where the words of an instruction are broad enough to cover all the

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of murder in the fifth degree," and it would be for the judge, after considering all the circumstances, to assess the punishment of fine or imprisonment, as he thinks the ends of justice require, within the limits fixed by statute for that offense. But in this territory the legislature chose to leave the assessing of the punishment, within those limits, to the jury instead of the judge, so that the verdict has to include not only a statement that they find the accused guilty of such a crime or degree of crime, but also, added thereto, the punishment within the statutory limits, which they have thought it proper to impose in cases where it is not absolutely freed by the law itself. This is a matter whether done by judge or jury, that comes after the determination of the degree of crime of which the accused is guilty, and is subject to the limitation of law as to punishment for that degree, so the fact of its being devolved upon the jury in this territory rather than upon the judge, cannot have any influence upon the rights, duties and powers of either judge or jury in finding a verdict as to the crime itself.

The fifth point of the appellant's counsel is, that the motion for a new trial was improperly overruled, for the reason that the defendant, if guilty at all, was guilty only as an accessory after the fact. We see nothing in the testimony on which to base this argument, even if there is such a crime known to our law in this territory, as that of being "accessory after the fact" to a murder. Believing that no error has been shown in the proceedings, the judgment of the court below must be affirmed.

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*S. B. Newcomb and Catron & Thornton*, for appellant.

The jurors who sat in the trial of this case were Mexicans, and none of them understood the English language, in which the proceedings at the trial were had. The policy of the common law is, that "Where there is a wrong, there is a remedy," and the common law, as recognized by the United States and the several states of the union, is the rule of practice and decision in the territory of New Mexico in criminal cases: Compiled Laws of New Mexico, sec. 18, page 194. The defendant did not except to the jurors. He had a right to a trial by an English speaking and English understanding jury: *Lyles v. The State*, 41 Texas, 172, and the cases therein cited. In this case, the learned judge, who delivered the opinion, says that the constitution says, "That the right of trial by jury shall remain inviolate." These precise words are found in the "Bill of Rights:" Compiled Laws of New Mexico, sec. 5, page 636. He further says, "It (the trial by jury) cannot be considered as remaining inviolate, when the jurors can neither speak, nor understand the language in which the proceedings were had," etc., etc. In *Lyles v. The State*, 41 Texas, 172, the court further say, "A trial by such a jury as sat in this case" (nine of whom did not understand nor speak the English language, in which the proceedings were had) "was violative of section 16, article 1, of the 'Bill of Rights' of the constitution, which declares that, 'No citizen shall be deprived of life, liberty or property,'" etc., etc., going on, giving the exact language, as that found in sec. 15, page 640 of the Compiled Laws of New Mexico, which see.

Sec. 15, page 496, and sec. 21, page 498, Compiled Laws of New Mexico, state what is necessary to parties "liable to be chosen and to serve as grand and petit jurors," etc.

Such persons are not competent jurors, however, unless they can speak and understand the language, in which the proceedings are had on the trial. If such were intended it

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would be null and void. See *Lyles v. The State*, 41 Texas, 172, and also sec. 5, page 636, "Bill of Rights," Compiled Laws of New Mexico, and sec. 15, page 640, *Id.*, also 8 Ala., 302.

The instructions to the jury were written in the English language and orally interpreted to the jury in the Spanish language. See 41 Texas, 172, and sec. 1, page 200, Compiled Laws of New Mexico, which declares that the instructions shall be in writing.

If the instructions were orally interpreted to the jurors, they were oral instructions—nothing but verbal instructions, and contrary to the law. To instruct the jurors in writing was a duty imposed upon the presiding judge, by the statutory law governing his judicial acts, and a right to which the defendant was entitled and could not waive. The purpose of instructing in writing is that the jury may see them while deliberating, and by verbal interpretation they cannot properly catch and retain them, and for this reason the law orders that they be given in writing, and therefore, any procedure which is a violation of the spirit of this law is an injury to the defendant. The law says that in a trial of this kind, certain acts shall be performed by the presiding judge. The law for wise purposes says the jurors shall be instructed in writing, and he disregards what the law says, and a plain and imperative duty is neglected, and the jurors are verbally instructed.

The defendant need not except; in a capital case he stands upon all his rights and waives nothing, and he is not required to instruct the court as to what are and what are not its duties, and if the plain letter and spirit of the law is not complied with, this dereliction is not chargeable to the defendant, and the case must be reversed because of this error: *Nomaque, an Indian, v. The People*, Breese (Ill.), 145; *People v. McKay*, 18 Johns. (N. Y.), 212.

"In a capital trial, if error intervene, it must be assumed

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to be injurious to the prisoner, and he is entitled to a reversal of judgment. The courts have no power to affirm the case: *People v. Williams*, 18 Cal., 187."

The court erred in commenting upon the evidence of appellant: Page 428 "Albany Law Journal," May 31st, 1879; *Veatch v. State*, 56 Indiana, 584; 26 Am. Rep., 44.

The court erred when it told the jury that the evidence showed the offense to be either murder in the first degree, or murder in the fourth degree, or that the killing was justifiable, because it invades the especial province of the jury, and takes from the consideration of the jurors the other degrees of criminal homicide, a right to which the defendant is entitled. See *The State of Iowa v. Ezra C. Clemons*, "Northwestern Reporter," vol. 1, p. 82 (No. 9 New Series), which says, "All the degrees of criminal homicide should be explained and submitted to the jury. \* \* \* The degree of the crime is to be determined by the jury, and not by the court, and there can be but one rule for the court, in all cases." See also 41 Texas, 172.

The court erred, when it told the jury what the evidence tended to show, and on what points certain evidence had some bearing: *Bill v. The People*, 14 Ill., 432; *Bond v. The People*, 39 Ill., 26; *Kennedy v. The People*, 44 Ill., 283; *Hopkins v. The People*, 18 Ill., 264; *Morrison v. The State*, 41 Texas, 516; *Bishop v. The State*, 43 Texas, 390; *Rice v. The State*, 3 Ct. of App., 451; *Haskew v. The State*, "Texas Law Journal," November 26th, 1879, published at Tyler, Texas. Opinion filed November 12th, 1879. Note the following extracts from the instructions: First, the judge says, "From the evidence before you, if the defendant is guilty of murder in any of the degrees designated by law, it must be either murder in the first degree or murder in the fourth degree." Then, further on, he says: "Murder in the fourth degree, on which some part of the evidence, if true, has some bearing, consists," etc.



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This tells the jury that the defendant's evidence is false, and, therefore, there is no evidence to show it to be in the fourth degree. Is this the law? Is it just and fair? The jury are to pass untrammelled upon the credibility of the witnesses and the bearing of the evidence. Then, again, "If the defendant actually killed Rafferty, then the case, as presented by the evidence, is either murder in the first degree or murder in the fourth degree, or the killing was justifiable." Again, "If the killing was justifiable, then the case, as presented by the evidence," etc. If this is the law, what is the province of the jury? What figure do juries cut in legal investigation? Finally, the court says: "You have heard his statement of the case. In determining the question as to whether the defendant has told the truth, and all the truth, as to the position of the deceased at the time he received the fatal blow, and in reference to all the circumstances, it will be proper for you to consider the fact that he is the defendant, and that the greatest possible temptation is presented to him to testify in his own favor, if he is really guilty."

This is not proper as an instruction from the court. It ignores the reasonableness or unreasonableness of his statement, taken in connection with the other circumstances proved by other evidence.

In a capital case, when the instructions do not announce correct legal principles, or, being correct, do not apply to the case, though no exceptions are taken to them, the appellate court, in the face of the record, will not pronounce sentence of death on the prisoner, but will award a new trial: *Falk v. The People*, 42 Ill., 331; *Schlenker v. The State*, Supreme Court of Nebraska, October 15th, 1879, Northwest-ern Reporter, vol. 2, New Series, p. 710. In criminal cases, where life is at stake, it is not required that the evidence be palpably insufficient to warrant a conviction, before an appellate court will reverse, the rule being different in civil and

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criminal cases, and especially where life is at stake: *Falk v. The People*, 42 Ill., 331.

If the prisoner was guilty the evidence would have equally well applied to murder in the third or fifth degrees as to murder in the first and fourth: Comp. L., secs. 12 and 13, p. 320.

The court should also have instructed as to both causes of justifiable homicide. The first cause being equally applicable to the case with the second: Comp. L., sec. 5, 1st and 2d ed., p. 313.

The jury should have assessed the punishment: Comp. L., sec. 22, p. 372; *People v. Bonney*, 19 Cal., 446; *People v. Bonney*, 40 Cal., 129; *People v. Marquis*, 15 Cal., 38; *People v. Nichols*, 34 Cal., 217.

Premeditation must be proven, and cannot be presumed from the mere fact of killing: *Stoakes v. People*, Thompson's Cases, 931.

*W. L. Rynerson* and *Wm. Breeden*, for appellee.

The jury was a lawful one; whether they understood English or not is of no consequence. If this were a valid objection it was waived by the defendant in consenting to go to trial and failing to challenge the jurors on that ground: 1 Bish. Crim. Law, 995, *et seq.*, and particularly sec. 997 and authorities there cited.

It was not necessary that the verdict should fix the punishment. The indictment charged murder in the first degree, and the verdict was guilty as charged, that is, guilty of murder in the first degree. The punishment of this offense is absolutely fixed by law, and the jury could not change it and had nothing to do with it: Compiled Laws of New Mexico, sec. 2, p. 318. Where the jury is required by statute to fix the punishment and has a discretion as to the character or amount of punishment, the verdict should fix the punishment, but not otherwise, and in this case if the jury had assumed to fix the punishment, that portion of the verdict

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would have been surplusage: 1 Bish. Proced., 838; 2 *Id.*, 625.

There was no error in commenting upon the evidence by the judge. He had a right to say to the jury what he did say: 34 Cal., 191. This was the common-law rule which governed at the trial of this cause: Compiled Laws of New Mexico, sec. 188, p. 194.

It was the province of the court to give to the jury the law applicable to the facts of the case. There was no error in the refusal or failure of the court to instruct as to the third and fifth degrees. And the instruction given by the court as to the justifiable homicide, comprehended all that the defendant was entitled to: 6 Cal., 214; 31 Ga., 424; 27 Cal., 507; 18 Tex., 343; 32 Cal., 280; 8 Cal., 89; 81 Mo., 147.

Premeditation or malice aforethought, is not susceptible of direct proof, but is to be presumed or its existence determined by all the facts and circumstances connected with the case and the conduct of the defendant: 65 Ill., 17; 17 Cal., 369.

The instructions were in writing as shown by the record and the law in that respect was complied with.

PRINCE, Chief Justice: This is an appeal from a judgment of the third district court, sitting in the county of Doña Ana.

The defendant was indicted in Grant county, at the July term in 1877, for the murder of Patrick Rafferty.

Thereafter, on application of the defendant, the venue was changed to the county of Doña Ana.

The case came on for trial at the June term in 1878, in said court.

At this trial, after the charge of the judge, the defendant's counsel took exceptions to certain parts thereof relative to the testimony of defendant.

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The jury brought in a verdict of "guilty as charged in the indictment," and thereupon the defendant moved for a new trial.

The motion was denied, and the defendant appealed to this court.

The first point relied on by the defendant in his brief is that "the jurors who sat in the trial were all Mexicans and none of them understood the English language in which the proceedings at the trial were had."

It appears by the bill of exceptions that this is true; and that the instructions to the jury were written in English and orally interpreted to them in Spanish; and that all the proceedings were similarly interpreted, the translation being made in all cases by an interpreter previously duly sworn.

The defendant claims that this was error for two reasons:

*Firstly.* That trial by a jury not understanding English was not "trial by jury," as understood at common law, or contemplated by the bill of rights.

*Secondly.* That the instructions to the jury were really given orally, being translated, and were thus in violation of law.

As to the first of these propositions it may be said that the qualifications of jurors in New Mexico were fixed by the act of February 2, 1859 (Compiled Laws, 496), and at the time of this trial had been unaltered for nearly twenty years. That act, in section 157, specifically provided that "all white persons," having certain qualifications of age, citizenship, etc., shall "be liable to be chosen and serve as grand and petit jurors;" and among these qualifications the ability to speak any particular language is not named.

Under this law juries were selected for over twenty years, embracing both Spanish and English speaking members, without any objection or any change being made in the law, or action taken by the congress of the United States. Since the trial of this cause below, in the year 1880, a new jury

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law was enacted by the legislature, but it made no alteration in this respect, though the fact that large numbers of Spanish speaking citizens, who understood no English, were annually called to serve on juries, it was known undoubtedly to every member, so that there can be no doubt as to the legislative intent.

We cannot shut our eyes to the peculiar circumstances of this territory, taken from the Republic of Mexico in 1846, and nearly all of whose inhabitants in the years first succeeding the annexation, understood no English. Even at the present time the preponderance of Spanish speaking citizens is very large; and in certain counties the English speaking citizens possessing the qualifications of jurors, can be counted by tens instead of hundreds. In at least three of the courts of the territory at the time of this trial below, it may be said without hesitation, that a sufficient number of English speaking jurors could not have been obtained to try any important case which had attracted public attention.

Apart from the impracticability of obtaining English speaking juries, it would have been manifestly unjust to the great majority of the people of the territory, had such a requirement as to language been made. Either they would have had to be tried in a language which they did not understand, or else a double system would necessarily have been established, including an English speaking jury for English defendants, and a Spanish speaking jury for Spanish defendants; and if the theory had been carried to its logical conclusion, an English speaking judge to address the English jury, and a Spanish speaking one to instruct the Spanish jury.

The practice under the territorial law has been uniform for a long series of years, and works as little injustice to any parties, whatever their language, as any system that could well be devised under the prevailing conditions. In all counties where the jury contains members representing each

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language, or where persons speaking each are before the court, all the proceedings are translated by a sworn interpreter, who is a court officer, into the other language from that in which they originally take place. Thus, every one interested is as fully as possible informed of every proceeding, and no injustice is done.

In the case before us, this course was pursued. There is no allegation or suggestion that there was any incorrect interpretation; indeed, there is nothing in the record or the bill of exceptions, to show whether the defendant himself speaks Spanish or English. If, as we infer from the argument, he is an English speaking citizen, then it was by his own act in demanding a change of venue, that the case was brought from a county where the English element largely predominated on the juries, to one where the Spanish population is very greatly in the majority.

We do not think that there is anything in the law which makes the fact of not understanding the English language a disqualification for a juror in this territory, or which gives to any defendant the right to be tried by jurors of any particular nationality or language.

As to the second point, regarding the written instructions to the jury, the argument of defendant's counsel is that the instructions being written in English, and translated to the jury in Spanish, they were really orally given; and, further, that the intent of the law was that the jury might see them while deliberating, and if only given to them orally that intent was defeated.

If the object of the law were as suggested by counsel, there might be something in this point; but that object, as shown by the context, was entirely different, being that the instructions should be filed with the papers in the case, so as to be available for exception or on appeal. In fact, at the time of the trial below, and until the passage of the Practice Act of 1880, there was no authority for allowing the jury to

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take the judge's instructions with them when they retired for consultation.

The law was fully complied with by the instructions being written by the judge, so as to be preserved on file; and there was no error in this respect.

The next cause for reversal assigned by the defendant, is that the court erred in stating in the charge to the jury that the killing in question was either murder in the first degree, murder in the fourth degree, or justifiable homicide.

The law with regard to this we have recently stated quite at length, in the opinion rendered in the case of *The Territory v. Young, ante*, p. 93, and so we do not repeat it here.

As there said, if there is any evidence whatever which could bring the case within the definition of any degree not given, the limitation of the degrees in the charge to the jury would be error which would be good cause for reversal. But we have examined the evidence before us in this case with much care, and fail to see any under which the degree of murder could be other than the first or the fourth, if a crime be proved at all. The definitions given by the judge of those degrees, and of the circumstances under which such a killing would be justifiable, substantially coincide with the statute, and could not have misled the jury. One of the "additional points" of the defendant is that the instruction regarding justifiable homicide should have included both cases named in the statute; but we think the words used are broad enough to cover all the circumstances possible under the evidence.

The next point raised, and upon which a large amount of argument was expended, was as to the form of the verdict; which is claimed to be insufficient and contrary to law, both because it does not designate the precise offense of which the jury found the defendant guilty, and also because the jury did not assess the punishment therein.

The record shows that the indictment is in the usual form

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of an indictment for murder in the first degree, including all the allegations required by the statute to constitute that crime.

It is conceded on all hands that under such an indictment, a jury can either find the defendant guilty of the crime charged, or of any lower crime the necessary constituents of which are included in the indictment. This is a general and elementary principle of criminal law.

The judge in his charge instructed the jury that under the evidence, three, and only three, verdicts could properly be returned, and these were respectively in case the jury should believe the defendant guilty of murder in the first degree, or in the fourth degree, or that the homicide was justifiable. He instructed them that if they found the defendant guilty of murder in the first degree, their verdict should be simply "guilty;" if in the fourth degree, their verdict should be that they "find him guilty of murder in the fourth degree, naming the degree in the verdict," and assessing the punishment within the statutory limits. If they entertained any doubt of his guilt in one of the degrees, then their verdict should be "not guilty." This made the distinction very clear and forcible, and if under such instructions, the jury should simply have returned a verdict of "guilty," there could have been no doubt of their intention to find the defendant "guilty" in the first degree.

The verdict which they did bring in was "guilty as charged in the indictment." This, in our opinion, is stronger and more certain even than the verdict of "guilty" would have been. The indictment charged murder in the first degree. It charged the defendant with the felonious killing of Rafferty, from a premeditated design to effect the death of said Rafferty.

If there could have been any doubt as to the verdict, if it had been simply in the words suggested by the court, that doubt is removed by the additional words used by the jury.



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Such a verdict under such an indictment, and especially in view of the judge's charge, can mean nothing else than murder in the first degree; and considering the peculiar wording of our statute, which nowhere expressly mentions the first degree of murder by name in its definition, was perhaps the very best and strongest way in which the jury could have expressed their opinion. While fully satisfied that this is a good verdict, for murder in the first degree, yet it may not be out of place to suggest that to avoid question and discussion, it may be better in the future, that all verdicts in murder cases should name the degree specifically.

The next point is that the jury should have named the punishment in their verdict. This is claimed under the provision in our statutes (chap. 57, sec. 22), which reads as follows: "All issues of fact in a criminal case shall be tried by a jury, who shall assess the punishment in their verdict:" General Laws, 289.

We have had occasion to refer to this provision somewhat in the recent case of *The Territory v. Young*, ante, p. 93, and have stated there to some extent our view of its intention and scope; but it may be best to consider the matter here more fully as the connection is somewhat different.

In our criminal law as in most others, the punishment for some offenses is fixed absolutely by the statute, being an undeviating penalty. Such, for example, is the punishment of death for murder in the first degree, and imprisonment for life under our definition of murder—the second degree. But for most offenses, a sliding scale of punishment is provided, so that in each case the penalty can be proportioned somewhat to the peculiar circumstances involved. This is a proper and beneficent system which has obtained in almost every criminal code, and in our statutes finds its strongest example in the penalty for murder in the fifth degree, where the option extends from a fine of a single dollar to imprisonment for ten years.

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Now, some authority must have power, after it has been determined that a person is guilty of one of these crimes, for which such a sliding scale of penalties is provided, to consider the circumstances of the case and determine what penalty within those limits fixed by law shall be inflicted; to use the technical words of our statute, to "assess the punishment."

In most, if not all of the older states, this is done by the judge presiding; in New York two local justices are associated with him for this purpose, and in such cases the jury simply finds the offense of which the accused is guilty, and nothing more; the punishment, within the limits prescribed by law, is entirely for the court.

But in our territory this power is given to the jury. They are to assess the punishment, wherever such assessment is necessary, as well as find the crime of which the accused is guilty.

The intent of the section above quoted was simply to give this power to the jury, which ordinarily had been exercised by the court. But it refers, of course, to cases where an assessment is to be made; where there is some penalty to be determined; where there is some option and discretion to be exercised. And this includes the great majority of crimes to which, by our statutes, a sliding scale of penalties is affixed. Here the jury is to "assess the punishment." within, of course, the limits provided by law.

But in the case of those few crimes for which the statute absolutely fixed one unchangeable penalty, there is nothing to be "assessed" either by the judge or the jury. The penalty is established by the law, and it would be absurd to talk of assessing that which is unalterably fixed and determined.

Had the verdict been "guilty of murder in the fourth degree," it would have been necessary for the jury to have "assessed the punishment," because the penalty for that crime is not established by law, except as to its limits, and

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within those is left to the jury. But for murder in the first degree, the law itself fixes the penalty unalterably, and no action of the jury could ratify or strengthen it. The statute in this particular instance even goes on to provide the duty of the governor in case of conviction.

Were this not entirely clear, the practice of the courts for nearly thirty-five years, since the promulgation of the Kearney code, of which this section, as to the power of the jury to assess, is a part, would be sufficient to guide us. But, in our opinion, there can be no doubt that that section only applies to those crimes whose penalties are capable of being assessed, that is to say those for which the punishment may be more or less, within certain statutory limits.

Another point raised by the defendant's counsel is that the use of the words "on which some part of the evidence, if true, has some bearing," by the judge, in giving a definition of murder in the fourth degree, was improper, and might prejudice the jury, but this, we think, is not a valid objection. The words really added nothing to the sense, as the fact of charging as to that degree at all implied that some part of the evidence, if true, had some bearing thereon, and we fail to see any way in which their use could have been injurious to the defendant.

A much stronger objection is urged against the part of the judge's charge in which he referred to the evidence given by the defendant himself. This is in the following words: "The defendant himself was admitted as a witness before you. You have heard his statement of the case. In determining the question as to whether the defendant has told the truth, and all the truth, as to the position of the deceased at the time he received the fatal blow, and in reference to all the circumstances, it will be proper for you to consider the fact that he is the defendant, and that greatest possible temptation is presented to him to testify in his own favor, if he is really guilty."

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At the time of this trial, the new practice act, which provides that the court "shall not comment upon the weight of the evidence" (Laws of 1880, chap. 6, sec. 23), had not been passed, and the rules of the common law governed in criminal cases, under sec. 18 of the act of July 12, 1851, General Laws, page 118.

We think it is the wisest course in similar cases to instruct the jury generally, that they have the right in determining the credibility and weight of evidence, especially where there is a conflict in the testimony, to consider the peculiar circumstances or position of any witness which might have the effect of influencing his evidence, without selecting the testimony of any particular witness for such comment; but under the law as it was at that time, full as strong expressions, with regard to the testimony of parties on trial, as were used in the court below, have been upheld by the courts, as in the case of \_\_\_\_\_ v. \_\_\_\_\_, 34 Cal., 191.

Whatever might be the case with such language if used under the new law, we do not think that the instruction, as given at the time of this trial, was error.

Two other points raised by the defendant may be considered together. They are:

*First.* That malice must be proved and not inferred.

*Second.* That premeditation must be proved and not presumed.

These propositions may be true if they are intended to mean that there must be some evidence in the case from which the jury can conclude that there was malice and premeditation; but they are not true if intended to mean that malice and premeditation must be proved directly by evidence. They are both matters which are within the breast of the person accused, and peculiarly within his own personal consciousness. They are not visible and tangible objects, or events that can be proved by ordinary witnesses, as something more substantial might be. No one but the

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accused himself can testify directly from absolute personal knowledge that they exist; and so there can be no direct evidence of their existence, except from his statements either on the trial or testified to as admissions. The jury has the right to infer their existence from actions or words of the accused, or collateral circumstances properly proved before them; and without this right, in the majority of cases, it would be impossible to prove them at all. We think there was no error in the case at bar with regard to this subject.

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ROMALDO BACA, Plaintiff in Error, v. ADOLPH BARRIER,  
Defendant in Error.

*January 28, 1881.*

QUANTUM MERUIT. (1) *Where special contract,*  
CONTRACT FOR WORK AND LABOR. (2) *Abandonment—Recovery notwithstanding.*

1. A contractor may sue generally for work and labor, as well as under his special contract.
2. Plaintiff contracted to paint defendant's house, etc., without delay, and the latter agreed to furnish defendant with the necessary materials to do the job, and did so as to part of the job and paid plaintiff part of the contract price, but before the contract was completed locked the house and refused to allow plaintiff to continue work, telling him that there were no materials, and that he would be notified when to resume. He never notified plaintiff to resume.

*Held,* That the furnishing of materials was a condition precedent to plaintiff's performance of the work; that plaintiff having done work amounting to \$789, and having been paid \$372 30, was entitled to judgment for the balance, with interest, notwithstanding he did not fully complete the work.

*Quare,* whether defendant was not so far at fault as to justify plaintiff in abandoning the contract, for under the terms of the contract whereby defendant obligated himself to furnish the materials, without any mention as to time, the law will imply an agreement to furnish them within a reasonable time.

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Error to the District Court of San Miguel county.

The facts appear in the opinion of the court.

———, for plaintiff in error.

1. As the plaintiff below did not sue on the contract, but in general assumpsit, the true rule of damages is the actual loss he sustained, if any, by reason of the stoppage of the work: Sedgwick on Measure of Damages, p. 273, 6th ed.; *Pond v. Wyman*, 15 Mo. Rep., 177; *Loker v. Damon et al.*, 34 Mass., 284.

2. The amount of damages so sustained by plaintiff, he was bound to show, and this he has utterly failed to do. There is no testimony to sustain the finding of the referee that one-half the work specified in the contract was done.

3. The finding of the referee and judgment of the court below is so plainly contrary to and unsupported by the testimony in the cause, that this court will reverse the judgment for that, if for no other reason: *Cary v. St. L., K. C. & N. R. R.*, 60 Mo., 209, and *Smith v. Crows*, 2 Mo. App. 269.

*Breedon & Waldo*, for defendant in error.

The defendant in error, plaintiff below, sued in assumpsit for the value of the work done, the plaintiff in error having prevented him from completing the work according to the contract. This the plaintiff below had a right to do, and the measure of damages was the value of the work performed. And the only evidence required from the defendant in error in the court below was as to the amount of work performed and the value of the same: 1 Col., 272; Sedgwick on Damages, 265, and note; 33 Vt., 80; 47 Mo., 401; 21 Vt., 17.

The finding of the referee had the same effect, and is to be regarded and treated in the same manner and according to the same rules as the verdict of a jury: 93 U. S., 78; 18 Ia., 36; 3 Cal., 284; 20 Ia., 276; 5 Cal., 228.

The most that can be claimed by the plaintiff in error is that there was conflicting evidence and disputed questions of

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fact in the court below. Such issues of fact and conflict of evidence having been passed upon and determined by a referee, this court will not disturb that finding or judgment thereon, especially so as no motion was made in the court below to set aside the finding or for a new trial, or new hearing, and the court below had no opportunity of passing upon or considering the correctness of the finding: 2 Cal., 153; 21 Cal., 179; 3 Cal., 284; 27 Cal., 470; 5 Cal., 228; 23 How., 491; 32 Ill., 53, 116, 146; 1 Blk., 414.

The judgment should be affirmed, with ten per cent. damages: Compiled Laws of N. M., sec. 8, p. 168.

**BRISTOL, Associate Justice:** The case is as follows: On the 9th of September, 1875, the parties entered into and executed a contract in writing whereby the defendant in error, Adolph Barrier, agreed without delay, and in a good and workmanlike manner, to the satisfaction of Romaldo Baca, the plaintiff in error, and according to his order and direction, to paint with three coats of paint all the woodwork of said Baca's house therein described, except the front doors, which had already been painted; in like manner to glaze all the windows and sash doors of said house; and in like manner to paper all the rooms and halls of certain two adobe stories therein mentioned; and in and by said contract, said Baca on his part agreed to furnish all the paints, oil, glass, putty, paper and materials necessary to the performance of such work by said Barrier; and to pay him, said Barrier, for the entire performance of said work, the sum of \$850, in manner following, that is to say, at the end of each and every week during which said Barrier shall have worked continuously under said contract, the sum of \$4 in money and \$8 in goods from some mercantile house in Las Vegas; and upon the completion of said work, the balance then remaining unpaid of said sum of \$850.

The said defendant in error, who was the plaintiff below,

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in his declaration did not declare upon this special contract, but for work and labor generally by him performed for the defendant below, and plaintiff in error here, at his instance and request.

The defendant below pleaded the general issue, and a special plea setting up said contract, and alleging plaintiff's non-performance. Issue was joined, and by stipulation of the parties the case was referred to Hon. Sidney M. Barnes, an attorney of this court, as referee, to take the testimony and to find the issues of fact as well as conclusions of law covering the whole case, the same to have the effect of a verdict of a jury upon the issues of fact upon which judgment of the court below was to be entered.

At the August, 1880, term of the court below the said referee filed and submitted his report and findings, which findings as to the issues of fact are as follows:

1st. That on the 9th day of September, 1875, the parties entered into the contract already stated.

2d. That the said Barrier performed at least one-half of the work under said contract.

3d. That said Baca improperly terminated said contract, and prevented Barrier from completing it.

4th. That Baca has not been injured but benefited by the part performance of the contract by Barrier.

5th. That Barrier has not been injured by having been prevented by Baca from completing the work.

6th. That all the work which the said Barrier did on said house, except certain extra work thereon in setting large glass and recting broken glass, was done under said contract,

7th. That Barrier at the request of Baca did obtain work for him outside of said contract in painting and papering a chapel and store, and painting a buggy and bedstead.

8th. That from time to time Baca has paid Barrier on the work performed, sums amounting in the aggregate to \$872.80.

9th. That the reasonable value of the work so done by



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Barrier, outside of said contract, is as follows: Extra work on house, \$135; painting buggy, \$25; painting bedstead, \$7; painting and papering chapel, \$150; and painting and papering store, \$47.

10th. That the reasonable value of Barrier's work on the house, under the contract, is the pro rata contract price, to wit, \$425.

11th. That there is still due and unpaid upon said entire work, the sum of \$416, with interest thereon from and after the 22d day of December, 1876, at six per cent. per annum.

As conclusions of law, the referee finds that under the circumstances, Barrier had a right to sue generally for his work and labor, instead of declaring on said special contract. And that he is entitled to recover of Baca in this action the sum of \$416, and interest as aforesaid.

The referee's report was regularly brought to hearing before the court below, on the questions of law involved therein, at the term aforesaid, and the same was in all respects confirmed, as well as to the issues of fact as to the conclusions of law, and judgment entered accordingly in favor of said defendant in error, for the said sum of \$416, and interest.

The case is here by writ of error from this judgment.

The questions of law presented for our decision upon this record are few.

All the evidence before the referee, together with the findings, are embraced in a bill of exceptions, and is before us as a part of the record.

All the questions involved will depend upon the fact as to which party was at fault for the non-performance of the contract by Barrier.

The counsel for the plaintiff in error virtually admit that if the plaintiff in error is at fault, the judgment ought to stand.

The entire argument of counsel for Baca is based on the

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theory that Barrier abandoned the work under the contract, without the fault of the plaintiff in error, and therefore violated the contract on his part.

This question must be determined by the terms of the contract and the subsequent acts of the parties, as disclosed by the evidence.

After careful examination of the entire record, we are of the opinion that this theory cannot be maintained.

It is claimed on behalf of Baca, that inasmuch as under the terms of the contract Barrier was bound to complete the work without delay, and that over a year had elapsed without such completion, we ought to presume that Barrier broke the contract.

But on this point it must be observed that under the terms of the contract Baca was bound on his part to furnish all the materials necessary to perform the work, and direct the manner of executing the work. The furnishing the materials therefore was a condition precedent to the performance of any work at all. And to have such materials on hand promptly at all times during the progress of the work, was a condition precedent to performance without delay by Barrier, and it must appear affirmatively from the record that this condition precedent was fully complied with before we can presume from the mere lapse of time, that Barrier violated the contract. The record does not show this, and no such presumption arises.

The only testimony bearing on this point directly is as to what took place in November or December, 1876, when, according to the testimony of some of the witnesses, Barrier, with his workmen, went to the house on which the work under the contract was to be done, found it locked and in the possession and under the control of Baca; demanded permission to work on the house; was refused by Baca; informed that there were no materials, and that he would be notified when to resume. One of the witnesses testifies that

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on this occasion Baca told Barrier that he did not want him to work any more.

If this testimony was true, and it was for the referee and not this court to determine that question, then there was a lapse of an entire year when Baca had not fully performed the condition precedent of furnishing materials.

And the question may well arise whether Baca in this respect was not so far at fault as to justify Barrier in abandoning the contract ; for, under the terms of this written agreement, whereby Baca obligated himself to furnish the materials without any mention as to time, the law will imply an agreement to furnish them within a reasonable time. It would be absurd to contend as a principle of law that Baca was at liberty to consult his own convenience and keep Barrier, with his workmen, waiting indefinitely for those materials, and still hold him to the contract. At all events, before any presumption against Barrier as to delay in completing the work, it must appear that Baca is not at fault in furnishing the materials.

Some of the evidence is to the effect that Barrier actually furnished some of the materials himself. Again, if Baca on the occasion referred to, gave Barrier to understand that he need not resume work until notified so to do, he was at liberty to take Baca at his word and to act accordingly.

There is nothing in the record to indicate that from that day to this Barrier has received any such notice.

In this light of these suggestions, it is plain that there was sufficient evidence before the referee to support his finding that Baca was at fault under the contract.

And this point being settled, it follows that the measure of damages applied by the referee in determining the amount due was as favorable to the plaintiff in error as the circumstances would admit of, and that he has no ground of complaint.

This disposes of the whole case.

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A number of legal questions touching the proper measure of damages under certain conditions have been raised by counsel and numerous authorities cited.

None of which do we feel called upon to decide.  
Judgment affirmed.

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CHARLES Z. FRICK, Plaintiff in Error, v. ANTHONY JOSEPH,  
Defendant in Error.

January 24, 1881.

ACCORD AND SATISFACTION. (1) *Executory agreement to pay out of proceeds of a mine is not.*

JUDGMENT NON OBSTANTE VEREDICTO. (2) *Discretionary with court.*

1. The maker of a promissory note for \$250 agreed to give the holder a portion of the proceeds of an interest in a mine, and claimed that the same was agreed to be in full payment for the note. At one time he paid the holder out of such proceeds the sum of \$86, which was credited upon the note. Subsequently, he tendered the holder \$50, all of the further proceeds of the mining interest, but the holder refused to accept this sum in full payment for the note and to surrender the note, and brought suit upon it.

It appeared that neither at the time the agreement was made nor subsequently did the holder surrender the note, give a receipt, or execute a release, and that he kept the note and credited all the money paid on it. It also appeared that at the time of the agreement the maker did not demand the note, or a receipt; that two years afterwards he paid the \$86 on the note, and that five years later tendered the \$50.

*Held*, That an agreement to settle a claim or demand in order to constitute an accord and satisfaction, and as such bar an action, must be executed. That this agreement was not executed but executory, since the money with which to pay the note was to be produced from the mine; and held, further, that the acts of the parties showed no intention to treat the agreement as an accord and satisfaction.

2. The rendition of judgment *non obstante veredicto* is discretionary with the court.

Error to the District Court of Taos county.

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This suit was brought to recover the amount due on a certain promissory note made by the defendant and one William W. Henderson, deceased, to plaintiff for \$250, dated January 29th, 1868, payable five months after date, with twelve per cent. per annum interest after maturity. On this note the sum of \$86 was paid March 10th, 1873.

The defendant pleaded non assumpsit and three special pleas. To two of the special pleas plaintiff's demurrer was sustained, issue was joined on the plea of non assumpsit and on the second of the special pleas, and the cause was heard upon the issue so made up.

The evidence offered on the part of the plaintiff was the promissory note sued on, and the depositions of Catron and Breeden, with the letter therein referred to; and on the part of the defendant, the deposition of Gourgas Pope, and deed of conveyance accompanying the same.

A jury was waived by the parties and the cause submitted to the court for determination by stipulation. The court found for the defendant on the special plea and gave judgment for the plaintiff only for the amount admitted by the special plea to be due, to wit, the sum of \$50 and interest; to which the plaintiff excepted and moved for a new trial, which motion was overruled, and the cause is brought into this court by writ of error.

*Breeden & Waldo*, for plaintiff in error.

The plaintiff claims that he is entitled to judgment for the full amount of the note sued on and interest, less \$86 paid thereon.

The finding of the court had the same effect, and should be here treated by the same rules as the verdict of a jury: *Ryan et al. v. Carter et al.*, 93 U. S., 81.

The defense rests entirely upon the special plea, and the finding and judgment of the court was for the defendant on his said special plea.

There was no evidence to sustain this plea, or to authorize

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said finding. On the contrary, the evidence shows that the agreement alleged in the plea was not performed, and that the defendant and his associate mentioned in the plea, placed it out of their power to perform the agreement. The evidence appears to refer to another and different note from that sued on, and if held to refer to the note sued on, it shows a different agreement from that set up in the plea.

The alleged agreement constituted no bar or defense to the suit. No consideration was alleged or proven. The alleged agreement was void, a mere *nudum pactum*, and the plaintiff was not bound thereby: 7 Conn., 57; 5 Mass., 301; 4 Johns., 235; 6 Yng, 418; Bouvier's Law Dictionary, title Consideration; 2 Greene, 553. As to necessity of proof of consideration, see 13 Conn., 170; 14 Johns., 238; 10 Wend., 675; 17 Johns., 301.

The alleged agreement was at most merely an accord, and was not binding upon the plaintiff, and constituted no bar of defense to the suit, because it was without consideration, was not advantageous to the plaintiff, was not certain, and was not executed or followed by performance or satisfaction: Bouvier's Law Dictionary, title Accord; 3 Wendell, 66; 14 Wendell, 116; 2 Johns., 342; 16 Johnson, 86; 2 Wash. C. C. 180; 6 Wend., 390; 5 N. H., 136; 2 Greene, 553. There was no evidence of the substitution of a new undertaking, or of any release of the makers from liability on the note, but on the contrary, the defendant's witness swears that he and the defendant assumed the payment of, and agreed to pay the note, and the defendant's plea shows that the payment made was applied upon the note, and by his pleadings the defendant admits and shows that the note has not been extinguished, but is still in force. The defendant's liability on the note was not extinguished or changed, but the evidence, if it shows anything in connection with the note sued on, shows that the proceeds of the mine, according to the alleged agreement, were to be applied to the payment of the

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note: 7 Johns., 315; 2 Wendell, 431. If the special plea was sustained by the evidence, the plaintiff was entitled to judgment, *non obstante veredicto*, because the plea and the matters therein pleaded, constituted no bar or defense to the suit. The plea shows no consideration for the agreement therein alleged: it does not show that the defendant's liability was affected by the agreement. The plea at most sets up merely an accord, which was not binding, and was not executed, and it sets up no matter or thing, which, if true, would bar the plaintiff from his suit for the full amount of the promissory note, or constitute a defense thereto: 12 Ohio 204; 2 Hill, 86; 1 Root, 351; 1 Chitty, 656; Freeman on Judgts, 7; Stephen on Pleading, 97.

The whole case being before this court, and no new trial being necessary in the court below, this court should render judgment for the plaintiff for the amount of the promissory note sued on, and interest. If the court should decline to render such judgment, then the judgment in this cause should be reversed, and a new trial awarded on the pleadings and proofs as they now stand, and according to the decision and direction of this court: *Compiled Laws of New Mexico*, sec. 7, p. 108.

*Conway & Risque*, for defendant in error.

The finding and judgment of the court below was in accordance with the law and the evidence, and should be sustained.

*First*, as to the evidence: The testimony of Messrs. Catron and Breeden, on behalf of the plaintiff, as to the letter signed Frank Pape, is wholly irrelevant, impertinent and immaterial, said Frank Pape not being in any way connected with the case. The uncontradicted testimony of Gourgas Pope shows that plaintiff agreed with W. W. Henderson, whose name is signed to said note on the face as maker, to accept a certain interest in a mine in settlement of the note

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sued on; that plaintiff received eighty-six dollars as his share from the mine.

*Second.* Plaintiff having thus released Henderson, one of the joint makers of the note, it follows that Joseph, the defendant, is released from all liability on the note, for "a release to one of several joint contractors is in law a release to all." Byles on Bills, p. 375, sec. 232 and foot notes. "A release of one of several joint debtors who are severally as well as jointly liable is equally a release to all." Byles on Bills, p. 375, sec. 232. "The holder of a joint and several note of A and B, by discharging A discharges B also." Chitty on Bills, p. 417, sec. 418. "A release of one joint maker or indorser by the holder, whether they are accommodation parties or not, will discharge all the joint parties, for such a release is a complete bar to any joint suit, and no separate suit can be maintained in such a case; in short, when the debt is extinguished as to one, it discharges all, whether the parties intend it or not." Story on Promissory Notes, sec. 425, p. 549 and foot note; Parsons on Contracts, sec. 27, vol. 1.

There was a consideration for the agreement set up in the plea; the consideration was the interest in the mine. This is set out in the plea and substantiated by the evidence. Not only this, but the credit on the back of the note shows that the money was paid by Pape & Joseph. Why should Pape pay anything on the note in question if it were not in pursuance of the said agreement? And why should plaintiff receive money from Pape if not in pursuance with his agreement with Henderson, there being nothing to show any indebtedness by Pape?

The plea is a good defense. "The holder discharging or giving time to any of the parties will be a discharge to every other party thereto," etc.: Story on Promissory Notes, p. 530, sec. 418.

The testimony of Pope identifies the note spoken of by



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him as the one sued on. The amount stated by him to have been realized from the mine corresponds to the amount credited on the note.

PARKS, Associate Justice: This case is clearly stated by the plaintiff in error, and is as follows:

This suit was brought in the court below to recover the amount due on a certain promissory note made by the defendant and one William W. Henderson, then deceased, to plaintiff for \$250, dated January 29, 1868, payable five months after date with interest at twelve per cent. per annum after maturity, on which the sum of \$86 was paid March 10, 1873. The defendant pleaded non-assumpsit and three special pleas. To two of said special pleas, the plaintiff's demurrer was sustained and issue joined on said plea of non-assumpsit and the second of said special pleas, and the cause was heard upon the issues so made up. The evidence offered on the part of the plaintiff was the Gourgas promissory note sued on, and the depositions of Catron and Breeden, with the letter therein referred to, and on the part of the defendant, the depositions of Gourgas Pope, and deed of conveyance accompanying same. A jury was waived by the parties and the cause submitted to the court for determination, by stipulation. The court found and gave judgment for the plaintiff for the amount admitted by said special plea to be due, only, to wit, the sum of \$50 with interest, to which the plaintiff excepted, and moved for a new trial, which motion was overruled, and the cause brought into this court by writ of error. The second special plea is as follows:

"And for a further plea in this behalf, the said defendant says *actio non*, because he says that long after the maturity of the note sued on and set forth in said petition, to wit: on or about the 25th day of May, 1870, the said plaintiff agreed with the said William W. Henderson, the maker and principal on said note, to accept in full satisfaction and payment of

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said note a certain portion of the proceeds of a certain interest then owned by the said William W. Henderson in a mining claim known as the California Company's Claim, situate in Humbug Gulch, in the county of Colfax, and that the said interest was then and there turned over to the said defendant and one Gourgas Pope by the said Henderson to carry out the said agreement; that on or about the 10th day of March, 1873, the said interest produced as the proportion due the said plaintiff the sum of \$86, which was paid to the said plaintiff by the said defendant and the said Pope, and credited on the back of said note by the said plaintiff; that the said interest produced as the proportion due the said plaintiff, on or about the 24th day of May, 1875, the further sum of \$50, as the only further product besides the \$86, and as the final and last product of said interest to be paid said plaintiff in full settlement of said promissory note, and as to the said sum of \$50 of the said several sums of money in the said declaration mentioned, the said defendant says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, to recover any more or greater damages than the said sum of \$50, parcel, etc., in this behalf, because he says that after the making of the said several supposed promises and undertakings in the said declaration mentioned as to the said sum of \$50, parcel, etc., and before the filing of the petition herein, to wit: on the 18th day of April, 1875, at the county of Taos, that is to say at the county of Mora aforesaid, he, the said defendant, was ready and willing and then and there tendered and offered to pay to the said plaintiff the said sum of \$50, parcel, etc., to receive which of the said defendant, he, the said plaintiff, then and there wholly refused; and the said defendant, in fact, further saith that he, the said defendant, has always from the time of the making of the said several promises and undertakings in the said declaration mentioned, as to the said sum of \$50, parcel, etc., hitherto at the county of Mora aforesaid, been ready

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to pay, and still is there ready to pay to the said plaintiff, the said sum of \$50, parcel, etc., and he now brings the same into court here ready to be paid to the said plaintiff, if he will accept the same; and this he, the said defendant, is ready to verify. Wherefore, he prays judgment if the said plaintiff ought to have or maintain his aforesaid action against him, to recover any more or greater damages than the said sum of \$50, parcel, etc., in this behalf, etc.

“CONWAY & RISQUE,

Attorneys for Defendant.”

The demurrer to this plea was overruled, but it is a little remarkable that the learned judge who overruled it, at the same time gave the defendant leave to amend it, and that defendant did not amend.

If this plea sets up a defense to the note as held by the court below, it is as an accord and satisfaction. The general doctrine that an agreement to settle a claim or demand in order to constitute a bar to an action, must be executed, is so well settled that it is stated on high authority that a “decision to the contrary would overthrow all the books.”

The law applicable to this case is believed to be well stated by the supreme court of Vermont in *Babcock and others v. Hawkins*, 23 Vermont, 563. The court says: “The accord is sufficiently executed when all is done which the party agrees to accept in satisfaction of the pre-existing obligation. This is ordinarily a matter of intention, and should be evidenced by some express agreement to that effect, or by some unequivocal act evidencing such a purpose; this may be done by surrender of the former securities by release or receipt in full or in any other mode. All that is requisite is that the debtor should have executed the contract to that point whence it was to operate as satisfaction of the pre-existing liability in the present tense; this is shown in the present case by executing a receipt in full the same as if the old contract had been upon note or bill and the papers had been surrendered.”

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In the case at bar, the intention of the parties is shown upon the part of the plaintiff, by the facts, that he did not surrender the note, did not give a receipt, did not execute a release, that he kept the note for years and credited all the money paid on the note; and upon the part of the defendant, it is shown by the facts that at the time of the agreement, he did not demand the note or a receipt, that two years after he paid \$86 on that note, and five years after, as stated in his plea, he tendered \$50 as the final and last product of said interest to be paid said plaintiff in full settlement of said note. We cannot understand how defendant could pay plaintiff \$50 in full satisfaction of the note in 1875, if the note had been extinguished by the agreement in 1870, and a new contract substituted for it. Against these convincing proofs that it was not the intention of the parties to substitute the new contract for the old, is the testimony of Pope to the effect that he understood the agreement and deed described in his deposition to be intended as a release of the note; but his testimony was taken six years after the transaction, and the deed furnishes no evidence of any such intention. In the view we take of this case, it is not necessary to examine particularly the weight of Pope's testimony, and in any view of the case, his recollection of the intention of the parties after so long a time is very slight testimony compared with the conclusive acts of the parties themselves. The agreement set forth in the plea does not show what kind of mine it was, whether it was of any value or what portion of its proceeds plaintiff in error was to receive; so far as the agreement shows, the mine may have been utterly worthless and the agreement void for want of consideration.

It is evident also from the plea that this was not one of that kind of agreements which are executed at the time they are made; plaintiff agreed to accept in full satisfaction and payment of the note, a certain portion of the proceeds of a certain interest in a mining claim. No portion of the pro-

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ceeds of the mine could be accepted till it was produced from the mine. Eighty-six dollars was produced, tendered and credited on the note two years after, and \$50 produced, tendered and not accepted five years after according to the plea.

The plea is inconsistent with itself; the plea of accord and satisfaction denies any and all indebtedness; the plea of tender admits that something is due.

The judgment on this plea should have been against the plaintiff for costs or in his favor for note and interest, deducting only the \$86 paid, for there is no proof of the tender of the \$50, and, in fact, there is no evidence of what became of the mine or of any interest in it, after the \$86 was paid. For aught that appears in the testimony, the portion of the proceeds of the mine to which plaintiff was entitled under the agreement, may have amounted to enough to pay the note. The plaintiff in error claims that the court has the right in this case to render judgment *non obstante veredicto*, as upon confession for the balance due on the note, but the exercise of that right is discretionary, and in this case we think it proper to give the defendant the benefit of a new trial.

For this purpose the judgment is reversed and remanded, with leave to the defendant to amend his plea.

All concur.

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THE TERRITORY OF NEW MEXICO, Appellee, v. JOHN J. WEBB,  
Appellant.

January 28, 1881.

MURDER. (1) *Verdict, when jury need not fix punishment.*

SAME. (2) *Finding of jury not set aside, when.*

NEW TRIAL. (3) *Discretionary with court.*

PARDON. (4) *Power of governor to grant.*

MURDER. (5) *Trial—Omission to ask prisoner if he has anything to say, before sentencing him.*

PRACTICE. (6) *Presumption of regularity of proceedings.*

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1. A jury finding a verdict of guilty of murder in the first degree, need not assess the punishment.
2. Where the testimony is conflicting, but the verdict of the jury is sustained by positive evidence, it will not be set aside as being contrary to the evidence. PARKS, J., dissenting.
3. A motion for a new trial is addressed to the discretion of the court.
4. The governor of the territory has discretionary power to grant a full pardon or mitigate the punishment, and in determining the question of executive clemency the governor may properly consider matters that are beyond the province of the supreme court.
5. It is not error for the court to omit to ask, before pronouncing final judgment, whether the prisoner has anything to say why sentence should not be pronounced against him, especially where the omission does not appear affirmatively from the record, but is only presumed from the fact that the record is silent as to such question. PARKS, J., dissenting.
6. A court of general jurisdiction having obtained jurisdiction, all the details of a trial are presumed to be regular and sufficient to sustain judgment until the contrary is shown.

Appeal from the District Court of San Miguel county.

The facts appear in the opinion of the court.

*S. M. Barnes*, for appellant.

The finding and verdict of the jury and the judgment and sentence of the court thereupon are contrary to law and void. The jury found the defendant guilty of murder in the first degree, but failed to assess the punishment, as required by law. The court assessed the punishment without authority of law. See Laws of New Mexico, by L. Bradford Prince; Practice in Criminal Cases; Kearney Code, sec. 22, p. 289; Wharton's Criminal Pleading and Practice, 8th edition, sec. 752, chap. 15: "Where a statute requires in the verdict a designation of a degree, or the specific assessment of a punishment, a general verdict without such designation or assessment will be a nullity," and the numerous cases cited by Wharton, as above, sustain these positions.

The verdict of the jury being contrary to the law and evidence, will be set aside: Wharton's Crim. Plead. and Practice, sec. 813, chap. 18, p. 551, and cases cited therein.

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The appellant should have been asked before the sentence was pronounced against him, if he had anything to say why sentence should not be pronounced against him, and it is essential that it should appear on record that this was done. The transcript of the record does not show that he was so asked. See, in support of this view, Wharton's *Crim. Plead. and Practice*, sec. 906, chap. 19, p. 604, and the numerous adjudged cases there cited. This is the doctrine and practice at common law in all capital felonies.

A new trial should be granted, where the court below, as it did in this case, allowed the prosecuting counsel, in his closing speech, to charge the defendant with other offenses besides that on trial. The court should have not permitted this, even though no objection was made by appellant's counsel. See Wharton's *Crim. Pleading and Practice*, sec. 853, chap. 18, p. 584, and adjudged cases therein cited.

The jury in this case was controlled by prejudice and popular excitement against appellant at and before the trial, and the facts in this case, as developed in the transcript, show that the appellant did not obtain a fair and impartial trial, and should not, from the law and evidence, have been found guilty and sentenced to be hung. The verdict of the jury was the result of misconduct of the sheriff at the close of the argument, in announcing improperly and untruthfully, in the presence and hearing of the court and jury, that defendant's friends were present to rescue him. The jury retired to consult without this announcement being denied or explained. The jury, by the conduct of the sheriff, as above stated, and the appeals of counsel to popular prejudice against defendant, were induced to render an unjust verdict against him. These facts entitle the defendant to a new trial: Wharton's *Crim. Plead. and Practice*, sec. 561 and cases therein cited; secs. 849, 853, 889, and the 8th Cal. Report, 441, and adjudged cases cited.

The appellant was a peace officer of San Miguel county,

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N. M., at and before the alleged killing. He was justified in attempting to disarm the deceased, and in killing him in self-defense. See Laws of N. M., acts 1871, 1872, p. 59, and acts 1873 and 1874, p. 27.

It was made the positive duty of appellant, as a police officer under said laws, to arrest and disarm deceased, and if he had failed in this he would have been subject to indictment and punishment under said laws above referred to. See also Prince's General Laws of New Mexico, p. 315. The appellant, under said laws of New Mexico, was authorized and empowered as a private citizen to arrest and disarm the deceased. See Prince's Gen. Laws N. M., p. 314, sec. 9.

The proof in this case fully shows that deceased was in a public drinking saloon at a late hour in the night, acting in a boisterous, improper manner, armed with a pistol, a deadly weapon, and threatening to kill appellant, and when appellant attempted to disarm him, the deceased made an effort to shoot the appellant and refused to be disarmed. The proof shows clearly that the appellant shot deceased in his own necessary self-defense. A new trial should have been granted him: Wharton on Homicide, secs. 501 to 507, inclusive, and authorities cited; Wharton's Criminal Law, secs. 1021 and 1026. The charge of the court below was contrary to law, and, in fact, was a comment upon the evidence.

*Breedon & Waldo*, for appellee.

*First.* 1. The verdict of the jury, and the judgment and sentence of the court thereon were correct, and sufficient in form. The verdict was murder in the first degree, and the punishment is fixed by law: Comp. L. of New Mexico, sec. 2, p. 318. 2. The statute requiring the jury to assess the punishment, could not apply to this case, in which the jury had no discretion as to the punishment to be imposed, and no power to vary or change the punishment prescribed by law. 3. The statute provides that the jury shall assess the punishment. The language clearly implies a power and discretion



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in the jury in determining the amount or character of punishment to be imposed; a reference to the judgment of the jury as to the punishment to be inflicted. To assess means to ascertain, to determine, to fix: Bouvier's Law Dictionary, Title, "To assess," "Assessment." 4. There is no ambiguity or uncertainty in the language used, and the words of the statute are to be taken and understood in their general, usual and well-known meaning and acceptation: *Beardstown v. Virginia*, 76 Ill., 34; *Dunn v. Reid*, 10 Peters (U. S.), 524. 5. The jury could not vary the punishment prescribed by the statute. It was not their province to determine or ascertain the punishment. The statute must have a reasonable application, and the verdict in this case was all that was necessary or required by law: 1 Bish. Proceed., 834; 2 Bish. Proceed., 625; Littell's Select Cases (Ky.), 419.

*Second.* 1. The verdict was fully warranted by the evidence. The case was fairly submitted to, and determined by the jury. The most that can be said for the appellant is that there was a conflict of evidence; this it was for the jury to pass upon, taking into consideration all the evidence before it, the credibility of witnesses, their manner and appearance on the stand, etc.; this the jury did, and it is not for the court to review their finding. 2. The evidence for the prosecution being amply sufficient to warrant a conviction, this court will not disturb the verdict merely because there was conflicting and contradictory evidence, even if the court itself might upon the whole case disagree with the finding of the jury: Hilliard on New Trials, sec. 8, p. 46; *Id.*, sec. 11, p. 50; secs. 1 and 2, p. 91, sec. 3, p. 92; p. 6; *Winfield v. The State*, 3 Greene, *Id.*, 339; *The State v. Elliott*, 15 *Id.*, 52; 53 Ill., 509; *People v. Ah Loy*, 10 Cal., 301; 4 Ga., 335; 1 Scam., 130; 15 Ia., 72.

*Third.* 1. The omission to ask the defendant, if he had anything to say why sentence should not be pronounced against him, was unimportant, inasmuch as the purpose of

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"It is therefore considered and adjudged by the court that the said defendant, John J. Webb, be taken hence to, and closely confined in the common jail of the county of San Miguel, until the ninth day of April, in the year one thousand eight hundred and eighty; that on said day, between sunrise and sunset, he be taken from said jail to some spot in said county, to be selected by said sheriff, and then and there be by the said sheriff hanged by the neck until he be dead."

From this sentence and judgment the case is here by appeal.

The record of the proceedings does not disclose the fact that any exceptions were taken in behalf of the defendant during the trial, though at every step during the progress of the proceedings subsequent to the filing of the indictment, the defendant was aided by counsel.

All the evidence adduced on the trial was settled by bill of exceptions and is before us as part of the record.

Several grounds of error are assigned by the appellant's counsel, on which they claim the judgment ought to be reversed. These grounds we have reviewed in the order in which they occur. The first assignment of error is, that the verdict and judgment is contrary to law and void, because the jury found the defendant guilty of murder in the first degree but failed to assess the punishment.

This question we have already passed upon at the present term, in the cases of the *Territory v. Young*, ante, page 93, and the *Territory v. Romine*, ante, page 114, in which we decided that this was not error under our statute. The opinions of the court delivered in those cases, so far as this question is concerned, we adopt and affirm in this.

The second assignment of error is that the verdict of the jury was contrary to the law and evidence.

As to the legality of the verdict, we have already decided. It cannot be said that the verdict was contrary to the evidence because there was positive evidence, which if true, fully justified the verdict. The testimony of the witnesses was

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conflicting, and the most that could be claimed on behalf of the appellant is that the verdict was contrary to the preponderance of the evidence.

The prisoner had the benefit of a motion for a new trial. This was addressed to the sound discretion of the court below. The chief justice of this court, who presided as judge in that court, heard all the testimony as it was uttered by the witnesses. He, as well as the jury, had the opportunity to notice the manner, and to some extent the character, of each witness on the stand. They heard the inflections of his voice, saw the varying expressions of his features, observed the language of his gestures, took in the general style and make up of each witness, and observed, perhaps, a number of other like things and incidents which though comparatively insignificant in themselves, yet, sometimes cast a flood of light upon the question of credibility. All this is an utter blank to the other members of this court, and renders them much less competent to weigh this conflicting evidence should they attempt to do so.

There is nothing in the record that casts the slightest suspicion on the integrity of the jury; and the fact that they found the defendant guilty of murder in the first degree, and that the court below refused a new trial, leaves us to infer that in the minds of judge and jury trying the cause there was no reasonable doubt of the prisoner's guilt.

We might, were it necessary or proper, in addition to positive evidence, review and critically analyze the circumstances attending the killing of the deceased, and point out, when brought to the test of human experience, how several incidents then occurring would naturally suggest bad faith on the part of the prisoner, and indicate, with some degree of force, a premeditated design to kill before he approached or uttered a word to the deceased.

To sustain the proposition that a conviction will be set aside when contrary to the weight of evidence, the appel-

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lant's counsel have cited as authority, Wharton's *Crim. Pl. and Pr.*, 8th ed., 551, sec. 813, where that author, under the head of New Trials, which are always within the sound discretion of the court, lays down this principle and applies it more especially to that class of cases where any of the material allegations of the indictment remain unproved, but in the conclusion of that section the same author says: "If, however, there be conflicting evidence and the question be one of doubt, it seems the verdict will generally be permitted to stand; and this though the court may differ from the jury as to the preponderance of the evidence." In support of this latter proposition, that author cites above thirty adjudications.

If this be the rule on a motion for a new trial which is addressed to the discretion of the court trying the cause where the evidence is conflicting, with how much more strictness ought the rule to be adhered to by an appellate tribunal, to which like this court an appeal from an order overruling a motion for a new trial does not lie. No such appeal is ever allowable except under express provisions of statutes.

Where the evidence is contradictory and the verdict is against the weight of evidence, though a new trial may be granted by the court trying the cause in their discretion, the decision denying the same is not examinable by an appellate court: *State v. Cruise*, 16, Mo. 391; *Herbon v. State*, 7 Tex., 69.

If there had been no part of the evidence which if true would sustain the verdict, then an error of law would have been apparent from the record upon which we could reverse the judgment.

Under the rules governing the judicial administration of the criminal laws of this territory, this court can only review and determine errors of law appearing upon the face of the record: *Cathcart v. Commonwealth*, 37 Penn., 108. It is

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quite beyond the scope of its duties to determine the credibility of witnesses testifying in a lower court, the weight of their testimony aside from the law of evidence, or the reconciliation of conflicting testimony.

It would, indeed, be establishing a precedent vicious in its nature and bad on principle if this court, sitting as an appellate tribunal to determine errors in law, should thus invade the province of the jury and attempt to determine these questions of fact from conflicting testimony.

If the affirmance of the judgment below should necessarily follow the overruling of this objection to the verdict now under consideration, such affirmance would not necessarily determine the fate of the prisoner.

The law has humanely reposed in the judgment and conscience of the governor the discretionary power to grant a full pardon or mitigate the punishment.

In determining the question of executive clemency, the governor may properly consider matters that are beyond the province of this court; and we think the ends of justice will be much better subserved by leaving the responsibility here, than that we should deviate from the course which the policy of the law has marked out for us to pursue.

We hold, therefore, that the objection that the verdict is contrary to the evidence, ought not to be sustained in this case.

Cases, however, might arise wherein, though there might be some evidence to sustain every material allegation of the indictment, yet at the same time the evidence might be so very slight, as to justify an appellate court in reversing a judgment rendered thereon.

The third assignment of error is that before final judgment was pronounced, the prisoner was not asked if he had anything to say why sentence should not be pronounced against him. As authority in support of this proposition we are referred to said ed. of Wharton's Crime Pl. and Pr. 604, sec. 906, where the rule at common law is shown to be that

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in capital felonies this was not only required, but that it should appear of record. But that author in the same section observes that "in several of the states the rule is that the absence of such an averment will require the remittal by a court of error of the record to the trial court for a new sentence." In other states the failure of the record in this respect has been held not to be ground for a refusal, though it is agreed on all sides that "the form is proper to be used."

"But this address is not to be viewed as an invitation to the defendant to bring forward additional motions in arrest of judgment, or for a new trial. Those motions have, according to the usual practice, been already made and disposed of.

"The object of the address is to give the defendant the opportunity to personally lay before the court statements which, by the strict rules of law, could not have been admitted when urged by his counsel in the due course of legal procedure; but which, when thus informally offered from man to man, may be used to extenuate guilt and to mitigate punishment."

It seems by this that the rule has not been uniformly adopted as common law among the various states of the Union. From the authorities cited, the courts of about as many states, holding one way as the other, and that the only benefit that can accrue to the defendant under any circumstances is to extenuate his guilt, or to mitigate his punishment.

This rule was adopted and subsequently became a part of the criminal code when the accused could not be a witness, to tell the court and jury anything in mitigation of punishment, or in extenuation of his guilt, and at a time also when such extenuation and the grade of punishment rested largely in the power of the court.

In cases of capital homicide under our statute, if the accused is found guilty of murder in the first degree, the

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only opportunity he would have to make any impression on the court in extenuation of his guilt, and therefore in mitigation of the punishment, would be on a motion for a new trial. But, if after this question has been disposed of, and the prisoner's guilt has been fixed and determined at murder in the first degree, then there can be no extenuation of guilt, or mitigation of the punishment by the court. While in the lower grades of homicide where the jury assesses the punishment, and determines the grade of the offense, the power of the court over such extenuation and mitigation is gone and the prisoner's address to the court utterly useless.

But the fact that under the law the prisoner was a competent witness, and on the trial in this case actually gave his testimony in his own behalf, would seem to supersede any occasion for his personal address to the court in extenuation of his guilt or in mitigation of his punishment.

Under our peculiar statute as to homicide and the law of Congress applicable to the territories, rendering the defendant in criminal prosecutions a competent witness in his own behalf, we may as well concur with the courts of those states that hold that the non-observance of this rule as implied by the silence of the record is not ground for reversal.

On principle it would seem that the observance of the rule ought to be presumed unless the record, by some statement, shows to the contrary. Upon the ground that in a court of general jurisdiction, after acquiring jurisdiction, all the details of a trial are presumed to be regular and sufficient to sustain judgment until the contrary be shown.

In the case of *Cathcart v. The Commonwealth*, *supra*, defendant was under indictment for murder in the first degree. The record did not show affirmatively that the prisoner had any counsel during the trial. This was one of the assignments of error. On this point the supreme court of Pennsylvania held, that they could not presume that the prisoner was denied counsel because the record did not show

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that he had counsel, notwithstanding the constitution of that state secured that right to every one indicted for crime, and that it was not ground for reversal.

It would be immeasurably more important to a prisoner on trial for a capital felony to be aided by counsel than that, after he had testified in his own behalf and had been heard on a motion for a new trial, he should be asked if he had anything further to say why sentence should not be pronounced.

If the silence of the record in regard to counsel is not ground for reversal, it would seem on principle that such silence in regard to the matter now being considered should not be ground for reversal. Notwithstanding this ruling, we would not advise that a custom so honored by time and high authority should be disregarded under any circumstances.

The fourth assignment of error is that the court below allowed the prosecuting counsel, in his address to the jury, to charge the defendant with other offenses than the one on trial.

As to this objection, it is sufficient to say that upon examination of the record we do not find the fact to be as assumed by this assignment of error.

There are several other assignments of error based upon *ex parte* affidavits used on the motion for a new trial, and on certain facts assumed to be true, but which relate to issues of fact for the jury. These all relate to matters which are not properly before us for review.

We discover no error in the record.

The judgment is affirmed.

PARKS, J., dissenting: I dissent from the opinion of the court for the following reasons:

*First.* The rule of the common law that a verdict against the weight of evidence should be set aside in criminal cases, is a just one and ought to be followed by the courts.

In case of crimes punishable with death, if the trial court



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disregards this rule, its action ought not to be held binding on this court.

In this case the killing was admitted, and the only question was as to the degree of the defendant's guilt. Upon this question the verdict of the jury was, as I think, against the weight of the evidence.

*Second.* The practice of asking the defendant, after conviction, if he has anything to say why sentence should not be pronounced against him, is founded in justice, reason and humanity. It is sanctioned by long and almost immemorial usage, and should be considered too well settled to be shaken by these cases in which it has been held unnecessary. It should be held both in the theory and practice, a sacred right for a man convicted of murder and about to be sentenced to an infamous death, to be heard before he is sentenced. In this case this right was not recognized.

*Third.* With this view of the law and in view of the state of things at present existing in this territory, I am not willing that this man's fate should depend upon the very uncertain action of any governor, no matter how high may be his qualifications and character.

For these reasons I am unable to concur in the opinion of the majority of the court.

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THE TERRITORY OF NEW MEXICO v. JOSEPH STOKES AND  
WILLIAM MULLEN.

*January 28, 1881.*

**BURGLARY.** (1) *Prosecution for, under general railroad law.*

1. The general railroad act, ch. 1, tit. 8, section 8, provides that "any person who shall in the day or night time enter by force, or otherwise, any car of any corporation, formed under this act, with intent to steal any valuable thing then and there being, shall be deemed

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guilty of burglary, and upon conviction thereof shall be punished as in other cases of burglary." This provision applied only to corporations created under this general act, but subsequently the legislature passed an act conferring upon all corporations organized before the passage of the general railroad law, "all the powers, *privileges* and exemptions conferred upon corporations organized" under that act. Upon the theory that the "privileges" thus conferred would give to corporations formed before the passage of the general railway law, the "privilege" of being protected from burglary in the means provided by the section of the general law quoted above, the defendants were indicted under section 8, ch. 1, tit. 8 of the general railroad act for burglarizing the cars of the N. M. & S. P. R. R. Co., a company organized before the general railroad statute was passed.

*Held*, That the word "privilege," as used in the second act, does not confer the right to prosecute any one for burglary under section 8 of the general railroad act, ch. 1, tit. 8, where the burglary was of cars owned by a company organized before the general act was passed; but that the defendants could be prosecuted under the criminal code of New Mexico.

Appeal from the District Court for Santa Fe county.  
PRINCE, J.

The defendants in this case were indicted by the grand jury of San Miguel county for burglary under sec. 8, chap. 1, title 8 of an act, entitled "An act to provide for the incorporation of railroad companies and the management of the affairs thereof, and other matters relating thereto," approved February 2d, 1878 (Laws of 1878, p. 43).

Change of venue was taken to Santa Fe county, and the cause tried at the July term, 1880, of the district court at Santa Fe county.

After the evidence was in, defendants, by their counsel, moved the court to instruct the jury to find a verdict of "not guilty," for the reason that the territory had not shown that the defendants entered by force, or otherwise, any car of any corporation formed under the act of the legislature of New Mexico, approved February 2d, 1878, which motion the court overruled, and defendants duly excepted.

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There was a verdict of guilty, and motions in arrest of judgment and for new trial were filed in due time.

The bill of exceptions shows that no evidence whatever was introduced on the part of the prosecution to prove that the New Mexico and Southern Pacific Railroad Company (whose car defendants were charged with entering) was organized under the act of February 2d, 1878, above mentioned, and that the court admitted in evidence, against the objection of defendants, a copy of certain articles of incorporation, set forth in the record, pp. 19 to 28.

*P. F. Conway* and *C. H. Gildersleeve* for appellants.

I.—Appellants claim that the court below erred in admitting in evidence the articles of incorporation above mentioned, and in refusing to instruct the jury to acquit.

An examination of the record (pp. 19 to 28), will show that the articles of incorporation introduced by the prosecution are not drawn in accordance with the provisions of the act entitled "An act to provide for the incorporation of railroad companies and the management of the affairs thereof, and other matters relating thereto," approved February 2d, 1878 (Laws of 1878, p. 17).

Sub-head 10, of sec. 2, title 1, chap. 1 of said act (p. 18, Laws of 1878), provides that articles of incorporation must set forth "that at least ten per cent. of its capital stock subscribed has been paid to the treasurer of the intended corporation, giving his name and residence." Section 4, same title and chapter of said act (p. 18, Laws of 1878), provides that, before filing articles of incorporation, the incorporators must have actually subscribed to the capital stock of the corporation at least one thousand dollars for each mile of its road and branches, and at least ten per cent. thereof must have been paid for the benefit of the corporation, to a treasurer appointed by subscribers to articles of incorporation.

Section 5, same chapter and title of said act (p. 19, Laws of 1878), is as follows: "There must be securely attached

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to said articles of incorporation an affidavit of the treasurer named therein, that the requisite amount of capital stock of the intended corporation has been actually subscribed, and that ten per cent. thereof has been actually paid to him for the benefit of said corporation, stating the amount of stock subscribed, and the amount actually paid in."

The articles of incorporation admitted by the court below do not comply in any manner with the provisions of the statute last above quoted, and consequently the New Mexico and Southern Pacific Railroad Company is not a corporation formed under the provisions of the act of Feb. 2d, 1878. Section 8, title 8, chap. 1 of said act (p. 43, Laws of 1878), reads as follows: "Any person who shall in the day or night time, enter by force or otherwise, any car of any corporation, formed under this act, with intent to steal any valuable thing there and then being, shall be deemed guilty of burglary, and upon conviction thereof, shall be punished as in other cases of burglary."

There can be no doubt that the indictment in this case was brought under this section, and in view of the failure of the incorporators of the New Mexico and Southern Pacific Railroad Company to comply with the provisions of this law in framing their articles of incorporation, it is plain that the objection of defendants to the introduction of said articles of incorporation was well taken, and that the court should have given the instruction to the jury to find the defendants not guilty as prayed for in their motion.

II. The action of the court below in admitting said articles of incorporation, and refusing to instruct the jury to acquit, was based upon section 1 of an act entitled "An act in reference to certain incorporated companies in the territory of New Mexico," approved Feb. 12th, 1878 (Laws of 1878, p. 52). We claim that this section cannot be so construed.

It provides that all powers, privileges and exemptions con-

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ferred on corporations organized under the act of Feb. 2d, 1878, are also conferred on corporations organized for railroad purposes under the general incorporation law of Dec. 27th, 1867 and Jan. 30th, 1868. Section 8 of the act of Feb. 2d, 1878, under which the indictment is brought, confers no power, privilege or exemption upon a railroad company. It is an act of the sovereign declaring certain acts to be a crime of a nature different from what it was before; or rather making that a crime which was not prior to the passage of the law. It is in derogation of the common law, and should be strictly construed.

The words, powers, privileges and exemptions, used in the act approved Feb. 12th, 1878, Laws of 1878, p. 52, have no reference to sec. 8, title 8, chap. 1, act of Feb. 2d, 1878 (Laws of 1878, p. 43). The first thing requisite in the construction of an act of the legislature is to discover what is the intention of the legislature.

Let us see what was meant and intended by the legislature in the use by it of these words, powers, privileges and exemptions.

Fortunately for the purposes of this inquiry, the legislature has not left its meaning dark or obscure; the powers, privileges and exemptions meant and intended by the act of Feb. 12th, 1878, are set forth at large and in the utmost minutiae of detail, in the act of Feb. 2d, 1878.

*First.* As to powers, see title 6, chap. 1 of act approved Feb. 2d, 1878 (pp. 31 to 39, Laws of 1878); there they are defined to be the power of succession by its corporate name, to sue, and be sued in court, to make and use a common seal, and alter the same at pleasure, to acquire, purchase, hold and convey real estate, and so on to the end of the chapter.

*Second.* As to privileges and exemptions, see title 9, chap. 1, secs. 1 to 10 inclusive, of act approved Feb. 2d, 1878 (Laws 1878, p. 49).

The powers, privileges and exemptions meant are all

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referred to and defined in the sections above quoted, but nowhere among them do we find any reference to the section of the same act defining the offense of burglary; but this section is found under its proper heading: "Regulation and Management." The conclusion seems most reasonable, that the legislature referred to the powers, privileges and exemptions specifically granted, and not to the section defining a criminal offense.

"The section of the statute under which the indictment is brought is in derogation of the common law, and to be strictly construed:" *Melody v. Reab*, 4 Mass., 471; *Gibson v. Jenney*, 15 Mass., 205; *Duelly v. Duelly*, 46 Me., 377.

"Penal statutes are to be taken strictly and literally, and cannot be extended by construction:" *U. S. v. Starr*, 1 Hempst., 469; *Andrew v. U. S.*, 2 Story, 202; *Ranson v. Starr*, 19 Conn., 292.

"When the liberty of the citizen is involved statutes should be strictly construed:" *Case of Pierce*, 16 Me., 255; *Elam v. Ransom*, 21 Ga., 139; *Ramsey v. Foy*, 10 Ind., 493.

"An offense cannot be created or inferred by vague implications. Penal laws must be construed strictly, but not so strictly as to defeat the obvious intention of the lawmaker; but so strictly that the case in hand must be brought within the definitions of the law that is within its reach, taken in their ordinary significance:" *Atlanta v. White*, 33 Ga., 229.

We submit that, in view of the foregoing, the law of Feb. 12th, 1878, does not bring railroad companies not organized under the law of February 2d, 1878, within the operation of the section defining burglary here sought to be invoked, and that the court below erred in the admission of the testimony complained of and in overruling the motions for new trial, and in arrest of judgment.

The act of February 12th, 1878, attempts only to confer certain "powers, privileges and exemptions" on railroad cor-

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porations, and does not in any manner pretend or assume to confer on the territory the right of prosecution for any new character of statutory crime.

The act of February 12th, 1878, is wholly and totally null and void; it attempts to confer on railroad corporations organized previous to February 2d, 1878 (to wit, under the law of December 27th, 1867, and the act of January 30th, 1868, amendatory thereto), all the "powers, privileges and exemptions" conferred on railroad corporations, and for the management of the affairs hereof, by the act approved Feb. 2d, 1878, and hence is in violation of the act of congress, June 10th, 1872, Revised Statutes U. S., sec. 1889, p. 333, which says that "legislative assemblies of the several territories shall not grant private charters or especial privileges," etc.

This act of February 12th, 1878, attempts to grant an especial privilege, and to grant the same especially to railroad corporations, organized for railroad purposes.

It attempts to grant, especially to certain railroad corporations organized previous to a certain date (February 2d, 1878), "powers, privileges and exemptions" that other railroad companies, organized under the same act, but subsequent to that date cannot enjoy.

It not only attempts to grant that especial privilege, but to grant the same especially to railroad corporations organized previous to February 2d, 1878.

Which is an exercise of legislative power clearly not vested in the legislature of the territory of New Mexico; said act of February 12, 1878, is hence null and void.

*Catron & Thornton*, for appellee.

There is no error on the record in this case. The indictment is for burglary in entering a car of the New Mexico & Southern Pacific Railroad Company, with intention to steal its property, etc.

The defendants pleaded not guilty to the indictment, but

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made no objections to its form or sufficiency. They were found guilty, and sentenced.

The bill of exceptions contains a statement of the judge as to evidence on a certain point, then sets out certificate of incorporation in full, which was given in evidence as stated, but does not pretend to give all the evidence.

The statement in the "bill of exceptions," that there was no evidence introduced to show that the N. M. & S. P. R. R. Co., was organized under the act of Feb. 2, 1880, is an attempt of the judge to forestall this court, and decide a matter pertinent to the issue.

This court cannot examine into the fact whether the evidence sustained the indictment or not, as all the evidence is not inserted in the bill of exceptions, without which it cannot pass on a question of fact: U. S. Digest, vol. 6, sec. 308, p. 14; *Id.*, sec. 346, p. 19; U. S. Digest, vol. 6, sec. 437, p. 20; *Id.*, sec. 450; 10 Ill., p.

The bill of exceptions does not show the reason for the objections made to the introduction of testimony. See 37 Missouri, p. 358.

If the case comes under the law referred to, still it is good, as the exemption from robbery, and the privilege to keep and use cars free from robbers and armed bands, and the right to immunity from them will extend these provisions to the old companies.

A privilege is a right to an immunity or protection in something, or some right.

Criminal law is nothing more than a protection of persons in their rights, privileges and immunities.

It is the privilege of every citizen to insist on his rights and protection, and to defend himself, either personally, or by means of the law, punishing persons who injure him in the enjoyment of his rights.

There being no error apparent on the record, the court must sustain the sentence.



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PARKS, Associate Justice: The defendants in this case were indicted at the last October term of the San Miguel district court for committing burglary in a baggage and express car of The New Mexico and Southern Pacific Railroad Company, on the fourteenth day of said month of October last. The case was taken to Santa Fe county by change of venue; was tried there, defendants found guilty and sentenced, and the case brought to this court by appeal.

There is no general law of this territory making the acts charged against the defendants burglary, or by which they could be punished under this indictment. The ground taken by the prosecution in this case is, substantially, that this indictment was founded upon and must and can be sustained by the eighth section of title eighth of the railroad laws passed February 2d, A. D. 1878, taken in connection with section first of the act upon the same subject of February 12, A. D. 1878.

Section eighth aforesaid defines the crime of burglary in any case of any corporation formed under that act, and fixes the punishment, and section one of the said subsequent act confers all the powers, privileges and exemptions of the said first act upon all the corporations incorporated under the laws of this territory for the purpose of constructing railroads, etc.

It was stated in the beginning of the argument, and it is evident from the record and the argument of counsel, that this case depends upon the meaning of the word "privileges" in the act of February 12, 1878.

According to Jacob's Law Dictionary, the original legal meaning of the word "privilege" is exemption of a private man or a particular corporation from the rigor of the common law. Another definition given by him is, exemption from some duty, burden or attendance. Bouvier says a privilege is a particular law which grants special prerogatives to some persons contrary to common right. Webster defines it

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to be immunity, franchise, right, claim, liberty, special exemption from evil or burden, special enjoyment of good, peculiar benefit or advantage.

Without multiplying authorities or definitions, it is sufficient to say that in no usual or proper or legal meaning of the word privileges can it be used as claimed in this case.

The right of the people of New Mexico to prosecute and punish wrong-doers under this, or any other law, is not a privilege of any particular person or persons, corporation or corporations. It is something more than that. It is part of the criminal law of the country, enacted for the public good; for the punishment of crime, and in which the whole community are interested. We are of the opinion that there is no law of this territory under which this indictment, verdict and judgment can be sustained.

But it does not follow upon this opinion that acts such as are alleged to have been proved upon the trial of this case can be committed with impunity.

The criminal code of New Mexico is believed to be sufficiently comprehensive to punish all invasions of the rights of personal liberty, personal security, and private or public property.

What part or parts of that code are applicable to the alleged facts of this case, if any, it is not the province of this court either to determine or indicate.

The judgment of the district court is reversed.

PRINCE, Chief Justice, dissenting: In this case, being unable to agree with the conclusions of the majority of the court, I think it proper to put on record my reasons for such dissent.

There is no question raised as to the facts in the case, and the decision turns upon one single point, and that one of much importance and interest.

The defendants are indicted under sec. 8, of title 8, of

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chap. 1 of the laws of 1878, commonly known as the General Railroad Act. That section reads as follows: "Any person who shall, in the day or night time, enter by force or otherwise, any car of any corporation formed under this act, with intent to steal any valuable thing then and there being, shall be deemed guilty of burglary, and, upon conviction thereof, shall punished as in other cases of burglary."

The object of this law was very evident. The criminal code of the territory contained provision concerning burglary in dwelling houses, offices, shops, warehouses, out-houses, colleges, churches, meeting houses, court houses, town houses, academies and other public buildings, in the day time or night time, and under almost all conceivable circumstances (General Laws, secs. 9 to 13, chap. 7), and these included every kind of structure, which, down to that time, had been capable of being burglariously entered, in New Mexico.

But a new era was approaching. Railroads were being built almost to the boundaries of the territory, and it was hoped would soon enter its borders. At that time, not a rail had been laid in New Mexico, but the legislature, wishing to encourage the introduction of the modern methods of travel, enacted this general railroad law, which is very elaborate and comprehensive in its provisions, and gives to companies organized thereunder such powers, privileges, franchises and immunities as were supposed to be necessary or desirable and consistent with the public welfare. Among other privileges conferred was that of protection from robbery and depredation by burglars, by the enactment of the section above quoted. Other similar privileges were those of protection from having their roads undermined by tunnels, etc., the digging of which was made a misdemeanor (sec. 10 of title 8); protection from having their structures, engines, etc., injured, or track obstructed, which was afforded by making such injuries misdemeanors, punishable by law (sec. 11, title

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8); protection from claims on the part of passengers for damages for injuries in cases where they had violated the regulations of the road (sec. 7); protection from attempts to throw cars off the track, or cause collisions, which are made felonies by sec. 9.

By section 1889 of the U. S. Revised Statutes, the legislature is prohibited from granting any "especial privileges" to any corporation or individual; but these privileges were included in a general act for the incorporation of railroad companies, intended not for the benefit of any one or more particular organizations, but for all that might exist in the territory, and thus were not obnoxious to the objection of being "especial." This act was passed on the 2d of February, 1878, but scarcely more than a day had elapsed, when it appeared that although there was no railroad actually built in New Mexico, yet there did exist one or more corporations for railroad purposes, which had been previously organized under the general incorporation act of 1868: General Laws, p. 203.

That act was comparatively brief, and did not confer the privileges of protection and immunity from violence and damage to which we have referred, as well as many other powers, privileges and exemptions; so that, unless legislative action were had, there would be two classes of railroad corporations—one possessing certain privileges and the other not. Besides, being manifestly unjust, this condition of affairs might also be construed as making these privileges "especial," which were thus confined to the corporations formed under a particular act, and of which other similar corporations were deprived, and thus be in contravention of the law of congress previously referred to, which prohibited the granting of said "especial privileges," and, consequently, void.

The legislature proceeded with great promptitude to obviate the difficulty, so that a bill, prepared for the purpose,

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was introduced, went through all its stages of consideration and progress, was passed by both houses and signed by the governor, and filed in the secretary's office as a law, by the succeeding twelfth day of February, but ten days subsequent to the general railroad law. This remedial statute is chapter 3 of the Laws of 1878, and it reads as follows:

"SECTION 1. All the powers, privileges and exemptions conferred upon corporations organized under an act entitled 'An act to provide for the incorporation of railroad companies and the management of the affairs thereof, and other matters relating thereto,' approved February 2d, A. D. 1878, are hereby conferred upon all corporations incorporated under the laws of this territory for the purpose of constructing railroads, and also upon all corporations organized for railroad purposes that have registered in the office of the secretary of this territory the original or certified copy of their articles of incorporation, in accordance with an act entitled 'An act to amend an act entitled "An act to create a general incorporation law," permitting persons to associate themselves together as bodies corporate for mining, manufacturing and other industrial pursuits; and to repeal the sixteenth section of said act,' approved January 30th, 1878: General Laws of New Mexico, p. 470.

The obvious intention of this statute was to place all the railroad companies organized under the laws of the territory upon the same footing; to permit no inequality of rights or privileges; to allow no partiality towards those organized under any particular statute, but to bring about an entire uniformity and equality in their position before the law.

The privileges conferred by the act of February 2, 1878, were no longer to be "especial" to the companies organized thereunder, but were to be enjoyed generally and equally by all of similar character. Among the privileges were the high and important ones of protection from robbery, depredation and willful injury, to which we have already referred.

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Can it not be supposed that it was not intended by the legislature, when it enacted this law of February 12, that these privileges of protection and immunity should be included among the privileges which were to be made general, and of which the older corporation were now to have the benefit equally with the newer?

Yet this is the sole question in this case. It is in proof that the New Mexico & Southern Pacific Railroad Company, one of whose cars was the scene of the burglary in question, was not incorporated under Chapter I of the Law of 1878, but under a prior incorporation act, and this was one of those referred to in Chapter III of that year, and for whose benefit and protection that act was passed. The point was raised, and it is held by the decision of the court just rendered that the offense was not cognizable by one law under the present indictment, because the car entered was not the property of a corporation organized under Chapter I; and that Chapter III does not remedy the difficulty by placing cars of the other corporations therein mentioned on the same footing as to the privilege of protection from burglars with cars of companies organized under Chapter I.

It may be that the legislature could have employed stronger and more apt words than it did to express its will, but I cannot concur in the opinion that the object is not substantially and legally attained by the language as it exists in Chapter III. The intention of the legislature is, to my mind, too plain to admit of doubt. It was obviously to place all similar corporations on the same basis, to give to one railroad company exactly the same powers, privileges and exemptions that every other similar company possessed within our territory; to prevent any inequality, discrimination or favoritism. This was not only right, but absolutely essential, in order to make the privileges conferred general, and therefore legal. It is not to be supposed that they intended that the protection afforded equally to those of

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another, that it should be a crime punishable by a heavy penalty to enter one car in a train, with intent to steal, because that car happened to belong to one company, and no crime at all to enter the next car, with like intent, because that car unfortunately belonged to a different company. Yet that would be precisely the result if the legislature intended to make such a discrimination, and if the word "privileges" in the act of February 12, 1878 does not include the privilege of protection from burglary or other injury. Under this construction, while it is a misdemeanor to undermine the track of the Rio Grande, Mexico & Pacific Railroad, it is no offense similarly to endanger the property of the company and lives of passengers on the New Mexico & Southern Pacific Railroad. It is a felony to place an obstruction on the track of one, with intent to throw the train off; or to displace a switch with intent to cause a collision—a felony for which the offender can be imprisoned for ten years—and no statutory offense at all to do a like deed to the other. The defendants now before us under the indictment in this case were felons if the car which they happened to try to rob belonged to one, and not guilty if it belonged to the other.

This would be, in my opinion, the height of injustice and inequality. The privilege of protection in the one case would be in the greatest degree "especial." Let us suppose the two roads ran in the same direction, and were opposed to each other in interest; would not that one have a very "especial privilege" over the other, and reap its benefits in passengers and freight, which received the privilege of protection from robbers, from underminers and train-wreckers?

Believing that the words of the act of February 12 conferred this protection and immunity from danger upon the New Mexico & Southern Pacific Railroad to which the car entered in this case belonged, I am compelled to dissent from the views of the majority of the court, in reversing the judgment herein.

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 Bennett et al. v. Zabriski.
 

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CORNELIUS BENNETT ET AL., Plaintiffs, v. JAMES ZABRISKI,  
Defendant.

January 29, 1881.

ATTACHMENT. (1) *Variance in pleadings as to description of parties.*

REHEARING. (2) *Changing decision upon.*

1. The declaration, affidavit, writ, bond, judgment and execution in attachment, must not vary in their description of parties. Affirming *Bennett v. Zabriski*. PRINCE, C. J., dissenting.
2. Unless convinced that it is wrong, the court will not change a unanimous opinion deliberately formed and announced.

Petition for rehearing.

Plaintiffs sue defendant in the third judicial district court, sitting within and for the county of Grant, in an action of assumpsit, and sue out a writ of attachment. The declaration, among other things, states the petitioners are Cornelius Bennett, of Arizona; Joseph F. Bennett, of Grant county, and Henry Lisinsky, of Doña Ana county, in this territory. That said petitioners were doing business under the firm name and style of Bennett Bros. & Co., and that the defendant, James A. Zabriski, was a resident of the state of Texas.

The affidavit upon which the writ was issued was, in effect, as follows:

TERRITORY OF NEW MEXICO, } ss.  
COUNTY OF GRANT.

This day personally appeared before me, the undersigned, clerk of the third judicial district court, within and for the county and territory aforesaid, Joseph F. Bennett, of the firm of Bennett Bros. & Co., and being duly sworn, says that James A. Zabriski is justly indebted to the firm of Bennett Bros. & Co. in the sum of \$180.78, after allowing all just offsets on account of goods, wares and merchandise sold and delivered, money lent and advanced, and account stated,



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and that the said James A. Zabriski is not a resident of nor resides in this territory.

J. F. BENNETT.

Sworn and subscribed to, etc.

Bond was given and approved. John P. Risque also made affidavit that the defendant was a non-resident of the territory. Defendant entered a special appearance for the purpose of filing the following motion to quash the proceedings herein :

1st. The affidavit is made by one Joseph F. Bennett, but does not state for whom.

2d. It does not state to whom the defendant is indebted.

3d. It does not say that said indebtedness is due after allowing all just credits.

4th. It does not state that he has good reason to believe and does believe in the existence of the fact set forth as a ground for issuing of attachment, that the defendant is a non-resident.

5th. The writ does not set forth when or where, or by whom, the debt was contracted.

6th. The body of the writ does not set forth in what style the plaintiffs sue.

7th. And for other good and sufficient reasons apparent upon the affidavit and writ.

This motion was by the court sustained and judgment so rendered. On the merits of the case, a judgment was rendered in favor of the plaintiffs.

*Conway & Risque and Catron & Thornton*, for appellants.

*First.* The plaintiffs insist that the whole record can be examined to see for whom and by whom the affidavit was made. See Drake on Attachment, sec. 93.

Failure to entitle the affidavit in the cause, failure to describe the person who made it as plaintiff, or debtor named in it as defendant, does not make it bad. See Drake on

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Attachment, sec. 92; *Cheadle v. Riddle*, 6 Ark. (1 English), 480; *Kinney v. Heald*, 17 Ark., 397; *Pool v. Webster*, 3 Metcalf (Ky.), 278.

*Second.* The affidavit does state to whom the defendant is indebted, it says to Bennett Bros. & Co., and the petition shows that Bennett Bros. & Co. are the plaintiffs.

It states that the amount sworn to was due after allowing all just offsets, which is the exact words of the statutory form.

The statute has prescribed a form of affidavit in attachment. See Compiled Laws, sec. 25, page 216. This affidavit is a substantial compliance with that form.

The writ is also in compliance with the statutory requirements, and is good.

Where a form is prescribed by statute for proceedings in attachment, it should be followed, and an affidavit which follows the statute is sufficient: *Shockley v. Bullock*, 18 Ga., 283; *Harrito v. Humphreys*, 26 Ga., 514; *McColburn v. White*, 23 Ind., 43; *Reyburn v. Brackett*, 2 Kan., 227; *Matthews v. Don*, 20 Ind., 248.

Courts will construe the statute in relation to attachment in the most liberal manner for the advancement of justice, the suppression of fraud and the benefit of creditors: *Bank of Augusta v. Conrey*, 28 Miss., 667; *Bryan v. Lashley*, 21 Miss. (13 Smed & M.), 281.

PARKS, Associate Justice: In this case the court adheres to and reaffirms its decision made at the last term for the following reasons:

1. The decision was founded upon well settled rules of pleading and practice and was in accordance with the statute of this territory.

2. The authorities referred to adverse to the decision of the court tend to introduce a vague, loose and indefinite

character of pleading and endless confusion in legal proceedings.

We have had more than one illustration during this court of the necessity of care in the preparation of pleadings and of the trouble that follows the want of it.

If the declaration, the affidavit and the writ in a summary proceeding, such as attachment, may materially vary in so important a matter as the description of the parties to the suit, so may the bond, the judgment, the execution, and any and all other papers in the case.

And in case of a sale of real estate it would be difficult to ascertain from whom the title was derived or to whom the conveyance should be made. Such uncertainty and confusion can easily be avoided by the plaintiff. In fact, the attorney who brings the suit is bound to know the correct description of the prisoner, partnership or corporation from whom he sues, and there is no excuse for his not using that description throughout the entire record he is making. If he may vary the description of the parties to the suit, so also may he vary the description of property or any other material fact or facts.

A title to property coming through so confused a record might be seriously contested and the value of property so derived materially lessened.

3. Where an opinion of this court has been deliberately formed and announced and is unanimous, nothing but conviction that it is wrong should induce the court to change.

The decisions of this court are the law of this territory, and that law should not be fluctuating and uncertain. The court itself, the bar and the people should know what to depend upon.

Neither doubts as to its correctness, adverse authorities or opinions or anything else, but a clear perception that it is wrong should induce this court by changing its opinion to change the law.

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And still believing that the unanimous opinion of the court in this case was founded upon correct principles, and would lead to correct practice, we shall adhere to it till convinced that we are in error.

PRINCE, Chief Justice, dissenting: On the rehearing in this case I regret to find myself unable to concur with my colleagues in their conclusions that the judgment rendered at the last session was correct, although on less consideration I concurred in it.

This action was commenced as provided in Chap. 21, sec. 2 of the Statutes (page 136, General Laws), which provides that "a creditor wishing to sue his debtor by attachment, may place in the clerk's office a petition or other lawful statement of his cause of action; and shall also file an affidavit and bond." Thereupon the attachment writ is issued.

This is different from the proceedings under the act of 1855 (page 140, General Laws), which provides for the issuance of the writ on filing an affidavit and bond only.

In this case, the petition or statement of the cause was filed April 16, 1875, and is the first paper appearing in the transcript. At the same time, apparently, at any rate on the same day, an affidavit and bond were filed, and thereupon the writ was issued.

The petition states the plaintiffs to be Cornelius Bennett, Joseph F. Bennett and Henry Lisinsky, doing business under the firm name of Bennett Brothers & Co., at Silver City.

The affidavit is made by "Joseph F. Bennett, of the firm of Bennett Brothers & Co.," and states that the defendant is indebted to said Bennett Brothers & Co.

In the writ the plaintiffs are named as Cornelius Bennett, Joseph F. Bennett and Henry Lisinsky.

The court below ruled and this court has decided that the writ was invalid because the plaintiffs mentioned in the

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aforsaid writ do not appear to have been the same persons as those named as plaintiffs in the affidavit.

In the affidavit the name is Bennett Brothers & Co., Joseph F. Bennett being one of said firm; in the writ no firm is mentioned at all, but the parties suing are separately named, as Cornelius Bennett, Joseph F. Bennett and Henry Lisinsky.

It is held that we cannot presume that these are the same, and that the affidavit cannot be cured by information obtained from other sources.

This might be so if the writ were based on the affidavit alone, as under the act of 1855; but in this instance, it appears to me, that the writ is based on both the petition and the affidavit. The petition is first named in the law, and in fact is filed as the foundation of the suit. I think, then, that we have a right to examine it to ascertain whether the parties named in the affidavit are the same as those named in the writ.

The cases cited by counsel, from Arkansas: *Cheadle v. Riddle*, 6 Ark., 480, and *Kinney v. Heald*, 17 Ark., 397, go far beyond this, in overlooking irregularities, but I think they should not be followed to their full extent. But I think the true rule is laid down in Drake on Attachment, sec. 93, when it says that if certain matters "appear by the record" it is not essential that they should have been stated in the affidavit. The precise case there cited is, that where it is required that the affidavit be made by a party to the suit, the fact that he is a party may appear by the record without being set up in the affidavit.

In the case before us, if we have recourse to the petition we find it distinctly stated therein that Cornelius Bennett, Joseph F. Bennett and Henry Lisinsky constituted the firm of Bennett Brothers & Co., and so all difficulty in connecting the affidavit and writ ceases. It appears while the plaintiffs were differently stated, yet they were in fact identically

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**Bennett et al. v. Zabriski.**

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the same. Believing that under the circumstances the court had a right to examine this petition, which constitutes part of the record, and specially as it is one of the papers on which the writ was issued, and made necessary for that purpose by the law, I think that the writ of attachment was good, and that the motion to quash the attachment proceedings should have been denied.

CASES DETERMINED  
BY THE  
SUPREME COURT OF NEW MEXICO,  
JANUARY TERM, 1882.

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THE TERRITORY OF NEW MEXICO, Appellee, v. ELEUTERIO  
BACA, Appellant.

*January 10, 1882.*

ACEQUIA LAW. (1) *Violations of, not crimes: Proceedings to enforce.*

1. The acequia law of New Mexico (Act January 7, 1853, Gen. Laws N. M., Prince, 14), provides (section 18) that "If any person obstruct, interfere with or disturb any of said ditches or use the water from it without the consent of the overseer during the time of cultivation, he shall pay for each offense a sum not exceeding ten dollars, which shall be recovered" (section 17) "by the overseer before any justice of the peace in the county." And section 18 further provides for the recovery, in addition, "of all damages that may have accrued to the injured parties, and if said person or persons have not wherewith to pay said fine and damages, they shall be sentenced to fifteen days' labor on public works."

*Held*, That these provisions created no public crime for which a person may be arrested in the first instance and prosecuted on behalf of the territory, and fined and imprisoned in default of payment. That the word "fine" should be construed to mean a pecuniary penalty merely that may be sued for by the overseer, in his official capacity, in a civil action, and when recovered by him, applied to the repairs of the acequia. That if the defendant is too poor to pay the amount adjudged against him, he may be compelled to work fifteen days on the public works, and the only restraint that can legally be placed on his liberty, is such as may be reasonably necessary to compel him to perform such work.

*Held further*, That a judgment under these provisions of the acequia

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Territory of New Mexico v. Baca.

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law by a justice of the peace, that the defendant pay a fine to the territory, and costs, and that he be imprisoned in the common jail until such payment, is without authority of law, and the whole proceeding was unauthorized as a criminal prosecution.

Appeal from the District Court of San Miguel county.

Eleuterio Baca, the defendant, appellant in this cause, was brought before a justice of the peace in the county of San Miguel, on a sworn declaration charging him with taking water from the acequia.

In said declaration no name is given to the acequia, it is not stated in what county the supposed offense was committed, nor even that it was committed in this territory. No time when the offense was committed is charged. The defendant was found guilty before the justice of the peace and an appeal taken to the district court of San Miguel county.

When the case was called for trial in the district court, the defendant moved the court to quash the indictment or sworn declaration for want of jurisdiction. The motion was overruled and the case proceeded to trial. There was a verdict of guilty. Defendants filed motions for a new trial and in arrest of judgment, which were overruled.

The bill of exceptions shows that the court, against objection of the defendant, permitted the prosecution to prove that the defendant had taken water from an acequia called Acequia de Nuestra Señora de los Dolores, and that said acequia was within the boundaries of San Miguel county, New Mexico, and also permitted proof as to the time when said water was taken.

*Conway & Risque*, for appellant.

I. The court below erred in refusing to quash the complaint or indictment, because :

*First.* There is no venue laid.

*Second.* No time when the supposed offense was committed is averred



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Territory of New Mexico v. Baca.

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*Third.* The complaint does not set forth any offense known to the laws of this territory.

As to venue and time: "Indictment must be certain as to time and place. Time and place must be added to every material fact in an indictment. In an indictment for offenses of commission, every act which is a necessary ingredient, must be laid with time and place:" Archibold's Criminal Pleading, p. 46. The place must be such as in strictness the jury who are to try the case should come from: *Ibid.*, p. 47. The time and place must be laid with certainty: *Ibid.*, p. 49.

No offense known to the law of this territory is charged. This prosecution is sought to be maintained under sec. 18, art 1, chap. 1, Compiled Laws of 1865, p. 22, viz.: "If any person in any manner obstruct, interfere with or disturb any of said (acequias) ditches or use the water from it, without the consent of the overseer, during the time of cultivation, he shall pay," etc.

The acequias referred to in this section are public acequias. It is not alleged in the complaint that the acequia was a public acequia, that the water was taken out of the acequia without the consent of the overseer, or that it was during the time of cultivation. This being the case, the complaint is necessarily fatally defective.

II. The court below erred in permitting the introduction of testimony proving that defendant had taken water from an acequia by name Nuestra Señora de los Dolores, that the same was within the boundaries of San Miguel county, New Mexico, and in permitting proof as to time when said water was taken. It having been shown that the complaint is fatally defective, it follows as a necessary sequence, that the justice of the peace had no jurisdiction; the district court has no original jurisdiction, and by appeal to it, acquires only such jurisdiction as the justice had, and it was error to admit the testimony above mentioned.

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Territory of New Mexico v. Baca.

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III. For the reasons and upon the authorities and statutes above cited, the court below erred in overruling motions for new trial and in arrest of judgment.

\_\_\_\_\_, for appellee.

This being a civil case, no statement of the cause of action is required, pleading being all verbal.

No technicality can be insisted on, especially if the objection has not been raised in the court below.

The justice says he tried the cause on the evidence taken in the case. See *State v. Stewart*, 47 Mo., pp. 382-4; *Ford v. State*, 3 Pinney, p. 450.

*Conway & Risque*, in reply.

The only point relied upon by plaintiff is a claim that the action is a civil one. An examination of section 18, Compiled Laws of 1865, page 22, under which this action is brought, will settle the fact of its being a criminal action.

It there appears a fine is the penalty, and that defendant may even be "sentenced to fifteen days' labor on public works," which is equivalent to an imprisonment.

BRISTOL, Associate Justice: This case is here by appeal from the district court, first judicial district, and county of San Miguel.

The case came to the court below by appeal from a judgment rendered by a justice of the peace of said county. This case in form is a criminal prosecution, wherein the territory is plaintiff and Eleuterio Baca is defendant. The supposed offense for which the defendant was tried and convicted in the court below appears by a complaint in the words and figures as follows, to wit:

" TERRITORY OF NEW MEXICO, }  
COUNTY OF SAN MIGUEL. }

"Before me, the undersigned, justice of the peace of the above county, personally presented himself Pablo Dominguez, a mayor domo of the acequia, and under oath declares

## Territory of New Mexico v. Baca.

that he accuses the following persons, to wit: Eleuterio Baca \* \* \* \* in this, in having taken water out of the acequia, and that they committed this act boldly, audaciously, and in disobedience of the authorities—this being against the laws and municipal regulations; therefore they make this declaration, to the end that the said aggressors may be arrested and their cause examined, and that it be treated in conformity with the law made and provided in such cases.

"PABLO <sup>his</sup> × DOMINGUEZ  
mark.

"Sworn and subscribed before me, to-day, }  
the 1st of July, 1880. }

"ARTHUR MORRISON,

*"Justice of the Peace."*

In the court below, and before the commencement of the trial, a motion was made, on behalf of the defendant, to quash the complaint for want of jurisdiction appearing thereby. This motion was overruled by the court.

A trial was thereupon had before a jury, who rendered a verdict of guilty, and assessed the punishment of the defendant at a fine of one dollar.

Motions for a new trial and in arrest of judgment were interposed on behalf of the defendant, and overruled by the court.

The following judgment on the verdict was rendered, from which this appeal is taken, to wit:

"It is considered and adjudged by the court that the defendant, Eleuterio Baca, pay into the territory of New Mexico, the sum of one dollar, the amount of the fine assessed by the jury in their verdict rendered herein, together with the costs of this prosecution to be taxed, and that execution issue therefor, and that the said defendant be committed to the common jail of the county of San Miguel, until said fine and costs be fully paid and satisfied, and that a warrant of commitment be issued against him."

The only law under which there can be any pretense for

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Territory or New Mexico v. Baca.

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sustaining this prosecution is the acequia law of this territory, providing for the enforcement of a pecuniary penalty against persons interfering with, disturbing or using the water of any public acequia without the consent of the owner thereof; which law was enacted on the 7th of January, 1852: General Laws N. M., Prince, 14.

This act provides for the establishment of public ditches for irrigating purposes, and for their construction; it also provides for their repairs, management, and the distribution under the direction of overseers thereof, and for the collection by suit, by the overseer, of certain pecuniary penalties against delinquents who neglect or refuse to obey his directions, and for the application thereof by him to the necessary repairs of the acequia under his charge.

Section 18 of the act provides as follows: "If any person shall in any manner obstruct, interfere with or disturb any of said ditches, or use the water from it without the consent of the owner, during the time of cultivation, he shall pay for each offense, a sum not exceeding ten dollars, which shall be recovered in the same manner prescribed in the foregoing section (sec. 17), for the benefit of said ditch, and shall further pay all damages that may have accrued to the injured parties, and if said person or persons have not wherewith to pay said fine and damages, they shall be sentenced to fifteen days' labor on public works."

The section referred to as the "foregoing section" (sec. 17), provides as follows: "If any proprietor of any land irrigated by any such ditch shall neglect or refuse to furnish the number of laborers required by the overseer, as prescribed by section 6 of this act, after having been legally notified by the overseer, he shall be fined for each offense in a sum not exceeding ten dollars, for the benefit of said ditch, which shall be recovered by the overseer, before any justice of the peace in the county, and in such cases the overseer may be a

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Territory of New Mexico v. Baca.

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competent witness to prove the offense, or any fact that may serve to constitute the same."

By transposing the language of both sections and bringing the same together so far as applicable, with a view of arriving at its true intent and meaning, it would read somewhat as follows: If any person shall in any manner obstruct, interfere with or disturb any such ditch, or use the water from it without the consent of the owner, during the time of cultivation, he shall pay for each offense a sum not exceeding ten dollars, which shall be recovered by the overseer, before any justice of the peace in the county, for the benefit of said ditch, and shall further pay all damages that may have accrued to the parties injured, and if said person or persons have not wherewith to pay said fine and damages, they shall be sentenced to fifteen days' labor on public works.

Section 19 of the same act provides that "all fines and forfeitures recovered for the use and benefit of any public ditch, shall be applied by the overseer to the improvements, excavations and bridges for the same."

The first question that presents itself is as to the nature of the judicial proceedings to be instituted to recover the "fine," or pecuniary penalty by the overseer. Is it a criminal prosecution to be instituted by the overseer in his own name and official capacity, for the recovery of a sum of money, not exceeding ten dollars, from the delinquent, which sum is to be received by the overseer and by him applied toward the needed improvements of the acequia?

There is a broad distinction between a mere pecuniary penalty to be recovered by a public officer, and applied to a specific object, and a fine imposed as a punishment for a public crime for which the criminal has been tried and convicted.

It is true that in section 17 of the act is the language that "he (the delinquent) shall be fined for each offense," etc., language which is usually applied to crimes or public offenses,

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Territory of New Mexico v. Baca.

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while, further on, are the provisions, that such fine shall be recovered by the overseer, and when so recovered, shall be applied by him to the benefit of the acequia—language usually applied to civil proceedings.

To authorize any interference with the liberty of the citizen by arrest or imprisonment, the authority for the same should be free from any doubt.

Public crimes are not created by mere innuendoes or inference, from the use of a single word in a statute.

The language of this statute is very loose and inaccurate, but considering all of its provisions with the view of giving it a reasonable and consistent construction, we are of the opinion that no public crime is created thereby, for which a person may be arrested in the first instance and prosecuted on behalf of the territory, and fined on conviction, sentenced to pay a fine to the territory, and imprisonment in default of its payment. That the word "fine" should be construed to mean a pecuniary penalty merely, that may be sued for by the overseer in his official capacity, in a civil action, and when recovered, received by him, and applied to the repairs of the acequia. If the defendant is too poor to pay the amount adjudged against him, then he may be compelled to work fifteen days on the public works, and the only restraint that can legally be placed on his liberty is such as may be reasonably necessary to compel him to perform such work.

The judgment, therefore, that the defendant pay a fine to the territory, and costs, and that he be imprisoned in the common jail until such payment, is without authority of law, and the whole proceeding from first to last was unauthorized as a criminal prosecution.

None of these irregularities are assigned as error. This was not necessary in a criminal prosecution under our practice. (*Vide* sec. 32, p. 290 of General Laws, N. M. per Prince.)

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Territory of New Mexico v. Tafoya.

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Other questions are presented, the decision of which we do not consider necessary or important in this case.

Judgment reversed. All concur.

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THE TERRITORY OF NEW MEXICO, Appellee, v. TOMAS  
TAFOYA, Appellant.

*January, 1882.*

**Acequia law.** Taking water from acequia not a crime: *Territory v. Baca*, *ante*, p. 183, affirmed.

Appeal from the District Court of San Miguel county.

Defendant was charged, under sec. 18, art. 1, chap. 1, p. 22, Comp. Laws, 1865, with taking water from an acequia, was tried before a justice of the peace for San Miguel county, and the case brought to the district court of San Miguel county on appeal, and verdict rendered against the defendant. The cause comes into this court on appeal. Motions for new trial and in arrest of judgment were filed in proper time and overruled.

*Conway & Risque*, for appellant.

The court below erred in admitting any testimony in the case.

**First.** Because there is no crime or charge alleged against defendant known to the laws of this territory. The section of the statute above referred to is as follows: "If any person shall in any manner obstruct, interfere with or disturb any of said (acequias) ditches, or use the water from it without the consent of the overseer, during the time of cultivation, he shall," etc. There is no allegation that it was during the time of cultivation, none that it was without the consent of the overseer, and none that the acequia was a public acequia, such as is contemplated by the statute. This

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Territory of New Mexico v. Tafoya.

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being the case, it follows that no offense is charged known to the laws of this territory.

There being no venue or time laid in said complaint, and the same being otherwise fatally defective, as above noted, the justice of the peace, on the face of the complaint, has no jurisdiction; the district court having no original jurisdiction, and acquiring, on the appeal of the case, only such jurisdiction as the justice had, it is manifest error to admit any evidence at all.

As to necessity for certainty as to time and venue *vide* Archibold's Criminal Pleading, pages 46, 47 and 49.

For the reasons above stated, it was error in the court below to overrule motions for new trial and in arrest of judgment

BRISTOL, Associate Justice: This case is here by appeal from the district court, first judicial district, county of San Miguel.

The case came to the court below by appeal from a court of a justice of the peace of that county.

It is a criminal prosecution in form, instituted on behalf of the territory, as plaintiff against the defendant, Tomas Tafoya.

The supposed offense for which the defendant was tried and convicted before the justice of the peace, and on appeal was re-tried and convicted in the court below, is set out in a complaint in the words and figures as follows:

" TERRITORY OF NEW MEXICO, }  
 " COUNTY OF SAN MIGUEL. } ss

" Before me, Arthur Morrison, a justice of the peace in and for the county and territory aforesaid, personally presented himself, Pablo Dominguez, an overseer of the Acequia Nuestra Senora de los Dolores of Las Vegas, and under oath declares and says that he accuses \* \* \* Tomas Tafoya



## Territory of New Mexico v. Tafoya.

in having taken and obstructed the flow of the water towards the town which was ordered by the county commissioners to be free from there above along the whole river for the period of eight days. And the said accused owners having obstructed the flow of the water in violation of such order of the county commissioners.

"I ask that he be arrested and brought to answer such complaint, and that he be treated in conformity with law.

"PABLO <sup>his</sup> + DOMINGUEZ,  
<sup>sign</sup>

*"Overseer of the Acequia of Nuestra Senora  
de los Dolores, in the C. de V."*

"Sworn to and subscribed, this }  
3d day of July, A. D. 1880. }

"ARTHUR MORRISON,

*"Justice of the Peace."*

The defendant was tried on the above complaint in the court below by a jury who rendered a verdict of guilty, and assessed the punishment at a fine of four dollars.

No exceptions appear to have been taken before or during the trial. After verdict, among other things a motion in arrest of the judgment was interposed by the defendant for want of a sufficient complaint and for want of jurisdiction which was overruled by the court below. Judgment was thereupon rendered and entered against defendant as follows:

"It is considered and adjudged by the court that the said defendant Tomas Tafoya, pay into the territory of New Mexico, the sum of four dollars, the amount of the fine assessed by the jury in their verdict rendered herein together with the costs of this prosecution to be taxed, and that execution issue therefor, and that the said defendant be committed to the common jail of the county of San Miguel, until said fine and costs be fully paid and satisfied, and that a warrant of commitment issue against him."

This case was evidently brought under the Acequia Law of 7th Jan., 1852 (Prince's Gen. Laws, N. M., 14)

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Badeau v. Baca.

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And as the same questions that arose in the case of the *Territory v. Eleuterio Baca*, ante, p. 188, decided at the present term, are presented in this case, the judgment herein is on the grounds reversed.

All concur.

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LOUIS BADEAU, Appellee, v. ROMALDO BACA, Appellant.

January 10, 1888.

JUDGMENT. (1) *When not set aside as being against evidence.*

1. A judgment will not be set aside by the supreme court upon the ground of the insufficiency of the evidence to sustain the verdict of the jury when the lower court has refused to do so, unless there is such a decided preponderance of evidence against it, as to create a conviction that it was the result of mistake or misconduct on the part of the jury.

Appeal from District Court of San Miguel county.

This is an action of assumpsit, brought by Lonis Badeau, appellee and plaintiff below, against Romaldo Baca, appellant and defendant below in the district court for the county of San Miguel, New Mexico, to recover the sum of \$3,572.94. The jury found for the plaintiff below and assessed his damages at \$1,225.79. The defendant below moved for a new trial, which was refused by the court, whereupon the defendant below prayed an appeal to this court, which was granted.

*Prichard & Sena*, for appellant.

We submit to the court that in this case there was not sufficient evidence upon the part of the appellee in the court below to entitle him to a judgment for any sum whatever. The verdict was against the weight of evidence, and there can be no question a verdict of this character should be set aside, and the court below erred in not doing so. See *Mum-*

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Badeau v. Baca.

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*ford v. Smith*, 1 Caines, 520; *Gordon v. Crooks*, 11 Ill., 142; *Lyle v. Robbins*, 25 Cal., 437; *Cox v. Hamilton*, 24 Texas, 777; *Bronde v. Wilson*, 12 Florida, 543; *Wells v. Lewis*, 28 Texas, 185. See Hilliard on New Trials, page 444, and other authorities there cited. See *Tilly v. Spalding*, 44 Ill., 80.

*Fiske & Warren*, for appellee.

The only errors alleged are that the court below erred in not setting aside the verdict of the jury, because, "the verdict was against the weight of evidence and against the evidence," and because—

"Taking the evidence as a whole, there was nothing offered upon which a jury could find the verdict which they did."

Some of the authorities cited in brief for appellant we are unable to find, but of those cited which we have found and examined, we submit:

*First.* That *Lyle v. Robbins*, 25 Cal., 437, 490, does not support the position of appellants, and besides, the decision in that case was governed by a special statute of the state of California, quoted from on page 490 of 25th Cal. report, by which it appears one of the grounds for granting a new trial in that case, is, "insufficiency of the evidence to justify the verdict."

*Second.* Hilliard on New Trials, p. 444, simply sets out and treats of when a verdict may be set aside in the discretion of the court below, not of whether, for the reasons given, it would be error for such a court to refuse to grant a new trial for such reasons.

*Third.* *McCarroll v. Stafford*, 24 Ark., 224, 228, is an authority for appellee and not for appellant. The decision on page 228 substantially agrees with that of the supreme court of New Mexico in *Territory of N. M. v. Webb*, Jan-Term, 1881.

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Badeau v. Baca.

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**PARKS, Associate Justice:** This was an action in assumpsit, in the district court of San Miguel county, in which the plaintiff recovered a judgment for \$1,225.79 on an account of \$3,572.94. Defendant moved for a new trial, which motion was overruled and the case was brought here by appeal.

In the argument before this court, both parties seemed to rest the case upon the question whether there was sufficient evidence before the district court to sustain the verdict of the jury, and in this view we agree with them.

Various authorities are cited in the briefs of the attorneys as to the law of the case. We are referred on both sides to the case of *McCarrol et al., Ads., v. Stafford*, 24 Ark., 228. In that case the court say: "The familiar and well established rule is that this court will not reverse the decision of the circuit court for having refused to grant a new trial upon a mere question of the weight or preponderance of the evidence, but only in cases where they find without evidence, or directly contrary to evidence, unless in extreme cases, where the verdict is so palpably contrary to evidence as to shock our sense of right and justice." In *Hilliard on New Trials* the rule is deduced from a large number of authorities "that a verdict will not be set aside unless clearly, palpably, decidedly and strongly against the evidence, or so much against the weight of evidence, as on the first blush of it, to shock the sense of justice, or unless there has been a flagrant abuse of discretion, that courts will never, in the absence of the most satisfactory evidence that the verdict is erroneous, substitute their impressions for the opinion of the jury."

It is held in Ohio that "a mere difference of opinion between the court and jury does not warrant the former in setting aside the finding of the latter. That would be, in effect, to abolish the institution of juries, and substitute the court to try all questions of fact." In Illinois the decisions are numerous upon the subject of new trials. In *Har-*

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Badeau v. Baca.

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*ris v. Hoopner*, 44 Ill., 307, it is said the court never interfere to reverse a judgment because the verdict is not supported by the evidence, except in a clear case, never where there is no more than a doubt of the correctness of the finding.

The *Territory of New Mexico v. Webb*, *ante*, p. 147, decided at the last term of this court, was a much stronger appeal to this court to reverse the district court than the present case, and yet the court refused to do so. The rule applicable to the present case, is, perhaps, as briefly, clearly and correctly stated in Nevada as in any authority to which we have been referred. It is that "a verdict will not be set aside by the appellate court upon the ground of the insufficiency of the evidence to sustain it, when the lower court has refused to do so, unless there is such a decided preponderance of evidence against it as to create a conviction that it was the result of mistake or misconduct on the part of the jury." As to the evidence in this case, it is not material to determine whether all that was admitted by the court was competent. The testimony of the plaintiff himself shows an indebtedness greater than the amount found by the jury, and is supported by other evidence. Taking all the evidence of both parties, which was competent, the preponderance may or may not be in favor of the defendant. But we cannot say the district court erred in refusing to set aside the verdict of the jury and grant a new trial. Still less can we say that that court so far abused its discretion as to require this court to reverse its judgment. The objection that the record shows expressly that an important part of the evidence is omitted from the bill of exceptions was not insisted upon, and may briefly be disposed of. This court, in *Rosenthal v. Chisum*, 1 Gilderleeve, p. 633, has given its opinion of what is necessary to constitute a correct and proper bill of exceptions, and need not repeat it here.

The judgment of the district court is affirmed.

All concur.

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Crolot v. Maloy.

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SEFERINO CROLOT, Appellee, v. THOMAS MALOY, Appellant.

January 14, 1883.

JUSTICE OF THE PEACE. (1) *Pleadings, whether to be written or oral.*

SAME. (2) *Same, must be sufficient to make an issue.*

SAME. (3) *Same, common-law rules of, not applicable in justice's court.*

SAME. (4) *Same, what writings may form.*

SAME. (5) *Appeal from, no reversal, but trial de novo to be had in district court.*

PLEADING. (6) *General issue need not be pleaded in writing.*

JUSTICE OF THE PEACE. (7) *Pleading, affidavit in attachment held sufficient declaration.*

BILL OF PARTICULARS. (8) *When it may be asked.*

JUSTICE OF THE PEACE. (9) *Substitution of demands before.*

EVIDENCE. (10) *Jury to judge of weight and credibility.*

1. The statute, secs., 18, 23 and 86, relating to justices of the peace, Prince's Laws N. M., pp. 88, 89, 92, providing that the pleadings before a justice of the peace may be oral, and that the plaintiff's cause of action shall be entered on the docket of the justice by a brief statement thereof, is directory merely, and does not preclude the filing of written pleadings, setting out the cause of action by the the plaintiff and a denial thereof or statement of any other defense by the defendant.
2. Though strict formality is not required in pleadings before a justice of the peace and they are to be treated with great liberality with a view to substantial justice between the parties, yet the substance of an issue in some way must be formed.
3. The technical rules of common-law pleading have no application to suits before justices of the peace.
4. In such suits any allegations or indorsements in writing or accounts sued on in whatever form they may be, if sufficient to apprise the opposite party of what is intended and which would be sufficient to bar another suit for the same cause, should be considered good pleading.
5. The rule that if the plaintiff's statement of a cause of action be objected to by the defendant as insufficient in substance to constitute a cause of action, and is erroneously decided to be defective in substance, the judgment will be reversed, cannot be applied in appeals from judgments of justices of the peace in New Mexico, as, whatever may be the errors in law committed by the justice in a case of which

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Crolot v. Maloy.

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he has jurisdiction of the subject matter, on appeal to the district court, the case must be tried on its merits *de novo*.

6. No pleadings, oral or in writing, on the part of the defendant are necessary to raise an issue on the plaintiff's statement of a cause of action as the general issue will be presumed by law, and need not be formally pleaded.
7. Where no written pleadings were filed, and no entry made on the justice's docket showing that plaintiff had a cause of action, a statement in an affidavit for an attachment that the demand is a money demand for \$99 belonging to plaintiff and had and received by the defendant, is a sufficient declaration by plaintiff to warrant a trial, especially as no objection to its sufficiency was interposed by the defendant.
8. A defendant in a suit before a justice of the peace, considering himself not sufficiently apprised of the cause of action, may demur or demand a bill of particulars.
9. A plaintiff in an action before a justice of the peace for money had and received, may substitute another demand, *e. g.* a demand for work and labor done by plaintiff for defendant. And where the defendant makes no objection to the evidence introduced to support the claim for work and labor, but instead of objecting, introduces evidence in rebuttal upon that issue, he will be considered as having waived any objections he might have urged against the competency of plaintiff's evidence to sustain his original claim for money had and received.
10. It is the exclusive province of the jury to determine the weight and credibility of testimony, and their determination is not subject to review.

### Appeal from the District Court of Santa Fe county.

This is an action brought by attachment before a justice of the peace in Santa Fe county, taken from that court by appeal to the district court, said county, and thence by appeal to this court. Claim was made for ninety-nine dollars for money received by said defendant belonging to plaintiff. Judgment in district court was for full amount claimed. The plaintiff below was the only witness to sustain claim, and upon his testimony alone the truth or falsity of the existence of a just claim depended. The principal error relied upon by appellants is the failure of the court below to grant a new trial upon all the facts brought out by plain-

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Crolot v. Maloy.

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tiff, and upon the affidavit filed by defendant in support of motion for new trial.

*Conway & Risque*, for appellant.

The evidence did not sustain the claim made by plaintiff below, as no proof was given to show that defendant had received any money whatever pertaining to plaintiff.

The court should have granted a new trial. The action of the court in refusing so to do was an unsound use of its discretion, and this court has power to review such action when clearly wrong: Hibbard on New Trials, title "Surprise," p. 521, secs. 1, 3, 5, note "A," and authorities there cited; California Digest, New Trials, head "Surprise," and authorities there cited.

*Fiske & Warren*, for appellee.

The courts of justices of the peace are of special and limited jurisdiction, and have no powers except those conferred by statutes.

Sec. 19, p. 129, and sec. 38, p. 143, Revised Statutes of N. M., Prince's ed., provides for denying the truth of the affidavit in attachment in the district courts, and a separate trial upon the issue thus made, but there is no statute of the territory authorizing such issue and trial in cases before justices of the peace.

Sec. 120, p. 109, and sec. 77, p. 101 Revised Statutes N. M., Prince's ed., provides for trial *de novo* in appeals from justices of the peace to the district courts, and that in the trial in the latter court on such appeals the rules of courts of justices of the peace shall govern.

There is positive evidence in the record to support the verdict of the jury in this case, and nothing therein to show ground for setting same aside on motion for new trial. The affidavit upon which that motion was chiefly based was defective in many particulars, and notably in not stating when the witnesses who were to give the newly discovered testimony could be produced in court, or that they could ever



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be so produced: Bouvier's Law Dict., 12th ed., vol. 2, p. 222, secs. 9 and 10.

The court properly overruled the motion in arrest of judgment. This motion was made because there was "nothing in the pleading or complaint filed which would support a judgment." We submit that the record does not support that conclusion, and especially see the attachment affidavit, but if it did, it would make no difference in this case. A mere appearance in the justice's court is all that the rules or customs of that court in this territory require, and there need be no written complaint or pleadings there. The record shows that the appellant appeared before the justice.

But even if he had never appeared, the case, when taken on appeal, was governed in the district court by the rules applicable to the court of the justice of the peace: Rev. Stats., Prince's ed., p. 101, sec. 77. No complaint or pleadings in the case were required in the justice's court, and consequently none on appeal in the district court. The appellant did not, when he appeared in the district court, raise any question denying jurisdiction, but by his general appearance he waived all jurisdictional objections, and he was properly in court regardless of all matters of complaint or pleadings.

Of the authorities cited in appellant's brief, the California cases are based upon the code of that state: Revised Stats. Cal., vol. 2, p. 1000, sec. 10657 and p. 1003, sec. 10662.

Of the remaining citations, all from the American decisions: *Brown v. Frost*, 2 Bay. (S. Ca.), 126, vol. 1, p. 633, is a case treating of when the court below in the exercise of its discretion may grant a new trial. In *Ross v. Overton*, 2 Cal. Va., 309, vol. 2, pp. 552, 555, the court says, that a new trial, because the verdict was contrary to the evidence, "ought to be granted only in case of a plain deviation and not in a doubtful case, merely because the court if on the jury would have given a different verdict." In *Houston v.*

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*Gilbert*, 3 Brown (S. Ca.), p. 63, vol. 5, pp. 542, 547, the verdict was set aside because it was "unlawful," etc., requiring the defendant to find his slave at a remote place. See the case for peculiarities of the verdict.

*Eagle Bank v. Smith*, 4 Conn. 71, vol. 13, pp. 37, 38. The verdict in this case was clearly against the evidence, and was so held under a statute of Connecticut (Conn. Stats. 54, sec. 68), providing for such cases in the following language: "That the verdict is against the evidence in the cause."

*Turnbull v. Rivers*, 3 McCord (S. Ca.), 131, vol. 15, pp. 622-5. On page 625 Am. Dec., vol. 15, the court says: "The court will therefore grant a new trial *toties quoties*, where the verdict is contrary to law, and where there is no evidence on which the jury can find a verdict."

Am. Dec., vol. 20, pp. 156-8 (3 J. J. Marshall, Ky., 440). On page 158, the court says: "A new trial ought to have been granted for the foregoing reasons;" and proceeds saying, the evidence is of such a character "as to leave no reasonable excuse for doubt in an intelligent and disinterested mind." See, also, *McCarroll v. Stafford*, 24 Ark., 228; *Territory of New Mexico v. Webb*, *ante*, 147.

In Tennessee, proceedings before justices are commenced by summons which the statute of Tennessee requires, shall set out the form of action: Tenn. Code, sec. 4146. There is no provision in that code that the proof shall govern regardless of the pleadings, except in cases where one of the parties fails to appear. In such cases, the Tennessee Code provides that the justice shall "hear the allegations and proof of the" party present, "and shall render judgment thereon:" Tenn. Code, secs. 4155 and 4156.

The statute of New Mexico provides that in the absence of either party, the "justice shall proceed to hear the proofs" (not combined with the allegations, as in Tennessee) "of the

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party present, and render judgment thereon :” Rev. Stats. N. M., Prince’s ed., p. 92, sec. 35.

In Tennessee, the justice must furnish on appeal, a transcript “including the process and written evidence filed, and the entries on his docket :” Code Tenn., sec. 4164. And in the court on appeal, the “court shall allow all amendments to the form of action :” Code Tenn., sec. 4177.

This is substantially what the Statutes of New Mexico require as to transcript, but the Tenn. Code, sec. 4177, presupposes a written “form of action,” which may be amended on appeal, while the statutes of New Mexico expressly provides that “each party may plead orally :” Rev. Stats. N. M., Prince’s ed., p. 89, sec. 23.

Yet the supreme court of Tennessee say in an action in which the cause of action was stated to be “in a plea of debt that these words of a ‘plea of debt’ must be moulded to apply to accounts, assumpsit, to damages for the non-compliance with a contract or legal duty,” etc. : *Bodenhamer v. Bodenhamer*, 6 Hump. (Tenn.), 267-8.

In Illinois the statute sets out clearly and distinctly the different forms of actions to be used in justice courts, such as money had and received, goods sold and delivered, work and labor, etc. : Rev. Stats. Ill., vol. 1, p. 686. Also, that “the justice shall proceed to hear and examine the “respective allegations and proof, and shall thereupon give judgment” against the party proved to be indebted : Rev. Stats. Ill., vol. 1, p. 702.

The statutes of New Mexico are much more liberal in this respect than the statutes of Illinois, in that our statutes do not require technical causes of action to be filed, or any written mention of cause of action, but expressly provides the pleadings may be oral : Rev. Stats. N. M., Prince’s ed., p. 89, sec. 23. And in Illinois “the allegations and proof” are to determine the justice’s action (Rev. Stats. Ill., vol. 1, p. 702), while in New Mexico the rule in justice’s courts, so

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far as shown by our statutes, require the justice to be guided by the "proof" alone, regardless of the "allegations:" Rev. Stats. N. M., Prince's ed., p. 92, sec. 35.

Yet the supreme court of Illinois hold that proof alone must determine the right to recover before a justice of the peace, and "although the plaintiff or the justice might call the case ejectionment or larceny, the statute requires the court to hear the proofs, and if it makes out a case of which the justice has jurisdiction, the plaintiff is entitled to recover: *Chicago eto. R. R. v Reid*, 24 Ill., 144; *Brewster v. Grover*, 29 Ill., 248.

In Missouri the law requires it should be the "same cause of action tried on appeal that was tried before the justice," and the court says it will not consider "any technical inaccuracies as to the name of the action., whether it be for work and labor, or on account of wages, or *quantum meruit*, or on special agreement:" *Metz v. Eddy*, 21 Mo., 14, 15.

In Texas, a judgment containing nothing more than the heading of the justice's judgment, in this case was held good: *Wahrenberger v. Horan*, 18 Tex., 58.

In Mississippi, "cases brought from justice of the peace into the circuit court may be tried without any written pleadings whatever," and even "character of the party suing could be shown by evidence," that is, a party might sue in his individual capacity, and recover in a representative capacity: *Hairston v. Francher*, 7 S. & M. (Miss.), 249 and 255. "The proceedings in actions before a justice of the peace are throughout in a summary manner, without the forms of pleading:" *Thurston v. McClanahan*, 5 Mo., 521.

The pleadings in this case were oral and distinct from the attachment proceedings, and the fact that the justice noted down in his docket only the names of parties and the words "Debt No. 99," which was before the district court on appeal, is sufficient: 6 Hump. (Tenn.), 267, 268; 18 Tex., 58; 24 Ill., 144; 29 Ill., 248; 7 S. & M. (Miss.), 249, all cited

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above. And it is especially sufficient, because a failure of the justice of the peace to note down in writing oral pleadings cannot prejudice the parties: *Sinnamon v. Melbourn*, 4 Green (Iowa), 310.

Under our statute failure of the district court in that regard had the same effect as in the justice court, and no more.

But if the attachment proceedings are the pleadings, then they must all be examined to find the cause of action; that is, not the affidavit alone, but the bond, writ and citation, or, in other words, all the papers filed by plaintiff below, before the appearance of the defendant. These show a money demand, or debt due, without reference to technical forms of action, and that is sufficient under the authorities cited.

There was no surprise, because the justice law of New Mexico provides that if the pleadings are not specific enough, or, in the words of the act, if the "opposite party" require it, the plaintiff shall furnish "a bill of particulars of his demand," and "then" the justice may, on cause shown, adjourn the cause not exceeding thirty days: Rev. Stats. N. M., Prince's ed., p. 89, sec. 23. If the pleadings were not satisfactory in the justice court, or, under our statute, in the district court, he had his remedy by demanding a bill of particulars.

But, if we admit in this case:

1st. That the oral pleadings were not sufficiently stated in writing outside the attachment proceedings.

2d. That the failure of the justice of the peace or of the district court to note the oral pleadings down in writing was a fault or error which can prejudice us here.

3d. That attachment proceedings are pleadings; that being such, they state a technical cause of action, money had and received; and, notwithstanding the authorities cited to the contrary, that we were bound to prove a technical case of money had and received.

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Then we say there could be at most only a variance which was cured by the verdict. In this case, the testimony of "work and labor" was not only admitted without objection, but appellant introduced evidence to rebut it, showing conclusively that appellant was not surprised, but fully understood and acquiesced in and assented to the issue below.

On this point the supreme court of Mississippi say: "But for a variance the proper course is to exclude the proof; and no motion to that effect was made. The testimony was admitted without objection: *Stiers v. Surget*, 10 Smedes and M. (Miss.), 158.

BRISTOL, Associate Justice: This case was originally brought by the appellee, Crolot, against the appellant, Maloy, before a justice of the peace of Santa Fe county, in the first judicial district, by attachment. The amount claimed as due him from the defendant is ninety-nine dollars.

No property of the appellant seems to have been attached, but one John Faber was summoned as garnishee, who appeared and acknowledged an indebtedness to the appellant in the sum of thirteen dollars. Both parties appeared before the justice. There is no record before this court showing that any pleadings were put in before the justice by either party, either oral or otherwise, except the affidavit of appellee for attachment, stating, among other things, that the appellant, Thomas Maloy, owes him, after allowing the just credits and offsets, the sum of ninety-nine dollars, which debt arose upon money which the said Thomas received belonging to the said Seferino Crolot, and a written plea of the appellant, not traversing the affidavit as to the alleged cause of action, constituting the indebtedness, but denying the statements in the affidavit as to the specific grounds for the attachment.

A jury having been waived, the cause was tried before the

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justice, who found and entered judgment in favor of the appellee, in the sum of sixty dollars, and costs.

From this judgment an appeal was taken to the district court for the first judicial district and county of Santa Fe, where the cause was tried *de novo*, before a jury, who rendered a verdict for appellee in the sum of ninety-nine dollars, and judgment for him in that sum and costs was entered accordingly. The case is here on appeal from that judgment.

The errors assigned are: *First*. There is no evidence to sustain the plaintiff's claim. *Second*. The court below erred in overruling the motion for a new trial.

The law of this territory governing proceedings in civil actions before justices of the peace specifically provide how parties may form an issue to be tried. Section 23 of the act relating to justices of the peace, provides as follows: "Upon return of any process, each party may plead orally, but shall give a bill of particulars of his demand, if required by the justice or opposite party": Prince's ed., Laws N. M., 89.

Section 13 of the same act provides that, "every justice shall keep a docket," in which he shall enter among other things, "a brief statement of the nature of the plaintiff's demand, and the amount claimed." *Id.*, 88.

Section 36 of the same act provides for impanelling a jury to try the cause "after issue joined." *Id.*, 92.

While the statute provides that the pleadings may be oral, and that the plaintiff's cause of action shall be entered in the docket of the justice by a brief statement thereof, yet this is directory merely, and does not preclude the filing of written pleadings, setting out a cause of action by the plaintiff, and a denial thereof, or statement of any other defense by the defendant.

Though strict formality is not required in pleadings before a justice of the peace, and they are to be treated with great liberality with a view to substantial justice between the par-

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ties, yet the substance of an issue in some way must be formed: *Phillips v. Bridges*, 2 Wis. 270. The technical rules of common-law pleading can have no application to suits before justices of the peace: *Bodenhamer v. Bodenhamer*, 6 Humph., 264. In such suits, any allegations or indorsements in writing, or accounts sued on in whatever form they may be, if sufficient to apprise the opposite party of what is intended, and which would be sufficient to bar another suit for the same cause, should be considered good pleading. In the case of *Stone v. Case*, 13 Wend., 283, it was decided in effect that if the plaintiff's statement of a cause of action in a justice's court be objected to by the defendant as insufficient in substance to constitute a cause of action, and the justice decides that it is sufficient, when in fact it is defective in substance, the judgment will be reversed. But this rule cannot be applied to judgments of justices of the peace in this territory, as whatever may be the errors in law committed by the justice in a case of which he has jurisdiction of the subject matter, on appeal to the district court the case must be tried on its merits *de novo*. On such appeal, however, the rule laid down in *Stone v. Case, supra*, would apply if the defects in the declaration were not cured by amendment. As the case is to be tried *de novo* on such appeal, amendments would be allowed by the court. No pleading, oral or in writing, on the part of the defendant, is necessary to raise an issue on the plaintiff's statement of a cause of action, as the general issue will be considered as in by law, and need not be formally pleaded: *Howard v. Cobb*, 6 Ind., 5; *McHatton v. Bales*, 4 Black, 63.

There is nothing in the record before us showing that in the court below there were any allegations of the appellee on file, or any entry in the justice's docket, showing that he had a cause of action, except that already stated as a part of his affidavit for an attachment made before the justice at the inception of the suit, to wit: a money demand of ninety-nine



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dollars, belonging to the appellee, and had and received by the appellant. This, though nowhere appearing in the proceedings, except in the affidavit, was a sufficient declaration on the part of the appellee, to authorize a trial, especially as no objection to its sufficiency was interposed by the appellant. If the appellant considered that he was not sufficiently apprised of the cause of action, he might have demanded a bill of particulars under the statute, or he might have demurred.

The evidence is all made a part of the record by a bill of exceptions, and is before us.

The evidence discloses the fact that the cause of action that was really tried was a demand of ninety-nine dollars for work and labor performed by the appellee for the appellant, and at his instance and request. There is no evidence whatever to support the claim for money had and received. Is this good ground for reversing the judgment if there is sufficient evidence of work and labor performed by the appellee for the appellant, and unpaid for, to sustain the verdict, had that been the issue?

We are of the opinion that it is not. The conduct of both parties during the whole trial was such as to amount to an abandonment, by mutual consent, of the original issue as to money had and received, and to the substitution of the issue for work and labor. This might be done though there were no formal pleadings, oral or written, to that effect. The appellant raised no objection to the evidence introduced by the appellee to support the claim for work and labor, but instead, thereof, introduced evidence in rebuttal upon that issue, and no other. By this, he must be considered as having accepted that issue, and as having waived any objections he might have urged against the competency of appellee's evidence, to sustain his original claim for money had and received. It is clear, however, that had the appellant stood upon his rights and objected to such evidence as not being

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pertinent to the issue, and the same had been overruled, and the appellant forced to trial without any amendment of the pleadings, it would have been error and good ground for reversing the judgment.

The case of *Allen v. Nichols, Jr.*, 68 Ill., 250, in some respects was similar to this. The plaintiff, before a justice, sued the defendant in trover for the value of a wagon, and recovered judgment in the sum of \$40. On appeal to the circuit court, evidence of a witness was received without objection tending to show that the plaintiff, who sued as administrator of one Hiram Allen, deceased, was entitled to—not the value of the wagon sued for—but the sum of \$10, which the deceased, during his lifetime, had furnished towards paying for the wagon. The jury found a verdict in the circuit court in favor of the administrator for this \$10, instead of for the value of the wagon in trover, which would have been, at least, \$35. Judgment for the \$10 was rendered by the circuit court after overruling a motion for a new trial. On appeal to the supreme court, that court refused to disturb the judgment, as no objection had been interposed to the evidence respecting the \$10 claimed.

On this point the court said, "Where evidence is received or a witness admitted without objection, we must presume that all grounds of exception are waived, and having been waived, the party cannot afterward object."

The court, in that case, took occasion further to say that, "In a justice's court there are no pleadings, and it has been held by this court that the plaintiff is not required even to file an account in a suit before a justice of the peace; and on bringing an action in that court, if the plaintiff proves any grounds of recovery, he is entitled to a judgment, if the justice of the peace has jurisdiction of the subject matter." This general doctrine thus laid down by the supreme court of Illinois is too broad to be applied to suits before justices of the peace in this territory under our present statute,

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except in cases where evidence is introduced without objection in reference to causes of action not embraced in any pleadings, but we quote the rule established in that state to show to what extent the courts have gone in their liberal construction of pleadings and proceedings in justice's courts.

The evidence in the case now under consideration disclosing, as it does, the issue that was actually tried by the implied assent of the parties, and the same being a part of the record, the appellant is well protected against any future prosecution for the same cause. The testimony of the appellee in his own behalf, if true, is sufficient to sustain the verdict.

Such evidence is flatly contradicted by the testimony of the appellant, but it was the exclusive province of the jury to determine the weight and credibility of all the testimony. Such determination is not subject to review by this court.

The record discloses no error.

Judgment affirmed. All concur.

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**THEODORE WAGNER**, Plaintiff in Error, v. **CYRUS EATON**  
**ET AL.**, Defendants in Error.

*January 14, 1882.*

**PRACTICE, REVIEW.** (1) *Bill of exceptions not certified to contain all the evidence is not reviewable.*

**SAME, SAME.** (2) *Verdict or finding; presumption as to correctness.*

**RECORD.** (3) *Accounts, affidavits, copies of instruments sued on, how made a part of record.*

**STENOGRAPHER.** (4) *Duty of court to employ.*

**PRACTICE.** (5) *Appeals involving small sums discouraged.*

1. Where the bill of exceptions had attached to it no certificate that it contained all the evidence in the case, and referred the court to a transcript for a very important affidavit which was used on the trial as evidence but which was not incorporated in the bill of exceptions,

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the supreme court will not examine the evidence on a motion for a new trial.

2. Verdict of jury, or finding by court, presumed correct until the contrary is shown.
3. Copies of instruments sued on, copies of accounts and affidavits filed in an action at law are not parts of the record, unless embodied in the bill of exceptions.
4. To facilitate the drawing of bills of exceptions and to secure the rights of parties against errors in the evidence, each district court should have a competent reporter to take testimony in all important trials; and any want of authority there may be in existing laws to appoint and pay such officers, should be supplied by appropriate legislation.
5. The practice of the supreme court is to discourage appeals to it in cases involving small sums.

Error to District Court of San Miguel county.

The facts appear sufficiently in the opinion of the court.

*Lee & Fort*, for defendants in error.

This suit was upon a written instrument. The names and description of parties are the same as designated in said instrument. See Prince's Statutes, page 123.

A motion for a continuance is addressed to the sound discretion of the court, and there is nothing in this case to show any abuse of it.

The plea of the defendant put in issue the execution of the note, and the evidence introduced was legitimate under this issue.

The judgment is regular in every respect. We ask the judgment affirmed with damages.

PARKS, Associate Justice: In this case the plaintiff in error, Wagner, admits the execution of a note to the defendants in error for \$125, but denies that the note as executed by him was to draw interest. The interest found by the jury was \$16.67.

The errors assigned are nine in number. Before the plaintiff in error can consistently ask us to examine so many

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errors for so small an amount, he should furnish us with a correct bill of exceptions. There is no certificate to this bill of exceptions that it contains all the evidence in the case. On the contrary, we are referred in the bill itself to the transcript for a very important affidavit which was used on the trial as evidence, and is not incorporated in the bill of exceptions. The supreme court of Illinois in *McPherson v. Nelson*, 44 Freeman, say that they have "uniformly held that when the bill of exceptions fails to show that it contains all of the evidence, they will not examine the evidence on a motion for a new trial. The presumption is, until the contrary is shown, that the finding is correct and that there was evidence which may not be in the record that warranted the finding." The same court in *Garrity v. Losano et al.*, 83 Ill., 597, say: "Copies of instruments sued on; copies of accounts and affidavits filed in an action at law, are not parts of the record unless so made by being embodied in the bill of exceptions." This court has so recently expressed its concurrence with this statement of the law and practice, that it is rather remarkable that attorneys in preparing bills of exception, do not conform to it. To facilitate the drawing of bills of exception and to secure the rights of parties against errors in the evidence, each district court should have a competent reporter to take the testimony in all important trials, and any want of authority there may be in existing laws to appoint and pay such officers, should be supplied by appropriate legislation. In *Rosenthal v. Chisum*, 1 Gildersleeve, which involved about \$2,400, the court expressed its regret that owing to the defects in the bill of exceptions, it could not decide the case upon its merits. In the present case, there is not much occasion for regret. If this court had the prerogative to set aside a practice so long and so firmly established and try the case upon its merits regardless of the errors in the bill of exceptions, it would probably decline to do so.

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We are not disposed to encourage appeals to this court in cases where so little is involved.

The judgment of the district court is affirmed.

All concur.

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ESTANISLAO MONTOYA v. JOHN DONOHUE.

January 21, 1882.

PRACTICE. (1) *District court cannot order nonsuit in ejectment peremptorily against the will of plaintiff.*

DECISIONS OF U. S. SUPREME COURT. (2) *Duty of New Mexico courts to follow.*

1. An action of ejectment was brought to trial, a jury impanelled and the case opened by plaintiff's attorney, when, before any testimony was taken, the court, of its own motion, acting under the 24th section of the Practice Act of 1851 (General Laws, page 119), providing that "When any matter is pleaded by either party at any stage of the cause, within the time of pleading, it shall be the duty of the court, before the same is submitted to the jury, to consider and determine upon the sufficiency of the matter, whether excepted to or not," directed a nonsuit to be entered in said cause, and the jury to be discharged, because of a defect in the declaration.

*Held* (affirming *Herrera v. Chaves*, ante, p. 86), that the district courts could not in any case order a peremptory nonsuit against the will of the plaintiff; that the foregoing statutory provision devolved upon the court the duty of doing only what could be done on motion or objection by a party, but did not give it authority to perform any act which it could not legally do in any other case, even upon motion or objection of a party; that the defect merely rendered the declaration demurrable, and that it was the duty of the court so to determine and to order an amendment of the declaration.

2. It is the duty of the courts of New Mexico to follow the decisions of the United States supreme court, so long as New Mexico remains a territory.

Writ of error to the District Court of Bernalillo county.

This is an action of ejectment brought by plaintiff in error,

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to recover the possession of a tract of land, described in the petition as situate in precinct No. 20, Socorro county, and bounded on the north by a little hill which encloses a vega or meadow; on the east by the Rio Grande river; on the south by a "Lome Parda," and on the west by the hills.

Defendant appeared and pleaded not guilty, and took a change of venue to Bernalillo county. The cause was once tried and the jury did not agree; on coming on for trial the second time, after the jury had been sworn, and plaintiff had opened the case to the jury and before he was permitted to introduce any evidence, the court directed a nonsuit in the case on the ground of uncertainty of the description of the property as is set out in the judgment of nonsuit entered.

*Breden & Waldo* and *Catron & Thornton*, for plaintiff in error.

It is not the practice to order a nonsuit upon the opening statement of the plaintiff's counsel on the assumed insufficiency of the facts stated to recover in the action. See *Fisher v. Fisher*, 5 Wis., 472.

A "nonsuit" cannot be ordered by the court without the consent and acquiescence of the plaintiff. See *De Wolf v. Robord*, 1 Pet., 497; *Crane v. Morris*, 6 Pet., 609; *Wills v. Gaty*, 8 Mo., 685; *Boos v. Davis*, 5 Blackf., 115; *Hill v. Rucker*, 14 Ark., 709.

The description in this case is good and sufficient. In English practice it is not necessary to give any local description of the premises beyond a statement of the county in which they lay. See Taylor on Eject., 393.

All the authorities say that a general description is good unless the statutes of the state require description to be more specific: *Id.*, 6 Peters, 50.

*Conway & Risque*, for defendant in error.

There is no error in the record in this case. The court below committed no error in ordering nonsuit after plaintiff

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had opened his case to the jury and before he was permitted to introduce any evidence.

The record shows that the plaintiff did not ask for leave to amend his declaration. Defendant insists that it was proper to order a nonsuit at the stage of the cause at which it was ordered by the court below.

“Where any matter is plead by either party, at any stage of the cause, within the time of pleading, it shall be the duty of the court, before the same is submitted to the jury to consider and determine upon the sufficiency of the matter, whether excepted to or not:” Prince’s General Laws of New Mexico, p. 119, sec. 24.

Where the pleadings are so defective as to justify an arrest of judgment, the court may order the plaintiff to be nonsuited: *Mason v. Lewis*, 1 Green’s Iowa, 494.

The court may order the plaintiff to be nonsuited against his consent: *Ringgold v. Haven*, 1 Cal., 108; *Dalrymple v. Hausen*, 1 Cal., 125; *Maters v. Brown*, 1 Cal., 221.

In a clear case the judge should direct a nonsuit, though not asked to do so: *Alegro v. Duncan*, 24 How. (N. Y.), 210.

The description of the land in the declaration is so vague, indefinite and uncertain as to render the same bad. The description of the land must be such as will enable the sheriff to deliver possession after judgment: *Fenwick v. Floyd*, 1 Har. & G. (Md.), 172; *Hitchcox v. Rawson*, 14 Gratt. (Va.), 526. The premises must be described with certainty: Chitty’s Pleadings, vol. 1. p. 191.

The cases quoted by plaintiff in error, in support of his position that court cannot order a nonsuit without consent of plaintiff, are based upon the common law in the absence of a statute, and in view of the fact that we have a statute governing in such cases, as above indicated, are not in point and do not apply in this case.



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Additional points and authorities of plaintiff in error.

*First.* After a plea a defective description in a petition in ejectment is waived. A verdict may supply the description: *Bolling v. Mayor, etc.*, 3 Randolph (Va.), 573-585 (especially the remarks on page 585); *Farrow v. Farrow*, 2 J. J. Marshall, 388; *Reese v. Middleton*, 1 A. K. Marshall, 6 margin.

*Second.* General description in an action of ejectment is good: *Bardlay v. Howell*, 6 Peters, 500 and 501.

*Third.* If an objection is taken to a defective description, it must be on demurrer; after plea or verdict it is too late: *Whitney v. Buckman*, 19 Cal., 30.

*Fourth.* It is enough if the premises demanded are described in the declaration with such substantial accuracy that they can be identified by the application of the evidence to the description. As the question properly goes to the jury whether the proof is sufficient to enable them to identify the premises with those described: *Munson v. Munson*, 30 Conn., 436.

*Fifth.* The verdict may supply defects of description in the declaration: *Fisher v. Larick*, 7 S. & R. (Pa.), 101; *Hagen v. Delweiler*, 35 Pa., 413.

*Sixth.* Jury may find for a part of the land only, etc.: *Bowles v. Sharp*, 4 Belb., 550; *Little v. Bishop*, 9 B. Mon., 240.

*Seventh.* The courts take judicial notice of the local divisions of their country into counties, cities and towns, etc., and of the acts of incorporation of cities which are public. They will take notice of counties in their own territory, but not that there are other counties of the same name in other territories: 1 Greenleaf Ev., sec. 6; *Woodward's Admr's v. C. & N. W. R. R. Co.*, 21 Wis., 314, and authorities there cited.

*Eighth.* Even if the description is artificial, it is waived by joining issue, and would be cured by the verdict.

If the district judge has power to direct a nonsuit at all,

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or even dismiss a case on his own motion, that power could not be exercised when there could be a trial, a good verdict and proper judgment. After the defendant waived the defects, the pleadings were good, if they had ever been bad. We claim here they never had been bad. But if they had been and a proper verdict and judgment could be rendered, then the case had reached that stage at which there could be no defect. It would be preposterous to allow a judge to dismiss a case when he has enough before him to render a good verdict and judgment on the merits of the whole case.

The law cited does not say what the judge shall do when he looks into the pleadings. It certainly did not intend to give him a discretion to dismiss cases at his pleasure; if it did, it would be more power than any other American judge has.

If he has this discretion, then he cannot be reviewed. To say the least, he should be held to as strict rules as the defendant in objecting.

In this case there had been issue joined, afterwards a change of venue, then a trial and disagreement, and finally a jury impanelled and sworn to try the case, and plaintiff's case stated to the jury, before the judge elected to nonsuit the plaintiff.

**PRINCE, Chief Justice:** This case is brought by writ of error from the second judicial district.

It is an action of ejectment, and was originally commenced in Socorro county, where the property in question is situate, the declaration being filed October 16, 1877. The defendant pleaded, March 14th, 1878, by W. L. Rynerson, Esq., his attorney, and afterwards, on the 15th of May, 1878, interposed another plea by Messrs. Conway & Risque. Thereupon issue was joined, and the case tried before a jury, May 17, 1878, resulting in a disagreement of the jury. Having been continued on motion and affidavit at the October, 1878, term, it came up for trial again on the 15th of May, 1879.

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On that day the record shows that a jury was called and sworn, and thereafter the plaintiff's attorney, "having opened his cause to the jury, and before any testimony had been introduced, the court having examined the said declaration in said cause, and being of the opinion, and so ruling, that the same was insufficient and void, for reason of the uncertainty in the description of the premises in question, the court directed a nonsuit to be entered in said cause, and the jury to be discharged."

"To this opinion and ruling of the court, the plaintiff, by his counsel then and there objected and excepted."

The specific assignments of error are :

1. The court erred in directing a nonsuit without permitting the plaintiff to introduce any evidence.
2. The court erred in directing a nonsuit without the consent of the plaintiff.
3. The court erred in deciding on its own motion that plaintiff's petition was insufficient.

On the hearing of the appeal, quite elaborate arguments were made, and numerous authorities cited, for and against the proposition that the description of the land in the declaration was so vague and uncertain as to make the declaration defective, and, therefore, justify action in the court below.

These questions, however, are not important if the court did not in any case have the power to direct a nonsuit without the consent of the plaintiff. That question is the primary one for consideration.

The action of the court in directing the nonsuit on its own motion, after an examination of the declaration, was evidently based upon the 24th section of the Practice Act of 1851 (General Laws, p. 119), which reads as follows :

"When any matter is plead by either party, at any stage of the cause, within the time of pleading, it shall be the duty of the court, before the same is submitted to the jury,

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to consider and determine upon the sufficiency of the matter, whether excepted to or not."

In this particular case, not only had no objection been made by the defendant to the sufficiency of the declaration, but he had twice pleaded to it, and the case had been once already tried before a jury, on the pleadings so made up. The action, therefore, was entirely that of the court, as was altogether proper under this 24th section; and the question that arises is, whether the precise kind of action taken was correct under the law as existing here.

This court, at its last session, in the case of *Herrera v. Chaves, ante*, p. 86, decided that the district courts have no power in any case to order a peremptory nonsuit against the will of the plaintiff, basing that decision on the uniform rulings of the Supreme Court of the United States, in a long series of cases, from the time of *Elmore v. Grimes & Beatie*, 1 Peters, 468, to the present, and the fact that the decisions of that court are conclusive upon the courts of New Mexico so long as it remains a territory.

It was contended on the argument herein by counsel for the defendant, that the line of decisions of the Supreme Court of the United States, and that of this court, in the case of *Herrera v. Chaves, supra*, only applied to cases arising under the common law, where there was no statutory regulation, and that the section above cited from the Practice Act of 1851 gave, by direct enactment of the legislature, this power to the courts in the cases included within its scope. The precise language of that section is, "It shall be the duty of the court to consider and determine upon the sufficiency of the matter, whether excepted to or not." The intention is, we think, to give the court the power, or, rather, to devolve upon it the duty of doing certain things of its own volition, which otherwise would only be done on motion or objection by a party, but not to give it authority to perform any act which it could not legally do in any other case, even on such

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motion or objection. It means that it shall be the duty of the court to do precisely as much on its own motion as it might do were the motion made by a party, and to do it in the same way. The most natural action of the defendant, on finding the plaintiff's declaration defective, would be to demur, and we think the practical effect of this statute is to place every declaration in the same position before the court as if a demurrer had been filed against it. Whatever action the court could take, if such or any other appropriate course had been pursued by the defendant to bring in question the sufficiency of the declaration, it has the right, under that statute to take, without any suggestion or action by the defendant whatever, but no more.

Section 26 of the same act (General Laws, p. 119), says: "When legal exceptions are sustained, the opposite party shall have leave to amend." The most appropriate form of the action of the court would probably be in exact conformity with the statute, to enter its determination, that the matter in the declaration was insufficient, with leave to amend. But, at all events, it has no greater power to direct a nonsuit in such a case, against the will of the plaintiff, than in a similar case where such action is directly asked by the opposing party by motion. This case was tried long before the adjudication in this court of the case of *Herrera v. Chaves*, *supra*, and at a time when, as the record shows, even the plaintiff's counsel suggested and insisted that, for a proper cause it was correct practice at that stage of the case to direct and order a nonsuit; but this does not change the law, nor lessen the obligation of the decisions of the U. S. Supreme Court, by which we are bound so long as we are a territory. It may not be improper to add here that, were New Mexico a state, and, consequently, possessing independent power to settle its own practice, it is more than doubtful whether this court would have followed the decisions of the U. S. Supreme Court in this matter, rather than the preponderance of deci-

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sions in state courts, which conflict with it. Without considering it necessary to inquire into any of the other points involved in the case, we have to hold that it was error for the court below to direct a nonsuit against the will of the plaintiff. The judgment, therefore, is reversed, and the case remanded to the district court for a new trial.

All concur.

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THE TERRITORY OF NEW MEXICO, Appellee, v. DAVID RUDA-  
BAUGH, Appellant.

January 21, 1881.

PRACTICE ON REVIEW. (1) *Insufficient bill of exceptions.*

1. The bill of exceptions stated that the defendant excepted to an instruction asked for by himself and given by the court. It referred to the transcript for matter which was intended to be part of the bill of exceptions. It omitted to state a number of instructions which it stated were refused by the court, and such refusal excepted to by the defendant. It had, at the close of the testimony, no certificate of the judge that it contained all of the evidence.

*Held*, unnecessary to examine the case, and that, perhaps, the appeal might properly have been dismissed, but that judgment would be affirmed.

Appeal from District Court of Santa Fe county.

PARKS, Associate Justice: The appellant in this case seems to have abandoned his appeal, and as the bill of exceptions is imperfect, it may be briefly disposed of.

There is no certificate of the presiding judge at the close of the testimony that it contains all of the evidence. In the body of the bill, there is a reference to the transcript for matter which is thus intended to be made a part of the bill of exceptions.

A number of instructions which it is stated were refused

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by the court are nowhere to be found in the bill or transcript, although it is stated they were refused by the court, and such refusal excepted to by the defendant. And the defendant, as excepting to an instruction, asked for by himself and given by the court.

As we understand the case, it is not necessary to examine it further. Perhaps the court might properly have dismissed the appeal, but we deem it better to affirm the judgment.

Judgment affirmed.

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HENRY BARRUEL, Appellee, v. WILLIAM K. IRWIN, Appellant.

*January 21, 1882.*

APPEALS FROM JUSTICE OF THE PEACE. (1) *District court governed by what laws as to jurisdiction and procedure.*

REPLEVIN. (2) *Value must be stated in affidavit, or writ will be quashed: Statute requiring this not repealed.*

SAME. (3) *Omission to state value in affidavit not cured by verdict.*

DEMURRER. (4) *Rule that pleading over waives demurrer is not applicable in justice's court.*

COURT OF JUSTICE OF THE PEACE. (5) *Replevin: Plea of not guilty not presumed where not, in fact, made.*

APPEAL FROM JUSTICE. (6) *Jurisdiction of justice must appear in order to enable district court to try case de novo.*

REPLEVIN. (7) *Dismissals in, under statute.*

SAME. (8) *Dismissals for fatal irregularity in affidavit.*

SAME. (9) *Property lost or destroyed, remedy of defendant.*

1. District courts, in the trial and disposition of causes upon appeals from justices' courts, are to be governed by the same laws relating to jurisdiction, and the kind of judgments to be entered, as well as the nature of the pleadings and the modes of acquiring jurisdiction by the court of the parties and subject matters within such jurisdiction that are prescribed by law to be observed in like proceedings before justices of the peace. That is, the district court upon appeals from justices of the peace sits as a court of special and limited jurisdiction, and not of general jurisdiction.

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2. The statute required the affidavit for a writ of replevin to be issued by a justice of the peace to state the value of the goods or chattels sought to be replevied, but in a subsequent section it prescribed a form for such an affidavit, in which the statement as to value was not included.

*Held*, That the adoption of this form in the statute was not a repeal of the preceding section requiring the value to be given.

*Held*, That the affidavit for a writ of replevin before a justice of the peace must contain an averment of value in order to authorize the issuing of the writ. That such statement of value was necessary in order to show that the justice had jurisdiction, and, also, in order to estop the plaintiff from showing a different value should it become his interest to do so. And the affidavit being insufficient because it contained no statement of value, the writ should have been quashed.

3. Where the affidavit in replevin before a justice of the peace omits to state the value of the property, and is objected to for this reason, but the objection is overruled, trial had and verdict rendered, the defect in the affidavit is not cured by the verdict.
4. The rule that pleading over by a defendant to a declaration adjudged good on demurrer is a waiver by him of any right he might have had to question in the appellate court the correctness of the decision by the lower court on such demurrer, is a technical rule respecting written pleadings in a court of general jurisdiction. In an action of replevin, before a justice of the peace, a motion to quash the writ for a defect in the affidavit was made and overruled, after which the parties proceeded to trial.

*Held*, That the motion to quash was not, in effect, a demurrer, and that pleading and going to trial after the motion to quash was not a waiver of the defect in the writ.

5. Where, in an action of replevin, before a justice of the peace, no plea of not guilty was ever filed, nor, if oral, was it entered upon the docket of the justice, no such plea can be assumed to have been made.
6. On appeal from a justice of the peace, the district court has no right to proceed to trial *de novo*, without having before it a *prima facie* case showing that the justice had jurisdiction. Such jurisdiction cannot be presumed.
7. Section 53 of the act relating to justices of the peace (Gen. Laws N. M., Prince ed., 96) providing that, "If the plaintiff discontinue, suffer a nonsuit, or if he should otherwise fail to prosecute his suit to final judgment, it shall be the duty of the justice to summon a jury as hereinbefore provided, to impanel and swear the same to inquire and assess the value of the goods and chattels replevied, together with adequate damages for the detention of the same; or, if on trial of the issue joined the jury shall find for the defendant, the value of the goods and



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chattels, together with adequate damage for the detention thereof, shall be assessed by the jury, and the justice shall render judgment in favor of defendant for such value and damages so found by the jury, but, if the jury shall find that the defendant did detain such goods, and that they were the property of the plaintiff, they shall assess adequate damages for such detention," relates exclusively to actions of replevin that have been in all respects regularly and properly commenced and the statute fully complied with so that so far as the regularity of the proceedings is concerned, a trial upon the merits might have been had. It does not apply to dismissals for irregularity, *e. g.*, defect in affidavit occasioned by omission to state value of property replevied therein.

1. If the action of replevin is dismissed for an irregularity which precludes a trial upon the merits, *e. g.*, a defect in the affidavit, consisting of an omission to state the value of the property, the court is to order a return of the property to the defendant with nominal damages; but there should be no assessment of value or of damages by a jury and judgment therefor. The plaintiff is not precluded by this from bringing a new action to determine his right to the property.
2. If, during the pendency of the proceedings in replevin the property shall have been lost, destroyed, or disposed of so that no return thereof can be made, the only remedy of the defendant would seem to be either to sue on the bond, or to sue for damages for the unauthorized and unlawful taking and conversion of the property.

Appeal from the District Court of Colfax county, PRINCE, J.

This is an action of replevin brought before FRANCIS MAYLAND, a justice of the peace, in precinct No. 2, Colfax county, on the fourth day of June, 1881, by Henry Barruel, plaintiff below, against William H. Irwin, defendant below, for the recovery of a gray mare.

Plaintiff's action was based upon an affidavit made by him, that he had "good right to the possession of the following described goods and chattels, and that the same were wrongfully detained by the said William K. Irwin, one gray mare." Upon such affidavit, the justice issued his writ of replevin, the property was replevied, a trial had and a verdict and judgment rendered in favor of plaintiff, from which defendant appealed to the district court for Colfax county.

Afterwards, at the August term, A. D. 1881, of said court held in said county, the defendant filed his motion to quash

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the writ, and dismiss said cause and alleged and set forth the following reasons therefor:

*First.* It does not appear from the affidavit or otherwise, that the justice had jurisdiction to try said cause.

*Second.* No affidavit as required by law was filed by the plaintiff to authorize the issuance of the writ.

*Third.* The affidavit filed in said cause does not state the value of the property claimed.

*Fourth.* The affidavit filed does not contain any sufficient description of the property claimed.

Which motion was by the court denied, to which defendant then and there excepted.

The cause was thereupon tried by a jury in said court, and a verdict returned in favor of the plaintiff, upon which verdict the court rendered judgment for plaintiff. Defendant, by his counsel, then entered motions to arrest judgment, and for a new trial, which were denied.

He therefore brings this cause here by appeal, and relies upon the following grounds for a reversal of the judgment of the court below. viz.:

*First.* It does not appear from the affidavit or otherwise, that the justice of the peace had jurisdiction to try said cause.

*Second.* No affidavit, as required by law, was filed by the plaintiff to authorize the issuance of the writ.

*Third.* The affidavit filed in said cause, does not state the value of the property claimed.

*Fourth.* The affidavit filed does not contain any sufficient description of the property claimed.

*Frank Springer and Catron & Thornton*, for appellant.

As to the first ground of exception, it is absolutely necessary that the affidavit in an action of replevin before a justice of the peace, should set forth such a statement of facts as will clearly confer jurisdiction. Justice's courts are courts of special, limited and inferior jurisdiction, and their authority is derived wholly from the statutes, and must be

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strictly pursued: *Matlook v. Strange*, 8 Ind., 57; *Evans v. Pierce*, 3 Ill. (2 Scam.), 468; *Pendleton v. Fowler*, 6 Ark., 41; *Reeves v. Clark*, 5 Ark., 27; *Martin v. Fales*, 18 Me., 23; *Levy v. Sherman*, 6 Ark., 182; *Everett v. Clements & Thompson*, 9 Ark., 478; *Williams v. Bower*, 26 Mo., 601; *Butler et al v. Wilson*, 10 Ark., 313; *Van Bibber v. Van Bibber*, 10 Humph., 53.

As to the second ground of exception, the statute has clearly set forth what the affidavit in replevin before a justice of the peace shall contain (Prince's General Laws of New Mexico, page 95, sec. 50), and without such specific compliance with the statute, the justice has no authority to issue his writ or to proceed in any other respect in the cause. In such a proceeding he derives jurisdiction, if at all, wholly from the affidavit which is the foundation of the suit.

The jurisdiction of a justice of the peace must appear from the records of the proceedings and will not be presumed: *Reeves v. Clark*, 5 Ark., 27; *Jolley v. Foltz*, 34 Cal., 321; *Trader v. Kes*, 2 Ill. (1 Scam.), 558; *Straughan v. Inge*, 5 Ind., 157; *State v. Hartwell*, 35 Me., 129; *Lane v. Crosby*, 42 Me., 327; *State v. Hall*, 49 Me., 412; *Bridge v. Ford*, 4 Mass., 541.

As to the third ground of exception, an allegation of the value of the property is necessary to give jurisdiction to the justice. The language of the statute not only is positive, but prohibitory. It declares that no writ of replevin shall issue, unless the plaintiff, etc., shall file an affidavit with the justice, stating, etc., and stating the value of the property, and every writ of replevin issued without such affidavit shall be quashed: General Laws N. M., p. 95, sec. 50.

There is nothing in the form prescribed in the justice of the peace act in conflict with this, or which in any manner supersedes the necessity of stating value. In construing two statutes relating to the same subject, that which is positive and certain must prevail: In the matter of Watts,

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1 New Mexico, 541; Potter's Dwarries on Statutes, etc., 110, 154 and 155.

As to the fourth ground of exception, the description, "one gray mare," is too vague and indefinite. The property should be described with such particularity that a judgment in the case could be pleaded in bar in another action.

Furthermore, the value is part of the description, just as material and essential as any other; the purpose of a description is to enable the court to act in the case, to determine the propriety of the remedy sought, its jurisdiction to try; and its capacity to render a judgment. If the description fails to furnish the court with this information, it is fatally defective.

In this respect the affidavit does not comply with the form prescribed, which requires that it shall describe the goods and chattels.

Jurisdiction of courts of limited jurisdiction must appear from the record: 8 Peters, 444.

If legislature prescribes a rule, although it may be technical, the court is bound by it: 7 Wall., 310, 311.

Appearance does not waive want of jurisdiction of the subject matter: *United States v. Yates*, 6 How., 608; 29 Conn., 417; 30 Ala., 602.

*Breeden & Waldo*, for appellee.

The affidavit for replevin was sufficient, as it literally followed the form prescribed by the statute: Prince's Statutes, sec. 124, page 109; Prince's Statutes, Form, page 113.

The description of the property was sufficient, as it appears that the officer who held the writ was able to find and did find the property sought to be replevied.

A description in replevin need only to be sufficient to enable the officer to find the property and execute the writ: *Hill v. Robinson*, 16 Ark., 90; *Stevens v. Osman*, 1 Mich., 92; *Farwell v. Fox*, 18 Mich., 166.

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The defendant's objection to the affidavit came after he had appeared and pleaded and after a trial upon the merits.

It was, therefore, too late: *Brown v. Keller*, 32 Ill., 151.

A motion based upon irregularity in issuing the writs, or insufficiencies in the affidavit, comes too late after pleading to the merits. Such irregularities and insufficiencies are waived by pleading to the merits, and cured by verdict: *Frink v. Flanagan*, 6 Ill., 35; *Smith v. Emmerson*, 16 Ind., 355; *Bales v. Scott*, 26 Ind., 202.

The affidavit and writ in this case, if defective, were amendable: *Jacques v. Sanderson*, 8 Osh., 271; *Frink v. Flanagan*, 6 Ill., 35; *Perkins v. Smith*, 4 Blackford, 299; 8 Hump. (Tenn.), 697; Prince's Statutes, 119.

If the affidavit was amendable, insufficiencies and defects therein were cured by verdict: *Haverhill v. Cronin*, 4 Allen (Mass.), 141; *Robinson v. English*, 34 Pa. State, 324; *Bean v. Mitchell*, 18 Mich., 207; *Lane v. Maine M. F. Ins. Co.*, 12 Me., 44.

The defendant's motion to quash in the district court was in effect a demurrer, and the objection was waived by pleading over: *United States v. Boyd*, 5 Howard, 29; *Walkins v. United States*, 9 Wall., 762; *Beall v. Terty*, 1 New Mex., 513.

The defendant had two trials on the merits and two verdicts against him. Substantial justice having been done, the court should not disturb the judgment: *Dawson v. Wisner*, 11 Iowa, 36; *Karney v. Paisley*, 13 Iowa, 89-94; 46 Ill., 112; 47 Ill., 178; 5 Ohio, 109; 1 Peters, 183; 1 Ohio, 855.

BRISTOL, Associate Justice: This is an action of replevin originally before a justice of the peace of Colfax county, in the first judicial district, by Henry Barruel, for the recovery of the possession of a domestic animal described as a "gray mare," and for damages.

The case was tried before the justice by a jury, who ren-

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dered a verdict in favor of the appellee and against William K. Irwin, the appellant, on the main issue and for damages in the sum of five dollars.

It does not appear from the record that any formal judgment was entered by the justice on this verdict, and perhaps none was necessary for the purpose of an appeal to the district court.

The case was appealed on behalf of the appellant to the district court for that county. A trial *de novo* was held in that court before a jury, who rendered a verdict of guilty against the appellant. No value of the property replevied or damages seem to have been assessed by the jury.

The only judgment rendered by the court below was that the appellee (plaintiff below), Henry Barruel, "have and retain possession of the property heretofore replevied herein, and also that he recover of the said defendant (appellant here), William K. Irwin, his costs in this behalf expended as well as in the court below (justice's court) as in this court (the district court below) taxed at \$38.60, and that he have execution therefor." The case is here by appeal from that judgment.

The affidavit for the writ of replevin made before the justice, and on which the case was originally tried before him and on which a trial *de novo* in the court below was had, is as follows :

"HENRY BARRUEL }  
v.  
WILLIAM IRWIN. }

"The above named Henry Barruel, being duly sworn, says that he has good right to the possession of the following described goods and chattels, and that the same are wrongfully detained by the said William Irwin, one gray mare.

"HENRY BARRUEL.

"Sworn to and described before me, }  
this 4th day of June, 1881. }

"FRANCIS MAYLAND,

"Justice of the Peace Precinct No. 2, Colfax County."

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On this affidavit a writ of replevin in the usual form was issued by the justice and placed in the hands of a constable to be served.

The constable returned the writ of the justice with his written indorsement thereon as to his doings thereunder, as follows :

“ Served on the 4th day of June, 1881.

“ F. E. FRANKLIN,

“ Constable.”

The affidavit for a writ of replevin, and the writ itself with the aforesaid return of the constable indorsed thereon, being in this condition, the case was presented to the court below for trial ; but before any other proceedings therein took place, the appellant, by his attorney, appeared and interposed the following motion, viz.: “ Now comes the said defendant and moves the court to quash the writ in the above entitled cause, and to dismiss said cause for the following reasons :

“ *First.* It does not appear from the affidavit or otherwise that the justice had jurisdiction to try said cause.

“ *Second.* No affidavit as required by law was filed by the plaintiff to authorize the issuance of the writ.

“ *Third.* The affidavit filed in said cause does not state the value of the property claimed.

“ *Fourth.* The affidavit filed does not contain any sufficient description of the property claimed.”

This motion was argued by counsel for the respective parties, and after being submitted, was overruled by the court, and an exception to such ruling was taken by the appellant. After this, leave was granted for the officer to amend his return to the writ by showing service on the defendant, and taking the “ chattel described in the writ, to wit, the gray mare,” from the defendant, and delivering the same to the plaintiff before the return day of this writ. The parties then went to trial, resulting in the verdict and judgment aforesaid.

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The only question raised by the appellant is whether the overruling the motion to quash the writ by the court below, is such error as will justify this court in reversing or modifying the judgment below.

Section 77 of the act relating to justices of the peace as to appeals, provides as follows: "The case upon such appeal shall be tried *de novo*, and the same rules shall govern the district court in said trial, that are prescribed for the government of justices' courts." General Laws N. M., Prince's ed., 101. We understand from this that district courts, in the trial and disposition of causes upon appeals from justices' courts, are to be governed by the same laws relating to jurisdiction and the kind of judgments to be entered, as well as the nature of the pleadings and the modes of acquiring jurisdiction by the court, of the parties, and subject matters within such jurisdiction, that are prescribed by law to be observed in like proceedings before justices of the peace. That is, the district court, upon appeals from courts of justices of the peace, sits as a court of special and limited jurisdiction, and not of general jurisdiction.

In referring to the statutory proceedings before justices of the peace, touching the action of replevin, we find that sections 48, 49 and 50 of said act provide as follows:

Section 48. "Whenever any goods or chattels are wrongfully taken or obtained, the value of which shall not exceed one hundred dollars, an action of replevin may be brought by the person having a right to the immediate possession for the recovery thereof, and the damages sustained by reason of the unjust capture or detention, as is hereinafter specified."

Section 49. "Actions of replevin shall in all cases be commenced by a writ which shall be returnable in the same manner as a summons."

Section 50. "No writ of replevin shall issue unless the plaintiff, his agent or attorney, shall file an affidavit with the justice, stating that the goods and chattels are wrongfully



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detained by the defendant, and stating the value thereof, and that he has a right to the possession thereof; and every writ of replevin issued without such affidavit, shall be quashed at the cost of the plaintiff: *Id.*, 95.

Section 124 of the same act is as follows, viz.: "The following forms are prescribed for the use of justices of the peace in the actions mentioned, and shall be used by them in all cases:" *Id.*, 109.

After which follow various forms, and among them is a form for an affidavit for a writ of replevin, as follows:

"A. B. } In replevin before E. F., Justice of the Peace for .....  
 "C. D. } township, in ..... county.

"The above named A. B., being duly sworn, says, that he has good right to the possession of the following described goods and chattels, and that the same are wrongfully detained by the said C. D. (here describe goods and chattels.)

"Sworn to and subscribed before me, } .....  
 this.... day of ..... 18 . } *Justice of the Peace.*" *Id.*, 112.

It will be observed that in this form of affidavit, the allegation of value of the property to be replevied, required by the aforesaid section 50, is omitted.

The affidavit in this case is in pursuance of this form, and omits the averment of the value of the property.

By no rule of construction of statutes can the adoption of this form, under the circumstances, be construed as a repeal of as much of said section 50, as requires an averment of value in the affidavit. Both of these sections, with all their provisions, are still in force. There is no inconsistency or conflict between them that cannot be perfectly harmonized. The averment of value in the affidavit is as necessary now as before the adoption of the form. The provisions of said section 50 being still in force, they must be considered as controlling the form. The affidavit, therefore, among other requirements, must contain an averment of value in order to

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authorize the issuing of the writ. It is a necessary and substantial requirement, and something more than a mere technicality of the law. On general principles applicable to courts of inferior and limited jurisdiction, where nothing can be presumed to be regular, such averment in the affidavit as to the value of the property becomes a necessity in order to show that such value is within, and does not exceed the jurisdiction of the justice. Upon this ground the defendant has a right to insist upon this requirement before going to trial. He also has the right to insist upon to estop the plaintiff from attempting to show a different value, should it become his interest to do so. The statute in this respect is mandatory in its terms, and determines what the result shall be if there is any material omission in the affidavit. Replevin being a special and extraordinary remedy, the provisions of the statute must be strictly complied with: Wells on Replevin, secs. 649, 661, 662 and 664. The overruling the motion to quash the writ for insufficiency of the affidavit, was error. The affidavit was the foundation of the suit: *Id.*, 651. It is what must confer jurisdiction on the justice to entertain the suit upon appeal; it is what the district court must look to as conferring upon it the right to proceed to a trial *de novo*. The appellant interposed his objections to the sufficiency of the affidavit at the proper stage of the proceedings. They were overruled and excepted to. The questions involved relating to jurisdiction and the ruling erroneous, it became and is reversible in this court. But it is contended, on behalf of the appellee, that inasmuch as the affidavit was amendable, any defect therein was cured by verdict, and we are referred to the case of *Tug Boat, E. P. Dorr, v. Asa E. Waldron et al.*, 62 Ill., 221, as authority. That was an action brought in a court of general jurisdiction by attachment against a vessel, for supplies furnished. In the appellate court it was objected that the proceedings failed to show that the court had jurisdiction, and that the

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affidavit did not show that the supplies were furnished at the home port of the vessel, and that she was a domestic vessel.

It was held by the appellate court that as the objection was one that might have been obviated by amendment, if made in the court below, it came too late when urged for the first time in that court.

This is not an authority in this case: 1st. Because this action originated in a justice's court, where jurisdiction is never presumed, but must appear affirmatively upon the record; and 2d. The objection was properly raised in the court below and improperly overruled. It is not, therefore, urged for the first time in this court. Defects which would be fatal on demurrer on other forms of legal exception, are never cured by verdict except on the ground that the objection was not interposed at the proper time.

It is further contended on behalf of the appellee that the motion to quash was in effect a demurrer, and that the objection to the affidavit raised thereby was waived by pleading over.

The rule that pleading over by the defendant to a declaration adjudged good on demurrer is a waiver by him of any right he might have had to question in the appellate court the correctness of the decision by the lower court on such demurrer, is a technical rule respecting written pleadings in a court of general jurisdiction. This rule, in our opinion, can have no application to the question now under consideration in this case. There are no formal pleadings by either party appearing of record. The only thing indicating the appellee's cause of action is this defective affidavit for a writ of replevin. Although the statute provides for a formal plea of not guilty on the part of the defendant below (Gen. Laws N. M., Prince's ed., 96), yet no such plea was ever filed, or if oral, none was entered in the docket of the justice, and being a court of special and limited jurisdiction, no such plea by the act of the defendant can be assumed.

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The plea of the defendant was in by operation of law, if at all. His appearance in court after having raised by motion the proper objections to the sufficiency of the affidavit and the decision of the court overruling the same, cannot be considered as a pleading over and a waiver of such objections.

The court below had no right to proceed to trial before having before it a *prima facie* case showing that the justice had jurisdiction.

There is nothing upon the record showing the value of the property or the jurisdiction of the justice or of the court below. It cannot be presumed.

Amendments to the affidavit may be permitted to correct mistake and in furtherance of justice, but leave to amend rests in the sound discretion of the court, to be exercised in the first instance with caution: Wells on Replevin, sec. 665, note 6. If it is quashed, the suit is no longer pending for any purpose except to render the proper judgment in favor of the defendant: *Ibid.*, sec. 518. The question here presents itself as to what should be done and as to what kind of judgment should be rendered in case the writ is quashed and the suit dismissed on the sole ground of informality and irregularity. In consequence of such irregularity, there has been no opportunity to try the case on its merits, or in any manner to determine the question of title or right of possession. In such case no evidence of the plaintiff's title can be given, when, perhaps, if an opportunity had been afforded him, he might have been able to show by competent proof, that he was the owner of the property and entitled to its possession: *Ibid.*, sec. 47. Heretofore it may have been considered, perhaps, that sec. 53 of the act relating to justices of the peace (Gen. Laws N. M., Prince's ed., 96), prescribe the kind of judgment to be rendered in such case, and what is to be done as the basis of such judgment. That section provides as follows: \* \* \* "If the plaintiff discontinue, suffer a nonsuit, or if he should otherwise fail to prosecute his suit

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to final judgment, it shall be the duty of the justice to summon a jury as hereinbefore provided, to impanel and swear the same to inquire and assess the value of the goods and chattels replevied, together with adequate damages for the detention of the same; or if on the trial of the issue joined, the jury shall find for the defendant, the value of the goods and chattels, together with adequate damages for the detention thereof, shall be assessed by the jury, and the justice shall render judgment in favor of defendant for such value and damages so found by the jury; but if the jury shall find that the defendant did detain such goods and that they were the property of the plaintiff, they shall assess adequate damages for such detention."

This section of our statute, in our opinion, relates exclusively to actions of replevin that have been in all respects regularly and properly commenced and the statute fully complied with, so that so far as the regularity of the proceeding is concerned, a trial upon the merits might have been had. If, after a suit has been in this way regularly and properly commenced, the plaintiff on his own motion dismisses it, such action on his part may be considered as an admission by him that he has no cause of action, and that the defendant is entitled to the property. No such presumption can arise when the suit is dismissed for irregularity on motion of the defendant. We hold, therefore, that the section of the statute last aforesaid does not apply to dismissals of this kind for irregularity. In such case the court would be justified in ordering a return of the property to the defendant, with, perhaps, mere nominal damages; but there should be no assessment of value or of damages by a jury and judgment therefor: *Ibid.*, sec. 518; 35 Vt., 396; 46 Vt., 399; 15 Me., 345. This rule seems very reasonable and just.

If the suit be dismissed merely on the ground of irregularity, there being no opportunity to determine the rights of either party to the possession, the plaintiff could not be pre-

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cluded thereby from bringing a new action to determine his right thereto. If, however, upon such dismissal for irregularity, the defendant is to have the same judgment that he would be entitled to on a verdict in his favor upon a trial on the merits, very great injustice might accrue to the plaintiff. If, for instance, upon a dismissal for irregularity, judgment should be rendered in the defendant's favor for the value of the property, instead of for a return thereof to him, in accordance with the provisions of the aforesaid section 53, of the statutes, what kind of new action could the plaintiff bring to recover back the amount of the judgment or to free himself from its obligations by proving himself to be the real owner of the property? The only proper and consistent thing for the court to do under the circumstances would seem to be to follow the rule above laid down and order a return of the property to the defendant with merely nominal damages, and to award him his costs. If this is done the plaintiff will be at liberty to bring a new action for its recovery, wherein the rights of the parties might be determined. On the other hand, if during the pendency of the proceedings, the property shall have been lost, destroyed or disposed of, so that no return thereof could be made, the only remedy of the defendant would seem to be either to sue on the bond or to sue for damages for the unauthorized and unlawful taking and conversion of the property, the same as for any other unlawful taking and conversion, and wherein his right thereto, if any he had at the time, might be established by competent proof.

The judgment should be reversed and judgment in this court rendered in favor of the appellant for a return to him of the property and for his costs, but without damages.

And it is so ordered.

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Samples v. Samples.

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JOHN L. SAMPLES, Plaintiff in error, v. FRANK SAMPLES, Defendant in error.

*January 21, 1882.*

PROMISSORY NOTE—AGENCY. (1) *Collection of claims due maker of note held on payment thereof.*

1. The maker of a promissory note sent the holder of it with a power of attorney to Virginia and Kentucky to collect certain claims for money due the maker, and agreed that out of the proceeds of such collection the note was to be paid, and the excess remitted to the maker. The holder proceeded to Kentucky, whence he sent a third person on to Virginia to collect the claim of the maker of the note. That person collected more than enough to pay the note. In an action on the note by the holder against the maker, *Held*, that so far as the collection, receiving, and possession of the money obtained in Virginia, affects the rights of the maker of the note, the holder (plaintiff) and his messenger to Virginia are one; that the possession of the money by such messenger is that of the plaintiff; that whether or not the money was actually and literally applied to the payment of the note, the law so applied it, and that the note was paid.

Error to the District Court of Mora County.

The suit in this case was brought on a promissory note held by plaintiff against the defendant. The defendant plead the general issue, and on trial the court permitted the defendant to introduce evidence tending to show that at some time previous the defendant gave the plaintiff a power of attorney to collect certain moneys. That this power of attorney was a settlement of the note, or that the claims when collected were to be in settlement of the note. The court also charged the jury that defendant was entitled to be credited on the note with any sums collected under the power of attorney, and if he sacrificed any claim, then with the amount such claims were worth at the time of such sacrifice.

The defendant did not plead a set-off for the amount collected or any other special plea claiming negligence in col-

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lecting the claims. The jury gave a verdict for the defendant, and the plaintiff appeals to this court.

*C. H. Gildersleeve and Breeden & Waldo*, for plaintiff in error.

The giving of the power of attorney by defendant to plaintiff to collect claims and appropriate the proceeds to the extinguishment of the note sued on was not a payment of the note: *Jose v. Baker*, 34 Maine, 446; *Hoar v. Clute*, 15 Johnson (N. Y.), 224, and a parole release of a note not accompanied with delivery is not good, it must be under seal: *Story on Promissory Notes*, 410, and notes.

If plaintiff was guilty of negligence in the collection of these claims, then defendant could recover in an action therefor (6 Selden, 261), but cannot give proof of such negligence under the general issue, in an action by the plaintiff on the note. He must plead it specially: *Stephens on Pleading*, 161; *Gould Pleading*, 306; *Tidd's Practice*, 663, 664, and notes; *Parsons on Notes and Bills*, vol. 2, p. 619; *Brown v. Hall*, 4 Iowa, 430. *Prince's Laws of New Mexico*, pp. 119, 124, with reference to set-off, states the defendant "may plead" a set-off or counter-claim.

The only inference to be drawn from the statute and from the well settled rule of the common law is that the only way the court could possibly have admitted evidence on the trial in set-off against the note, would have been under a special plea of the defendant.

*Catron & Thornton*, for defendant in error.

The action in this case was assumpsit on a promissory note made by the defendant. Plea, general issue. The errors assigned are the admission of evidence tending to prove that the defendant gave to plaintiff a power of attorney to collect certain debts due him, with the understanding that he was to take the indebtedness due, with the power to collect it in satisfaction of the note; was to send the note to him as soon as he reached Kentucky, where the note was.



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Proof was introduced to show that the indebtedness was more than sufficient to pay the note, and that plaintiff did collect, or cause to be collected, an amount sufficient to pay this note.

Defendant insists that under the general issue any evidence tending to show that at the time the suit commenced, the defendant was not indebted to plaintiff, was competent. Under the general issue, any matter which showed that the plaintiff never had cause of action, might be given in evidence; and also that, under that plea, most matters, even in discharge of the action, and which showed that at the commencement of the suit, the plaintiff had no subsisting cause of action might be taken advantage of: 1 Chitty on Pleading, section 478 and note; Stephen on Pleading, section 162, and note.

"Under a plea of non-assumpsit may be given in evidence anything which shows there was no cause of action at the time of the action brought:" 1 Chitty on Pleading, section 478, note 2; 4 Taunton, 165; 10 Wendell, 164.

The authorities cited by plaintiff have no bearing on the case.

The reference in Stephen on Pleading, 161, is an authority under the Westminster rules, Reg. Hilary term, 4 W., 4, as is expressly shown, for the author goes on to state that prior to those rules, the practice was different. See note 20, pp. 161, 162. These rules have never been adopted in this territory, and but few of the states of the Union have ever adopted them: Stephen on Pleading, 161, note 20.

The evidence offered in this case all tended to show that at the time the suit was brought no action did exist. It showed the acceptance of the transfer of another indebtedness and power of attorney, in satisfaction of the debt, and that the debts or accounts transferred were of sufficient value to pay the note. A release or parol discharge can be given in

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evidence under this plea: 1 Chitty on Pleading, 477; 10 Wendell (N. Y.), 164.

"The authority referred to in Tidd's Practice does not sustain the plaintiff. On the contrary, that author says: "In short, the question in assumpsit upon the general issue is whether there was a subsisting debt or cause of action at the time of commencing suit." See page 646.

The case in 10 Wendell, 165, and 16 Johnson (N. Y.), 224, are both stronger cases and go further in support of defendant's position than defendant asks in the case. Not any authority cited by plaintiff supports his case except those decided under a code of practice, or in some state where the rules of Hiliary term have been adopted.

PARKS, Associate Justice: In this case the plaintiff in error sued the defendant in error on a note assigned to him by Charles Samples, the payee, which note was dated April 22, A. D. 1865, due one day after date, for the sum of \$200, bearing ten per cent. interest, and on which note \$40 was credited in June, 1876, and \$150 was credited in January, 1877.

Defendant pleaded the general issue. There was a trial by jury, verdict for defendant, and judgment against plaintiff for costs. A motion for a new trial was overruled, and the case came to this court by writ of error.

The plaintiff introduced the note and assignment thereof to him without objection. The defendant, Frank Samples, testified as follows: In the fall of 1876—in September, I think—the plaintiff, who had the note, came to this county to make a settlement with me. I had some money coming to me in Virginia, and a brother of mine in Kentucky owed me fifty dollars, and I gave the plaintiff a power of attorney to go to Virginia and collect what was due me, and, after taking out the amount of the note, to send me the balance. There was near six hundred dollars due me in Virginia from

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my brothers', father's and grandfather's estate. I gave plaintiff power of attorney to receive this, and also fifty dollars due me by my brother in Kentucky. It was understood that the power of attorney paid the note sued on, and plaintiff was to send me what was over, together with the note. It was understood the power of attorney paid the note sued, and the plaintiff was to go to Virginia and collect the money coming to me there. Plaintiff had no authority to sell my claim and interest.

On cross-examination, plaintiff testified that:

It was understood the power of attorney settled the note; the plaintiff was to go to Virginia and collect the money and send me what was over. The plaintiff distinctly agreed that the power of attorney should pay and settle the note. The note was not delivered to me because plaintiff said it was then in Missouri; he was to send it to me. Plaintiff afterwards wrote to me that he went as far as Kentucky, was taken sick, and sold out my interest for the pitiful sum of \$250. He wanted me to pay the balance of the note, but I refused, because the note was paid by the power of attorney. At the time I gave the power of attorney, I was solvent and able to pay my debts and acknowledged that I owed the note in question. I was not to pay the plaintiff for going to Virginia. I do not remember whether or not I agreed to pay part of his expenses. He was to send me what he collected in excess of the amount of the note.

This testimony of the defendant is uncontradicted, and as the plaintiff did not offer himself as a witness and did not produce the power of attorney, there is no reason why entire credit should not be given to the statement of the defendant.

The only other evidence which it is material to notice is that W. P. Samples, by whom it is proved that S. G. Samples collected in Virginia, on the power of attorney, \$465, that being more than the amount of the note. From this evidence, it appears:

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1st. That there was no sale of the power of attorney to S. G. Samples, the alleged sale being unauthorized and void, and having been repudiated by the defendant as soon as he heard of it.

2d. That whether the plaintiff, John L. Samples, was authorized by the power of attorney to appoint any one to go to Virginia and get the money or not, yet as a matter of fact, he did do so.

3d. That said agent or messenger received or collected, of the moneys belonging to the defendant in Virginia and which by the agreement between the plaintiff and defendant was to be appropriated to pay the note sued on, an amount amply sufficient to pay it.

The question before this court is, briefly, whether the verdict of the jury is so clearly wrong that it is our duty to reverse the verdict of the district court in refusing to set it aside and grant a new trial. We cannot say that it is.

On the contrary, we think the better opinion is, that so far as the collection, receiving and possession of the money obtained by S. G. Samples in Virginia affects the rights of the defendant in this suit, the plaintiff and his said messenger or agent are one that the possession of this money by the agent is the possession of the plaintiff, that whether the money was actually and literally applied to the payment of the note or not, the law so applied it and the note was paid.

As to the question of pleading raised by this record, we think the evidence was properly admitted under the general issue, and as the instructions did not mislead the jury it is not necessary to discuss them. The judgment of the court below is affirmed.

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 Lamy v. Remuson.
 

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JOHN B. LAMY, Plaintiff in error, v. LUCIEN REMUSON, Defendant in error.

*January 30, 1882.*

REPLEVIN. (1) *Presumption as to execution of writ.*

SAME. (2) *Affidavit of plaintiff, evidence of value.*

FRACTION. (3) *Correction of erroneous orders after continuance.*

REPLEVIN. (4) *Abandonment of action by plaintiff, proceedings, and judgment of court upon.*

1. It is the duty of the plaintiff in replevin to know, before he compels the defendant to plead, what has been done with the writ and the property, and where a plaintiff sues out a writ of replevin, and on his motion the defendant is ruled to plead, and does plead to the merits, and the case is continued to the next term of the court without any question being raised by the plaintiff as to the whereabouts of the writ or the status of the property, till the final act of the court in assessing the value of the property, these acts by the plaintiff raise a strong presumption in the court below that the writ has been fully executed, and that the property is replevied and is in plaintiff's possession. In the supreme court this presumption under such circumstances will be conclusive.
2. The affidavit of the plaintiff as to the value of the property in suing out the writ is competent but not conclusive evidence of that value in any trial of that issue as against the plaintiff.
3. A case having been continued and remaining upon the docket for disposition next term, the court has the right to correct any erroneous orders previously made in such case, there having been no trial, verdict, or judgment in it.
4. Where plaintiff by dismissal abandons his suit in replevin, the court may retain the cause for the benefit of the defendant, and as against plaintiff and in favor of the defendant, the court may assess the damages and the value of the property, and render judgment therefor in defendant's favor. Such an assessment of the damages and the value of the property is not an invasion of the constitutional right of trial by jury.

Error to the District Court of Rio Arriba county, PRINCE, J.

This is an action of replevin brought by plaintiff in the district court for the county of Rio Arriba, first judicial dis-

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Samples v. Samples.

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1st. That there was no sale of the power of attorney to S. G. Samples, the alleged sale being unauthorized and void, and having been repudiated by the defendant as soon as he heard of it.

2d. That whether the plaintiff, John L. Samples, was authorized by the power of attorney to appoint any one to go to Virginia and get the money or not, yet as a matter of fact, he did do so.

3d. That said agent or messenger received or collected, of the moneys belonging to the defendant in Virginia and which by the agreement between the plaintiff and defendant was to be appropriated to pay the note sued on, an amount amply sufficient to pay it.

The question before this court is, briefly, whether the verdict of the jury is so clearly wrong that it is our duty to reverse the verdict of the district court in refusing to set it aside and grant a new trial. We cannot say that it is.

On the contrary, we think the better opinion is, that so far as the collection, receiving and possession of the money obtained by S. G. Samples in Virginia affects the rights of the defendant in this suit, the plaintiff and his said messenger or agent are one that the possession of this money by the agent is the possession of the plaintiff, that whether the money was actually and literally applied to the payment of the note or not, the law so applied it and the note was paid.

As to the question of pleading raised by this record, we think the evidence was properly admitted under the general issue, and as the instructions did not mislead the jury it is not necessary to discuss them. The judgment of the court below is affirmed.

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Lamy v. Remuson.

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JOHN B. LAMY, Plaintiff in error, v. LUCIEN REMUSON, Defendant in error.

*January 30, 1882.*

REPLEVIN. (1) *Presumption as to execution of writ.*

SAME. (2) *Affidavit of plaintiff, evidence of value.*

PRACTICE. (3) *Correction of erroneous orders after continuance.*

REPLEVIN. (4) *Abandonment of action by plaintiff, proceedings, and judgment of court upon.*

- 1 It is the duty of the plaintiff in replevin to know, before he compels the defendant to plead, what has been done with the writ and the property, and where a plaintiff sues out a writ of replevin, and on his motion the defendant is ruled to plead, and does plead to the merits, and the case is continued to the next term of the court without any question being raised by the plaintiff as to the whereabouts of the writ or the status of the property, till the final act of the court in assessing the value of the property, these acts by the plaintiff raise a strong presumption in the court below that the writ has been fully executed, and that the property is replevied and is in plaintiff's possession. In the supreme court this presumption under such circumstances will be conclusive.
- 2 The affidavit of the plaintiff as to the value of the property in suing out the writ is competent but not conclusive evidence of that value in any trial of that issue as against the plaintiff.
- 3 A case having been continued and remaining upon the docket for disposition next term, the court has the right to correct any erroneous orders previously made in such case, there having been no trial, verdict, or judgment in it.
- 4 Where plaintiff by dismissal abandons his suit in replevin, the court may retain the cause for the benefit of the defendant, and as against plaintiff and in favor of the defendant, the court may assess the damages and the value of the property, and render judgment therefor in defendant's favor. Such an assessment of the damages and the value of the property is not an invasion of the constitutional right of trial by jury.

Error to the District Court of Rio Arriba county, PRINCE, J.

This is an action of replevin brought by plaintiff in the district court for the county of Rio Arriba, first judicial dis-

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*Lamy v. Remuson.*

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The amendment was proper. The assessment by the court was proper. The affidavit of plaintiff was competent evidence.

There is no error, and the judgment should be affirmed.

PARKS, Associate Justice: This court cannot discuss at length all the questions raised before it by assignment of errors or otherwise. In the present case a brief ruling is all that is necessary. Upon the record the court holds:

1st. The writ of replevin sued out in this case by the plaintiff was his suit, and to a very considerable extent under his control. The primary object was the possession of the property in dispute. It was the duty of the plaintiff to know, before he compelled the defendant to plead, what had been done with the writ and the property. On his motion the defendant was ruled to plead, and did plead, to the merits. The case was continued to the next term of the court, and no question was raised by him as to the whereabouts of the writ or the status of the property, till the final act of the court in assessing the value of the property. These acts on the part of the plaintiff raised a strong presumption in the court below that the writ had been fully executed and the property replevied and in his possession. In this court such presumption under the circumstances is conclusive.

2d. That the affidavit of the plaintiff to the value of the property, in suing out the writ is competent, but not conclusive evidence of that value in any trial of that issue as against the plaintiff.

3d. That the case having been continued, and remaining on the docket for disposition at the next term, the court had the right to correct any erroneous order previously made in the case, there having been no trial or verdict of a jury, or judgment upon such trial or verdict.

4th. The question of the right of the court to assess the value of the property or the damages, is the only one of which



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*Lamy v. Remuson.*

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we have had any doubt. But the weight of the decisions in the states upon similar statutes is in the affirmative. The supreme court of Illinois, more than twenty years ago, decided that statutes conferring upon courts the right to fix the value of the property and assess the damages in replevin were not an invasion of the constitutional right of trial by jury. And the supreme court of Iowa, upon a statute very similar to ours, has held that, where upon plaintiff's motion, an action of replevin has been dismissed and is again reinstated on defendant's motion, for the assessment of the damages, the plaintiff is treated as a party in default, and cannot demand a jury.

In this case, we think there was no error in the court's fixing the value of the property or assessing the damages, for in the record those expressions are used interchangeably. It is also to be considered that a reversal in this case could not benefit the plaintiff. The judgment against him is only \$200, the value of the property fixed by himself in his affidavit, and on a new trial he would be estopped from proving any less sum.

We also call the attention of the attorneys to the fact that the bill of exceptions herein is materially defective, as is so often the case, and that we might affirm the judgment on that account alone.

The judgment of the district court is affirmed.

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Territory of New Mexico v. Maxwell.

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THE TERRITORY OF NEW MEXICO, Appellee, v. GEORGE W.  
MAXWELL, Appellant.

January 30, 1882.

JURY. (1) *Finding by, not disturbed.*

EMBEZZLEMENT. (2) *Indictment need not state purpose for which accused received money.*

SAME. (3) *Accused need not have received money from some one other than principal.*

SAME. (4) *What relation must be shown between accused and his principal.*

SAME. (5) *Money need not be specifically described.*

COMMON LAW. (6) *What is not, as to embezzlement.*

1. The jury are the judges of the weight and credibility of evidence, and where there is a conflict of testimony, their finding will not be disturbed if sustained by any testimony.
2. An indictment for embezzlement need not state the object for which the money embezzled was originally received by the accused.
3. Under the statute of New Mexico (Gen. Laws, sec. 22, page 268) relating to embezzlement and providing that "If any officer, etc., shall embezzle or fraudulently convert to his own use any money or property of another, which shall have come to his possession or shall be under his care, by virtue of such employment, he shall be deemed," etc., it is not necessary to show, in order to convict of embezzlement, that the money was received by the defendant from some one on account of the defendant's principal, and not from such principal directly. There is no limitation in the statute of New Mexico as to the manner of the money coming into the possession or control of the accused, nor as to the person from whom it may so come to him.
4. To sustain an indictment for embezzlement it is enough if the relation between the accused and his principal be shown to have been the relation of principal and agent. He need not have been technically the "clerk" or "servant" of the principal.
5. In an indictment for embezzling money it is not necessary specifically to describe each particular coin or bill embezzled. All that is required is the best description which the circumstances will permit, both in the indictment and upon the trial.
6. The act of parliament passed in 1799 (39 Geo. III.) relating to embezzlement and the decisions of courts construing it, are not part of the common law of New Mexico.

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Territory of New Mexico v. Maxwell.

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Appeal from District Court of Doña Ana county, BERTRAM, J.

At the November term, A. D. 1877, of the district court, Doña Ana county, the appellant was indicted for the crime of embezzlement, and was tried at the June, A. D. 1878, term of said court, and convicted and sentenced to pay a fine of \$500 and costs of prosecution.

The testimony adduced at the trial shows that appellant was intrusted with \$10,000 in money, the property of one Mrs. Daily (afterwards Mrs. Rea). That said Mrs. Daily was, at the time she gave the money to appellant, a partner in business (general merchandise) with appellant; that said money was originally given to appellant by his said partner to loan out at interest; that said money was so loaned out to different parties by appellant, and finally was loaned by appellant to the firm of "G. W. Maxwell & Co.," which said firm was composed of said appellant and Mrs. Daily; that the money was never paid back by appellant to Mrs. Daily, except the sum of \$1,060—the balance of the said \$10,000 was expended in paying the debts of said copartnership; that appellant on August 17, 1877, rendered an account of this money to Mrs. Daily, showing the amounts he had expended on her account and the balance still due her; that upon the dissolution of said company, appellant turned over to Mrs. Daily all the property and effects of said company, valued at about \$31,000, and Mrs. Daily was to pay the debts due by the company, which amounted to some \$16,000.

———, for appellant.

*First.* The indictment charges that the money was received in the name and for the account of Mrs. Daily.

The testimony shows receipt of money with directions to be loaned at interest.

*Second.* The indictment does not prescribe any particular article alleged to have been embezzled, sufficiently: *State v.*

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Territory of New Mexico v. Maxwell

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*Edson*, 10 Louisiana "A," 228; *People v. Cox*, 40 Cal., 277; Russell on Crime, 185.

*Third.* The proofs show the money was loaned to a partnership and in effect paid back, and only shows bad judgment, and at most a breach of trust, but not embezzlement.

*Fourth.* The indictment does not show the object for which the money was received by the defendant: 2 Russell on Crimes, 195.

*Fifth.* Proofs do not show the conversion of any single article by description, which does not establish embezzlement: Russell on Crimes, 184, 186.

*Sixth.* The proofs show that defendant made no concealment, but shows that defendant admitted loaning money to the partnership, alleging a right in himself to so do. This is not embezzlement: Fisher's Dig. Crim. Law, 119; Roscoe Crim. Ev., 416, 402.

*Seventh.* Proofs show that the money was received by defendant from his principal direct, and not from some one else for and on her account, which cannot be embezzlement: *King v. Howe*, Fisher's Dig., 119; Russell on Crimes, 166, 180; 2 Bishop Crim. Law, 352.

*W. L. Rynerson and William Breeden*, for appellee.

Upon all the points and propositions of fact relied upon for the defense, there was a conflict of evidence, which the jury passed upon, and it is not competent for this court to review the finding or attempt to settle conflicts of evidence, or the credibility of witnesses.

As to first point of appellant. The evidence shows that the money was intrusted to the defendant for a certain purpose. If he appropriated or converted it to his own use, he was guilty of embezzlement: Compiled Laws of New Mexico, sec. 23, p. 334.

Further, the evidence shows that the defendant loaned the money intrusted to him to Barela and others, and that he afterwards received the same from these parties for and on

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account of Mrs. Daily (Rea), which would make the conversion of the same to his own use embezzlement under the common law definition and under our statute: Compiled Laws of N. M., sec. 22, p. 334.

The description in the indictment of the property embezzled is sufficient, as is also the description in the evidence; it was money, and could not be more accurately described: Archibold's Crim. Pleading, 60, 330.

In the concealment and accounting by defendant there is a conflict of evidence which was purely a matter for the jury to determine.

There was sufficient to show and to authorize the jury to find that the defendant received ten thousand dollars from the witness, Mrs. Daily, and that he never returned or repaid it to her, although required so to do. This would make embezzlement under section 23, above cited, of our statute.

And also that he received the money for and on account of Mrs. Daily, from Barela and others, which money was never in her hands or possession, and that the defendant has never paid over the same to Mrs. Daily, although she demanded it of him. This would be embezzlement under the strict common-law definition, and under section 22 of our statute.

The questions involved are matters of fact which it was the province of the jury to determine, and which the jury did determine. This court cannot undertake the trial of the cause upon the evidence, or review the finding of the jury upon conflicting evidence.

PRINCE, Chief Justice: This is a case of embezzlement arising in the third district court, and brought here by appeal.

The defendant was indicted by the grand jury of Doña Ana county, on the 16th day of November, 1877, the indictment setting out that the said Maxwell, on the first day of May, 1877, being then and there employed as agent and

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servant of and to Mariacita O. Daily, did, by virtue of his said employment, and while he was so employed, as aforesaid, receive and take into his possession certain money, to wit, etc. (giving seven different descriptions), of the value of \$10,000, for and in the name and on the account of the said Mariacita O. Daily, his principal and employer, and the said money \* \* then and there fraudulently and feloniously did embezzle and convert to his own use, he, the said G. W. Maxwell, not then and there being an apprentice, nor a person under the legal age of sixteen years, and so, etc., "said money, notes and coin, the property of the M. O. Daily, his said principal and employer, from the said M. O. Daily, unlawfully did steal, take and carry away."

On the next day the defendant interposed a demurrer to the indictment, giving as causes thereof, the following, substantially:

1. That the money or property is not described with sufficient particularity.
2. That it is not set out specifically.
3. There should be a description of both number and denomination of both coin and notes.

This demurrer was overruled by the court, on the nineteenth of November, and thereupon the defendant pleaded "not guilty." The trial then proceeded, and on the twenty-first, the jury rendered a verdict of guilty, and assessed the judgment at a fine of \$500.

Thereupon a motion in arrest of judgment was interposed, which was overruled. Judgment was pronounced in accordance with the verdict, and the defendant appealed to this court.

The appellant made his argument on seven points, which appear on his brief, and which we will consider separately, so far as their nature will permit.

The first and the sixth points may be disposed of together, as in each case there was evidence adduced, as to the truth

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of which the jury were the sole judges, sufficient to support the verdict. The first point is that, while "the indictment charges that the money was received in the name and for the account of Mrs. Daily," the testimony shows receipt of money with directions to be loaned at interest. As matter of fact there is evidence from defendant himself, as well as from other witnesses, that the greater part, if not all, of the precise money which defendant is charged with embezzling, was received directly from Lesinsky, Barela & Co.; that it was so received "for the account of Mrs. Daily," and so literally "in the name" of that lady; that two of the receipts put in evidence are signed, "Mariacita Daily, pr G. W. Maxwell." The jury had the right to believe this evidence, if satisfied of its truth.

The sixth point is: "The proofs show that defendant made no concealment, but shows that defendant admitted loaning money to the partnership, alleging a right in himself to so do. This is not embezzlement." Without commenting on this proposition as matter of law, it is sufficient to say that there is much in the evidence for which the jury could conclude, if so disposed, that the reverse of the above statement of fact, was, as to concealment, the case. For example, Mrs. Daily, in her evidence, says: "He always told me it was on interest; it was loaned. \* \* \* Two days before August I asked him where the money was. He told me, 'part in the safe, and part was loaned out at interest' Two days thereafter, he said it was in the company, etc., and again, on the day of the dissolution, he said it was with Lesinsky, Schultz & Barela and in the safe." It is such a well established rule as scarcely to require repetition, that, when there is competent evidence, the jury are the judges of its credibility, and the weight to be attached to it.

From the evidence before them, the jury in this case had a right to believe, if satisfied of its truth, that the defendants made these statements as to the money being loaned out

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long after that money, or the most of it, had come back into his possession, and when they were palpably false. The same right of the jury to decide as to questions of fact covers the subject of the fifth point also.

The fourth point is that "the indictment does not show the object for which the money was received by the defendant." One authority only is cited as showing the necessity for such an allegation in the indictment, and that is 2 Russell on Crimes, 195. On examination, this authority will not be found to apply to our statute at all. The case there cited was one brought under the English statute 7 and 8 George IV. C. 29, sec. 49 of that statute provided, among other things, that if any chattel, etc., shall be intrusted to any banker, etc., "for safe custody," it should be a misdemeanor, etc. In the case of *Rex v. Mason* (D. & R. N., p. 22), in which the defendant was the proprietor of what was called a weekly savings bank, but which was in reality a kind of lottery, the indictment charged under the statute that the defendant had received the money of the plaintiff "for safe custody." The judge held that "there did not seem to be any such keeping for safe custody as was contemplated by the statute. It will be observed that the point in this case was that the object for which the money was received was wrongly stated, not that it was not stated at all; and at all events, it could have no bearing on an indictment under our statute, which does not refer in any way to the object of the reception.

This brings us to the consideration of the two subjects of most importance and apparent difficulty involved in the case.

The first of these is that raised in the seventh point of the appellant's, which reads as follows:

"Proofs show that the money was received by defendant from his principal direct, and not from some one else for and on her account—which cannot be embezzlement."

Many cases are cited (and they might have been multi-



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plied indefinitely) in which it has been held, to use the language of Roscoe, that "the chattel, money or valuable security embezzled by the prisoner must be such as has not come to the possession of his master—if it has come to his possession, the offense is larceny and not embezzlement:" Roscoe Cr. Ev., 445; *Luck v. Smith*, Russ. & Ry., 267; *R. v. Peck*, 2 Russ. Crimes, 180; *Com. v. Berry*, 99 Mass., 428; *Com. v. O'Malley*, 97 Mass., 584; *Com. v. Davis*, 104 Mass., 548; *U. S. v. Hulchanson*, Whart. Prac., 461, and many cases cited in 2 Bishop on Criminal Law, 352.

The cases go so far even as to apply this principle to money received by one clerk from another in the same employ, because the latter was the agent of the owner: *John Murray's Case*, C. C., 275; 5 C. & P., 145.

These authorities would be of much weight, and no doubt might control the determination of this court, if the statutes under which they were promulgated were the same as ours. But in reality the statutes differ in exactly the essential particular required to make those decisions authorities with us.

In both the English Statutes of 39 Geo. III, c. 85, and 7 and 8 Geo. IV, c. 20, the wording is as follows:

"If any clerk or servant, etc., shall, by virtue of such employment receive or take into his possession any chattel, money or valuable security for, or in the name, or on the account of his master," etc.

The recent act of 24 and 25 Victoria, c. 96, in the corresponding section (68), while differing in some other particulars from the older statutes, preserves this same language, that portion of the section reading as follows: "Whosoever being a clerk, etc., shall fraudulently embezzle any chattel, money or valuable security, which shall be delivered to, or received, or taken into possession by him, for, or in the name, or on the account of his master, or employee," etc. In Massachusetts and many other states this language was followed, and all the decisions which make it essential that the property,

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money embezzled should have been received from some or other than the employer, will be found to have been pronounced under such statutes. And under these circumstances they are undoubtedly correct as this language, "for or in the name or on the account of," certainly implies that the articles are received for some third party.

But in the law under which we are acting, these words are not employed. In many ways our statute is broader than those which we have quoted, and this is one of the most important of those respects. The wording here is (sec. 22, p. 268, Gen. Laws), "If any officer, etc., shall embezzle, or fraudulently convert to his own use any money or property of another which shall have come to his possession, or shall be under his care by virtue of his employment, he shall be deemed," etc.

There is no limitation as to the manner of the coming to his possession, or under his control, or the person from whom they may so come. This widens the scope of the law very much, and renders the decisions, made under the more restrictive language of the older statutes entirely inapplicable. This we could hold from the very nature of the language employed, and the difference obviously made by the omission of the old restrictive clause without the need of any previous adjudication on the subject; but for those who think that precedent in such cases is of specially great importance, we have also the benefit of previous decisions, rendered under statutes analagous to our own. Thus, in New York the statutory language is as follows: "If any clerk, etc., shall embezzle and convert to his own use, or take, make away with, or secrete, with intent to embezzle or convert to his own use, without the assent of his master or employers, any money, goods, rights in action, or other valuable security, or effects whatever, belonging to any other person, which shall have come into his possession or under his care, by virtue of such employment or office, he shall be, etc.:" 2 R. S. of

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N. Y., 678, sec. 59. Under this law, Judge Cowan, in rendering the decision in the case of *People v. Dalton*, 15 Wendell, 581, said, "The statute is intended to provide for a fraudulent conversion of money or goods by a servant when they are delivered to him as such, either by his master or mistress, or in their behalf by a stranger. That was but a breach of trust at common law, because the money or goods came to his hands by delivery. The statute intended to convert such a breach of trust into a crime."

In Alabama, the language of the statute on this subject, is almost identical with our own. It reads: "Any officer, etc., who embezzles or fraudulently converts to his own use, any property of another, which has come into his possession by virtue of his employment, must on conviction," etc.: Alabama Code, sec. 3143. The court of that state in a case in which a clerk was indicted for embezzling a bill of exchange which came into his possession from that of his employer, says: "The language of this section is much more comprehensive than either of the English statutes. It embraces and provides punishment for every case of embezzlement of property of another, which has come into the possession of the clerk or agent by virtue of his employment." "The case is within the very letter of the statute," and Judge Stone, in his opinion of the case, draws very clearly the distinction between the decisions under the English analogous statutes and those whose scope has been enlarged, as those in New York and Alabama, and we may add, New Mexico. He says: "The words in the English statutes 'for, or in the name or on account of, his master,' show clearly that the money, goods, etc., to come within those statutes, must have been taken or received from some person other than the master and employer. To say that a clerk received or took goods, etc., from his employer, for, or in the name or on the account of said employer would be palpable solecism. We think the English decisions upon their statutes are manifestly

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correct. Our statute contains no such clause as that copied and commented on above:" *Lowenthal v. State*, 32 Ala., 589.

We have dwelt to this extent on this topic because the point was raised and argued at some length on the hearing in this case, and is of such importance that it did not seem proper to pass it by without disposing of it. If, however, our statute had been similar to that of England, we think there was no error in this regard in this particular case, as there was evidence to prove that the money, or, at least, the greater part thereof, with the embezzling which the defendant is charged in this case, was received by him from various persons other than Mrs. Daily, that is to say, from Messrs. Lesinsky, Barela & Schultz. The fact that the amount represented by the sums received by the defendant from these parties had originally come from Mrs. Daily, even if that was absolutely established, would not affect the case, as the question under the English statutes is as to the person for whom the precise and identical money embezzled was obtained. In one well known case, for example, upon an indictment for stealing a £5 note and certain silver coin, it appeared that the prisoner's master gave him the £5 note to get change; this he did, saying that his master had sent him and that the change was for him. He never returned to his master, however. The judges, on a case reserved, held that as it was the silver which had been taken and not the £5 note, and as the silver had never been in the possession of the master, it was a case of embezzlement under the statute of 39 Geo. III, and not stealing: *Rees v. Sullins*, R. & M. C. C. R., 129; and several analagous cases are cited by Wharton (sec. 1013) as *R. v. Winnall*, 5 Cox C. C., 326; *R. v. Reena*, 11 *Ibid.*, 123; *R. v. Gale*, 13 *Ibid.*, 340, etc.

Before proceeding to the consideration of the points relative to the description of the property, we will allude to one other subject which was commented on to some extent in the

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argument, that is, that the necessary relation between the defendant and the owner of the property was not charged or made out by proof in this case so as to bring it within the definition of embezzlement. We refer to this here because the answer to the object we thus raised is substantially the same as that to the question just discussed, viz.: that the statute of this territory is much broader in its language than those under which the law quoted to us on the subject was promulgated. The English statute from 39 Geo. III. to 25 Victoria, confine the operations of the law to "any servant or clerk or person employed for the purpose or in the capacity of a servant or clerk," and an enormous amount of time and erudition have been employed during the last century in discussion as to the exact definition of these terms "servant" and "clerk," and as to those who were properly to be considered within or excluded from those classes. The text books are full of refinements on this subject, and the cases cited show that an almost infinite variety of questions have arisen with regard to it. See 2 Russell, 168 to 180; Wharton, sec. 1011 to 1020; 2 Archibold, 449-454, side paging, etc.

But we are saved from difficulty as to this point by the introduction in our statute (sec. 22, p. 268, General Laws) of the word "agent," which greatly enlarged the application of the law, and makes unquestionable its bearing on many cases which might otherwise be doubtful. While it might be seriously questioned whether a person intrusted with one business affair for another or performing some one act without remuneration, is a servant, there can generally be no such doubt as to his falling under the definition of an agent; and at all events on the state of facts as developed in this case, there can be no such doubt.

In speaking of the effect of the introduction into the statutes of this word "agents," Mr. Wharton, whose views as to the crime of embezzlement are generally more technical and contracted than those of other writers on the subject, says:

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"As used in the Massachusetts statutes, the term 'agents' is much wider in its signification than 'servants' or 'clerks;' the latter are restricted to the performante of specific acts in a specific way; the former may or may not be restricted, and may, in fact, be clothed with full powers to represent their principal with the same discretion as he might exercise himself." 1 Wharton's Crim. Law, sec. 1022, and referring to *Com. v. Young*, 9 Gray, 5, and *Com. v. Libbey*, 11 Met., 64.

There can be no doubt that the defendant acted as the agent of Mrs. Daily in the transactions which form the basis of this indictment and trial. His own evidence is to that effect, and in the receipt signed by him across the face of the \$6,000 note dated Apr. 20, 1877, he uses that precise term, the signature being "Mariacita Daily per G. W. Maxwell, Agt."

This brings us to what is, perhaps, the most important of the objections raised by the defense to the validity of the indictment and correctness of the judgment, those presented in the second and fifth points. The second point is: "The indictment does not describe any particular article alleged to have been embezzled sufficiently." The fifth point is: "Proofs do not show the conversion of any single article by description, which does not establish embèzzlement." For convenience of consideration we will group these two together, as they both relate to the lack of particular description of the property embezzled or any part of it.

On this subject we were referred by counsel to a large number of authorities, and the investigation of the question which seemed necessary for its satisfactory determination, has involved the examination of many more. The indictment in this case charges the defendant with embezzlement of ten thousand dollars, and this is set up in various forms, viz.: As \$10,000 in United States currency (commonly called greenbacks); \$10,000 in United States national currency notes; \$10,000 in United States fractional currency notes; \$10,000

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in gold coin of the coinage of the United States of America ; \$10,000 in silver coin of the coinage of the United States of America ; \$10,000 in gold coin of the coinage of the Republic of Mexico, and \$10,000 of silver coin of the coinage of the Republic of Mexico ; each being alleged to be of the value of \$10,000. It is obvious then that the property charged to have been embezzled was money. Several of the authorities which are cited do not bear directly on the point, because they refer to the embezzlement of chattels, articles other than money, and it is so obvious that a rule of description which might with justice and propriety be enforced as to an ordinary chattel, might not necessarily apply equally to money, either in specie or the usual circulatory paper currency.

The first of these authorities is, *State v. Edson*, 10 Louisiana Annual Repts., 229. In this case, the articles alleged to have been embezzled were "a certain lot of furniture of the value of \$400, with a certain lot of lumber of the value of \$150, and with certain tools, commonly called cabinet-maker's tools, of the value of \$250."

The court decided that the property was not described with legal certainty: "The indictment should have set out specifically, at least one article of the property embezzled." The rule as to such articles and the reason of it, are so well set forth in this decision, that we copy the clause on that subject, especially as it is the rule which the defendant and appellant herein insists should be applied to money as well as ordinary chattels.

The court says, "the rule applicable to indictments for embezzlement, as well as to indictments for larceny, is, that the goods stolen or embezzled should be described, at least in part, with such a certainty as will enable the jury to decide whether the chattel proved to have been stolen or embezzled is the very same with that upon which the indictment was founded, and show judicially to the court that it could have

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been the subject matter of the offense charged, and enable the defendant to plead his acquittal or conviction to a subsequent indictment to the same chattel." The next case cited, that of *Stewart v. The Commonwealth*, 4 S. & R. (Pa.), 193, relates to promissory notes. The *State v. Thomas*, 2 McCord, 527, has no special application, a new trial being granted on account of the omission of certain words (not of description) in the indictment, and because the value of a pocketbook was not proven; the real reason as stated by the court being that there were "circumstances which call on the court to exercise a humane discretion," the penalty for the crime (grand larceny, second offense), then being death in South Carolina. The case of *State v. Stinson*, 24 N. J. Law, 22, is a more important authority, and while it involves at least two questions other than that under discussion, viz.: the lack of any allegation of value of the bank notes alleged to have been embezzled, and the attempted introduction into the case of a "promissory note" which the court decided was not within the words or meaning of the statute, yet in other respects it is a good authority for the appellant, so far as any decision of a state court is authority here. It was brought, however, under a special modern statute, directed solely against the officers and agents of incorporated banks of the state of New Jersey (N. J. Revised Statutes, 125), and is quite technical in its provisions. While so far as it touches on this point, it favors the appellant's view, yet we cannot consider it of itself a controlling authority for New Mexico. These are all of the authorities specially quoted, all being American; and we will now consider the law as produced to us from the best books and the cases cited therein. The books referred to in appellant's brief are, Bishop's Cr. Law; Bishop's Cr. Prac. and Roscoe's Cr. Evidence, with the English decisions therein quoted. These at first sight, all seem to uphold the theory of the appellant, that the indictment must specially describe, and the evidence identify at



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least some one part of the articles charged to have been embezzled. Thus Bishop in his Criminal Law (p. 358) says, "the indictment under the statute must set out specifically some article of the property embezzled;" an allegation, that the prisoner "took and received divers sums of money, amounting in the whole to a large sum of money, to wit, the sum of £10, and afterwards embezzled the same, not being sufficient:" *Rea v. Flowers*, 5 B. & C., 736; *Rea v. Freeman*, Russ. & Ryan, 335. "In other words, the indictment must describe according to the fact, some of the identical goods or money. So the evidence must establish the embezzlement of the specific articles described:" *Rea v. Tyers*, Russell & Ryan, 402.

In the case of *Rea v. McGregor* (2 East. P. C., 576), the reason of this particularity is stated as follows: "For that the new offense created by the act of parliament being a larceny, it must be described in the indictment as such, and with all the properties of a larceny." Roscoe says (Criminal Evidence, 447), "It was held upon the statute of 39 Geo. III., that the indictment ought to set out specifically some article of the property embezzled, and that the evidence should support that statement. Therefore, where the indictment charged that the prisoner embezzled the sum of one pound, eleven shillings, and it did not appear whether the sum was paid by a one pound note, and eleven shillings in silver, or by two notes of one pound each, or by a two pound note, and change given to the prisoner, on a case reserved, the judges were of opinion that the indictment ought to set out specifically, at least, some articles of the property embezzled, and that the evidence should support the statement, and they held the conviction wrong" (quoting the cases of *Freeman* and *Tyer*, *supra*).

The reason of this rule in case of chattels is of course obvious. They should be so described in the indictment that the defendant will be thereby informed with precision

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as to the offense with which he is charged, and so proved on the trial as to be identified as the same mentioned in the indictment. It is also proper, in order to afford the defendant an opportunity to prove, if afterwards accused of the same offense, that he has previously being tried therefor. This reasoning applies equally to money, either in specie or current bills, whenever they can be described; but with regard to them a peculiar difficulty arises, which does not exist in ordinary larceny.

In larceny, by the legal theory, the accused takes some article of personal property out of the possession of the owner. The owner consequently is acquainted with the article, and able to give a description of it. But in embezzlement, as a rule, the article taken had never been in the actual possession of the owner, and he therefore has not the means of accurate description which he would otherwise possess. In case of the embezzlement of a chattel, some kind of description fairly accurate, can usually be obtained from the person from whose possession it came to the accused, and in case of a large number of chattels, some one or more, at all events, can be described with sufficient accuracy. But with money, the case is different. After the lapse of a little time, it would be a rare case indeed, in which the third party from whom it was received and who had no special cause or inducement for recollection, could describe the exact bills or pieces of specie which composed it. This is more especially the case at present in this country, where the natural currency is uniform in appearance, instead of presenting the great variety of designs which distinguished bank bills previous to the establishment of the National Bank system, and where the coin does not present even the variety produced in other countries by the change in the monarch's head on the obverse in each succeeding reign.

Even in England, and as long ago as 1827, the impossibility of describing embezzled money in such a way as to

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meet the requirements of the law as laid down in the cases cited by the appellants, was so obvious, that the statute 7 and 8 Geo. IV., chap. 29, was passed to remedy the difficulty. Section 48 of that statute provided that, "In every such indictment, except where the offense shall relate to any chattel, it shall be sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed, shall not be proved."

Similar statutes to this have since been passed in nearly all the states of our union, and of course obviate the difficulty of which we are speaking; so that in the more recent writings on criminal law, little is said of the questions which arose under the older and more imperfect form of enactment. But our statutes do not contain this provision, and hence it is claimed by the appellant, that we are bound by the rules and decisions promulgated in England, previous to the statute of Geo. IV., as part of the common law.

To ascertain if this is correct, we must examine briefly the history of the law of embezzlement. Unlike many branches of criminal law, it is purely statutory. No part of it came down from any remote antiquity or was any part of the common law. It is made up of additions to the common law of larceny, enacted at various times in order to meet classes of criminality which arose in the changing condition of society, and were not embraced within the scope of the definitions or adjudged limits of larceny. The first of these statutes is 8 Henry VIII., chap. 7, passed in 1517, which recites, "That before this time divers as well noblemen, as other the king's subjects, had, upon confidence and trust, delivered unto their servants, their caskets, safely to keep to the use of their said masters or mistresses, and after

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such delivery the said servants had withdrawn themselves, and gone away from their said masters, or mistresses, with the said caskets, jewels, money, goods and chattels, or part thereof, to the intent to steal the same," etc., and thereupon enacts, "That if the said caskets, jewels, money, goods or chattels, that any such servant shall go away with, or which he shall imbezil, with purpose to steal it, as is aforesaid, be of the value of 40 shillings, or above, that then the same false, fraudulent and untrue act and demeanor, from thenceforth shall be deemed and adjudged felony": 1 Hawkins, P. O., 188. The recital here shows the special occasion of the enactment and the subsequent ones were passed on like necessity. The next of these statutes enacted in 1589, provided that any one having charge "of the king's armour, ordnance, or munition," and embezzling the same, should be guilty of a felony: 31 Eliz., ch. 4. The next, passed in 1610, related to persons employed in various manufacturing occupations, who should embezzle any of the materials with which they were entrusted: 7 Jac. I., chap. 7. The next statute was directed against lodgers who "imbezilled or purloined" the furniture of their lodgings: 3 and 4 W & M., chap. 9.

Thus there were various statutes passed at considerable intervals to meet special cases, but none of a general nature until the 39 Geo. III, ch. 85, which may be said to be the first that caused embezzlement to be raised to the rank of a separate crime. The provisions of the previous statutes will be found in the older books under the head of "Simple Larceny" (Hawkins' Pleas of the Crown, p. 134).

All of the English decisions to which we have alluded as being referred to by the appellant herein as authority to show what the common-law doctrine was with regard to this crime, were under this statute of 39 Geo. III; and the language of the text books which we have quoted was based on those decisions. But the 39th year of Geo. III was long

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after the date of the independence of the United States, in 1776, which is the latest period, according to the most liberal view, that the law, as held in England, was of any authority here, or composed part of that common law which became the legal heritage of the American people. Neither the act of 1799 (39 Geo. III), nor any decisions under it, could have any binding force here, and can only be held in the same esteem with which we regard the adjudication of other foreign tribunals of weight and respectability.

In settling, therefore, what should be the practice in this territory, in cases arising under our statute relative to embezzlement, we are, fortunately, not confined by decisions and precedents which might prove far from applicable to our circumstances, or suited to our times. It is obvious that in a case like that now under discussion it would be practically impossible ever to indict or ever to convict if it were necessary to describe specifically the money embezzled, and prove its identity on trial. Even if the doctrine contended for had been fixed as part of the common law of England prior to 1776, it is very questionable whether, over a hundred years after, under entirely changed conditions, it would have been incumbent on us to submit to the imposition of rules which would have made the administration of justice and the punishment of crime, so far as this offense is concerned, impossible.

In laying the foundations for a future practice, on what is comparatively virgin soil, we have a right, we think, to regard the circumstances of the age and the locality to some extent, and, at any rate, to preserve sufficient independence for self-protection. It could not be good law, we believe, to impose on a people by whom it has never before been recognized, and among whom it has no claim to authority, by usage or precedent, as common law, that which would require an impossibility as essential to the enforcement of their criminal statute.

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We hold, then, that all that is to be required in cases of embezzlement, under our law, is the best description which the circumstances will permit, both in the indictment and and upon the trial.

We quote here as singularly appropriate a few words from the concluding remarks of Mr. Bishop, on this particular crime:

"As we leave this subject, let us bear in our minds that embezzlement is merely a statutory offense, not an offense at the common law, and that the statutes creating it differ somewhat in their terms. \* \* \* Let us remember that we are now upon a branch of the law not very thoroughly considered in our books, and not as yet expanded by judicial decision to its ultimate and complete proportions \* \* \* and that we merely respect the modern English adjudications, but do not seriously follow them. \* \* \* The legal difficulty is to know, and state in the indictment what particular coin or bank notes are embezzled. This difficulty merely runs the question into one of pleading, and we may observe that a court departs from its duty when it does not allow some form of pleading to cover every form of offense known in the law. \* \* \* The law of embezzlement is not so firmly fixed in the adjudications of any one of our states as to render improper a fresh examination of it by the judges, in the light of our judicial science, and in the experience of past imperfection and present necessities, as well as of actual judicial decision:" 2 Bish. Cr. Law, 366 to 370.

The judgment of the court below is affirmed.

All concur.

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PHILIP HOLZMAN, Plaintiff in Error, v. FELIX MARTINEZ,  
Defendant in Error.

*February 1, 1882.*

PRACTICE. (1) *Appearance to move to quash writ of attachment for irregularity, not general, but special.*

SAME. (2) *Forthcoming bond in attachment not a general appearance or waiver of irregularities.*

ATTACHMENT. (3) *Effect of forthcoming bond.*

PRACTICE. (4) *Judgment by default assumes no appearance to have been made.*

SAME. (5) *When judgments nū dicet and on ground of non-appearance should be rendered.*

SAME. (6) *Judgment by default, what necessary to authorize in attachment.*

ATTACHMENT. (7) *Power of probate clerks to issue writs of.*

PRACTICE. (8) *Service of copy of declaration.*

SAME. (9) *Attachment, service of writ.*

SAME. (10) *Service of writ and copy of declaration must precede judgment in personam.*

SAME. (11) *Attachment, writ returnable on impossible day and term.*

1. When a party appears for the purpose of making a motion for irregularity in a writ of attachment, and states specifically in the motion that he appears for that purpose and no other, it is a special and not a general appearance.
2. A bond given by the owner of property attached to the sheriff for the purpose of enabling the owner to keep possession of the property, is not a waiver by such owner (defendant in the attachment suit) of all preceding irregularities in such suit, and does not operate as a general appearance by him for all purposes.
3. Under the statute, the giving of a forthcoming bond in attachment does not release the property from the attachment lien. It simply constitutes the defendant in attachment the bailee of the sheriff for the safe keeping of the property and for its return to the sheriff in case the plaintiff shall recover, and in default of which the liability of the bond attaches to the defendant and his sureties.
4. A court which renders judgment by default against a defendant does so on the assumption that there has been no appearance by the defendant.
5. If there has been a general appearance by the defendant, it is irregular to proceed to assess damages and enter judgment before first

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entering a rule to plead and showing non-compliance with it, and in such a case judgment *nil dicet* instead of for non-appearance, is the proper proceeding.

6. In case the defendant does not appear, it is always incumbent on the court before proceeding in the cause, to see that the preliminary proceedings have been so far regular and sufficient as to confer not only jurisdiction of the subject matter of the suit, but also of the person of the defendant. In an attachment case this is to be determined by the affidavit and bond for an attachment, the writ with the officer's doings thereunder as shown by his return, the declaration and service of a copy thereof, and the authority of the officer issuing the writ.
7. *Quaere*, whether the statutory authority conferred upon probate clerks to entertain applications for and to issue writs of attachment returnable to the district court, does not repeal so many positive requirements of the law previously existing in relation to authenticating the writ and approving the bond in attachment as to render such authority of probate clerks exceedingly doubtful and impracticable.
8. In case of personal service of process, a copy of the declaration must be served on defendant before the court can treat the defendant as in default.
9. The service of a writ of attachment is never complete without also serving the petition or other lawful statement of the cause of action.
10. Where there is nothing before the court in an attachment proceeding to show that the writ has ever been served on the defendant or that the declaration or other statement or notice of the cause of action was ever served on him, the court has no authority to render judgment *in personam* against him.
11. A writ of attachment was in September, 1880, issued and made returnable "at the next March term, 1880."

*Held*, That the writ of attachment having been made returnable on a day and to a term of court then past, such writ was returnable to an impossible day and term. That all proceedings under it were void, and that the defendant need not have paid any attention to it, even if it had been served.

PRINCE, C. J., dissented, holding that "1880" had been written in the writ by clerical error, and that the word "next" made it sufficiently apparent that "1881" was intended, and that such day and term were not impossible.

Error to the District Court for San Miguel county.

This is an action of assumpsit in which a writ of attachment was issued by the probate clerk of San Miguel county, on the declaration, affidavit and bond being filed with him.



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The writ of attachment is in the Spanish language, and is directed to the alguacil (constable) of the county of San Miguel. It commanded him to attach of the goods, chattels, moneys, effects, credits, etc., of Philip Holzman sufficient to pay the sum of \$2,000, in order that it be and appear before the district court in and for the county of San Miguel at the next March term, 1880, before the Honorable L. Bradford Prince, to answer a suit of Felix Martinez; also commanding him to summon said Philip Holzman to appear before the said judge at the time and place aforesaid and answer to the action of the plaintiff.

The writ was dated the twenty-first day of September, A. D. 1880, being the same date on which declaration, affidavit and bond were filed with the said probate clerk.

The writ was also signed and issued by said probate clerk.

Said writ of attachment nowhere states any amount of damages claimed, or what kind of action was brought by Martinez against Holzman.

There is nothing in the writ or indorsed on it to show whether it was an action *ex contractu* or *ex delicto*. It has no indorsement whatsoever of the nature or cause of action or the amount of damages claimed.

The said writ itself is made returnable at no time or place, but directs the property attached to be produced at a term six months previous to the date of the writ, and that the defendant Holzman be summoned to appear before the Hon. L. Bradford Prince at the same time.

The only indorsement on said writ is made by Desiderio Romero, sheriff, by Jose D. Romero, deputy. This indorsement is claimed to be the return of the sheriff of San Miguel county as to his manner of serving said writ, and states that he served the order, having attached property sufficient to cover the debt, as the inventory shows, which property remained in the possession of the defendant, he having given

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bond to retain possession of the same. This return is dated the day of September, 1880.

Said return does not show that the property attached belonged to Holzman, or that the writ was served on Holzman.

The declaration does not ask for any judgment, and is nowhere referred to in the writ.

The declaration is indorsed, "Filed Sept. 21, 1880, Jesus Ma Tafoya, P. clerk."

The affidavit is indorsed in the same manner.

The bond is indorsed "Filed at my office, Sept. 21, 1880, Jesus Ma Tafoya. P. clerk."

The bond has no particular date, but purports to be on the blank day of September, 1880, and there is no acknowledgment by its makers, or any justification of sureties indorsed thereon, and it does not show that the sureties thereon are residents of the territory of New Mexico.

The writ appears to have been filed by the sheriff of San Miguel county on the twenty-second day of January, 1881. On the eighth day of March, 1881, Felix Martinez, by his attorney, filed in the clerk's office of the district court the declaration, affidavit and attachment bond included in the record; the same in no way showing that they were filed or returned by the probate clerk for the county of San Miguel, and were not filed on or before the first day of the court to which they were made returnable in the body of said writ, nor on or before the first day of the next succeeding term of the district court for the county of San Miguel, after said twenty-first day of September, 1880.

The record does not show why the said papers were not filed on or before the first day of the court in which they were made returnable, or the first day of the March term, 1881, and shows no leave to file the same.

On the ninth day of March, the defendant appeared specially for the purposes of his motion and no other, and moved

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to quash the writ for the reasons therein stated, which said motion is included in the record.

On the fifteenth day of March, 1881, the court rendered judgment, overruling this motion, and, afterwards, the court attempted to enter a judgment by default against the defendant, and thereafter, on the eighteenth day of March, 1881, the court, after hearing proofs in behalf of the plaintiff, assessed his damages in the sum of \$2,000, and gave judgment in favor of said Martinez and against said Holzman for this sum.

*Louis Sulzbacher and Catron & Thornton* for plaintiff in error.

The probate clerk has no authority to issue any process instead of the clerk of the district court: R. S. of U. S., sec. 1871.

All suits in the district court must be commenced by filing a declaration in the office of the clerk of the court, and upon so doing the clerk shall issue the summons to the defendant: Prince's New Mexico Statutes, secs. 54 and 55, p. 122, act of 1878.

Said writ should have been directed to the defendant: *Id.*

The writ directed to the constable is void: *Id.*, also sec. 2, p. 527, also sec. 7, p. 137.

A writ returnable to an impossible day, or an impossible term, is void: *Holliday v. Cooper*, 3 Mo., 286.

The summons must state the time of holding the court at which the defendant is summoned to appear: *Thompson v. Bishop*, 24 Texas, 302; *Neill et al. v. Brown*, 11 Texas, 17; *Covington v. Burleson*, 28 Texas, 368; *Wright v. Wilmot*, 22 Texas, 398.

A wrong or impossible date for the return of the writ renders the same void: *Holliday v. Cooper*, 3 Mo., 286.

A valid writ or summons should specify the nature of the action, and a particular day on which it is returnable: *Bouvier's Law Dict.* (Title Summons), vol 2, p. 559; *Viner's*

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Abridgment (Title Summons); Blackstone Commentaries, book 3, p. 279; Bacon's Abridgment (Title Summons).

Every writ of summons returnable to the district court shall be issued by the clerk of the district court, and shall have a brief statement of the cause of action, nature of the suit, the amount of the damages claimed, and for what demand the suit is brought: 4 Prince's Statutes, sec. 55, p. 122; *Id.*, chap. 29, sec. 1, p. 131; *Howell et al v. Hallott*, 1 Minn., p. 102; *Stone v. Cordell*, 8 Western Law Jour., 79; Prince's Stats. of New Mex., sec. 42, p. 140, showing that writs of probate clerks must conform to writs of the district clerks.

Persons must be summoned to appear before the court, and not before the judge. A valid writ must have the seal of the district court affixed: Prince's Statutes of New Mex., sec. 3, p. 116; *Foss v. Isett*, 4 G. Green (Iowa), 76; *Shaffer v. Sundwall et al*, 33 Iowa, 579; *Fross v. Schlumpff*, 2 Texas, 522; *Boal v. King*, 6 Ohio, 11; *Smith v. Affanasieffe*, 2 Rich (S. C.), 334.

It must appear by the officer's return, that the property seized belonged to the defendant, otherwise, the attachment is void. Also that the summons was served on defendant as an ordinary citation: *Mason et al v. Anderson*, 3 Monroe, 293; *Anderson v. Scott*, 2 Mo., 15; *Clay v. Neilson*, 5 Randolph, 592; 1 Prince's Statutes of New Mex., sec. 9, p. 139.

When there has been no service on defendant, the judgment is a nullity: *Parker v. Jennings*, 26 Ga. 140.

An insufficient bond renders the attachment void. To make a valid bond, it must appear that the sureties were residents of the county, and acknowledged the bond: *Simonds v. Parker*, 42 Mass., 508; *Moore v. Parker*, 3 Mass., 310; Drake on Attachment, sec. 117; *Houston v. Belcher*, 12 Smedes and Marshall, 514; *Tyson v. Hamer*, 2 Howard (Miss.), 669; *Bank of Alabama v. Fitzpatrick*, 4 Hum-

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phrey, 311; Prince's Statutes of New Mexico, Act of 1874, sec. 44, p. 144; *Id.*, sec. 5, p. 136.

A writ is a nullity when made returnable to a wrong or impossible day or term; nothing can be done by virtue of it, nor can it be amended: *Dame v. Fales*, 3 N. H., 70; *Parsons v. Lloyd*, 3 Wilson, 341; 2 Wm. Blackstone, 845; *Bun v. Thomas & King*, 2 Johns., 190; *Burk v. Barnard*, 4 Johns., 309; *Shirley v. Wright*, 2 L. Raym., 775; *Green v. Rivet*, 2 L. Raym., 772; *Mills v. Bond*, 1 Strange, 399.

The affidavit should also state on what account the sum claimed is owing: *Sullivan v. Fugate*, 1 Heiskell, 22; *Moneyhan v. Tarter*, 1 *Ibid.*, 20; *Stewart v. Mitchell*, 10 *Ibid.*, 489; *Rumbough v. White*, 11 *Ibid.*, 261; *Johnson v. Luckadoo*, 12 *Ibid.*, 273; *Willey v. Riorden*, 2 Bax., 227; *Rickman v. Gest*, 1 Sneed, 297.

In actions of attachment begun before the clerk of the probate court, all the papers pertaining thereto shall be returned to the district court on or before the first day of the next term (Prince's Statutes of New Mexico, sec. 23, p. 140), otherwise the proceedings will be invalid.

A statute authorizing proceedings by attachment, must be strictly construed and strictly pursued: *Planters' Bank of Tennessee v. Byrns*, 3 La Ann., 687; *Shirley, Escott & Co. v. Owners of Stmr. Bride*, 5 *Ibid.*, 260; *City of New Orleans v. Garland*, 11 *Ibid.*, 438; *May v. Baker*, 15 Ill., 89; *Pool v. Webster*, 3 Metc. (Ky.), 278; *Wilkie v. Jones*, 1 Morr. (Iowa), 97; *Wooster v. McGee*, 1 Texas, 17; *Humphrey v. Wood*, Wright (Ohio), 566; *Buckley v. Lowry*, 2 Mich., 418; *Mo Pherson v. Snowden*, 19 Md., 197; *Chevalier v. H. H. Williams & Co.*, 2 Texas, 243.

The plaintiff should set forth the nature of the relief sought (Prince's Statutes of New Mex., sec. 22, p. 118), and ask for some sort of judgment, otherwise the court can grant no relief, nor render any judgment in his behalf whatever.

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*Lee & Fort*, for defendant in error.

In the attachment proceedings below, as appears in the record, the writ in the suit was levied upon certain goods by Desiderio Romero, sheriff of San Miguel county, as the property of the defendant in attachment, and thereupon the defendant, Philip Holzman, made and executed to Desiderio Romero, sheriff of said county, a delivery or forthcoming bond, and the property attached was redelivered to him. We hold that by making and executing the bond, the defendant, Philip Holzman, entered an appearance in the suit, and thereby waived all objections to the irregularities in the attachment proceedings: *Dierolf v. Winterfield*, 24 Wis., 143; *Childress v. Fowler*, 9 Ark., 159; *Gillespie v. Clark*, 1 Tenn., 2; *Harper v. Bell*, 2 Bebb., 221; *People v. Cameron*, 7 Ill., 468; *Fife v. Clark*, 3 McCord., 347; *Reynolds v. Jordan*, 19 Ga., 436; *Wharton v. Conger*, 9 Sm. & M., 510; *Barry v. Foyles*, 1 Peters, 311; *Payne v. Snell*, 3 Missouri, 409; *McMillan v. Dana*, 18 Cal., 339; *Blyles v. Kline*, 64 Penn., 130; *Whiting v. Budd*, 5 Missouri, 443; *Evans v. King*, 7 Missouri, 411; *McGee v. Collow*, 4 Cranch, 251; *Shields v. Borden*, 6 Ark., 459; *Morrison v. Alpine*, 23 Ark., 136; *McCroy v. Austin*, 9 Louisiana, 360; *Paddock v. Mathews*, 3 Mich., 18; *Swan v. Cameron*, 2 Gillm., 468; *Pixley v. Winshell*, 17 Cow., 366; Drake on Attachments, pp. 318 and 480.

The defendant moved to quash the writ in the attachment proceedings. We hold that such a motion is an appearance in the cause, whether he was served with process or not, and it is so held in *Whiting v. Budd*, 5 Mo., 443; *Evans v. King*, 7 Mo., 411; 15 Ind., 194; *Swan v. Cameron*, 2 Gillm., 468.

Therefore, while it is not admitted that the proceedings are irregular or void in any particular, yet it is claimed that even if they are, the plaintiff in error is estopped from rais-

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ing any question in regard to such irregularities, and therefore the judgment should be affirmed.

*Louis Sulebacher* and *Catron & Thornton*, in reply:

The giving of a bond under our statutes is no appearance in court and no waiver of irregularities: *Childress v. Fowler*, 9 Ark., 174, 175; *Coplinger v. Steamboat*, 14 Ind., 48; *Glidden v. Packard*, 28 Cal., 649; *Clark v. Bryan*, 16 Mo., 171; *Billin v. White*, 15 La., 624.

A motion to quash the writ is only a special appearance, and a special appearance is only an appearance for the purposes specified in the motion and cannot confer jurisdiction: *Camp v. Tibbetts*, 2 E. D. Smith (N. Y.), 20; *Uye v. Liscomb*, 21 Pickering (Mass.), 263; *Ames v. Winsor*, 36 Mass., 247; *Simcock v. First National Bank*, 14 Ks., 529.

Persons being in presence of the court do not authorize a judgment to be rendered against them unless they have been brought in by legal means: *Jones v. Kenny*, Hardin (Ky.), 103.

The following steps are held not to constitute an appearance: Indorsing an admission of service on a summons: *National Bank v. Rogers*, 12 Minn., 529. Giving bail after arrest under bail process: *Lanneau v. Erwin*, 12 Richardson, (S. O.), 31. Giving a bond by third parties to dissolve an attachment; *Clark v. Bryan*, 16 Mo., 171. Giving an attachment bond in a suit *in rem* in order to get possession of a seized vessel, and taking deposition: *Coplinger v. Steamboat*, 14 Ind., 48. Giving notice of a motion to dissolve an attachment where there had been no personal service: *Glidden v. Packard*, 28 Cal., 649. Making a motion to quash: *Ferguson v. Ross*, 5 Ark., 517; *Girch v. Jeter*, 5 Ark., 383; *Wheeler v. Lampman*, 14 Johnson, 480. Applications raising the question of jurisdiction are no appearance: *Huff v. Shepard*, 17 Post, Mo., 242; *Smith's Administrator v. Rollins*, 25 Mo., 408; 8 U. S. Digest, Action; *Abbott v. Semple*, 25 Ill., 107; *Flake v. Carson*, 33 Ill., 518; *Campbell v.*

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*Swasey*, 12 Ind., 70; *Allen v. Lee*, 6 Wis., 478. A defendant's special appearance to object to the jurisdiction does not cure the defect: *Hodges v. Brett*, 4 Green (Iowa), 845; *Milburn v. Fouts*, *Ibid.*, 346; *Olmer v. Hiatt*, *Ibid.*, 439. An appearance for the purpose of moving to quash the writ for want of jurisdiction or insufficiency of service, will not subject the party so appearing to the jurisdiction of the court: *Johnson v. Buell*, 26 Ill., 66; *Weil v. Loewenthal*, 10 Iowa, 575. Defects apparent on record may be taken advantage of by motion: *Simonds v. Parker*, 42 Mass., 508; *Willey & Kelly v. Riorden & Ward*, 2 Baxter, 227; *Fingley v. Pate-man*, 10 Mass., 343; *Guild v. Richardson*, 6 Pickering, 364. A motion to quash is to be examined on error: 3 Ala., 57; 2 Baxter, 228; Drake on Attachment, 312, 327, 422; 7 Howard (Miss.), 505.

We therefore ask that the judgment of the district court refusing to quash the writ, be reversed.

BRISTOL, Associate Justice: On the 21st day of Sept., 1880, Felix Martinez, the defendant in error, before one Jesus M. Tafoya, the then probate clerk of said county, made an affidavit for an attachment against the property of Philip Holzman, the plaintiff in error, to secure a debt claimed to be due in the sum of \$2,000. The affidavit contains no statement as to the cause or grounds of the indebtedness.

On the same day the said Tafoya, as such clerk of the probate court, issued under his official signature and the seal of said probate court, a writ of attachment directed to the constable of said county, commanding him to attach sufficient of the goods, chattels and estate of the plaintiff in error, to pay the said sum of \$2,000 with interest and costs. The writ was made returnable to the next March term of said district court for the year 1880.

On the 22d day of January, 1881, the sheriff of said county filed said writ in the office of the clerk of said district court



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with the return of his doings thereunder, indorsed thereon as follows:

"I certify that I have served this order, having attached property sufficient to cover the debt, as the inventory shows, which property remained in possession of the defendant, having given bond to retain possession of the same. Done this day of Sept., 1880.

"DESIDERIO ROMERO, *Sheriff*.

"By JOSE D. ROMERO, *Deputy*."

On the said 22d day of January, 1881, said sheriff also filed in the office of said clerk of the district court, a receipt signed by the plaintiff in error, dated Sept. 22, 1880, to the effect that he had received of said sheriff the goods and chattels that had been attached by him in a suit of Felix Martinez against him, in which receipt the goods and chattels are described; and on said 22d day of January, 1881, said sheriff also filed in said office of the clerk of the district court, a bond executed by the plaintiff in error as principal and by two sureties in the penal sum of \$4,000, payable to said sheriff, bearing date the 22d day of September, 1880, to be void if the said plaintiff in error shall have the property attached by said sheriff under a certain writ of attachment sued out by the defendant in error before the said probate clerk against the plaintiff in error for the sum of \$2,000, when and where the court shall direct, and shall abide the judgment of the court in the premises. Such bond recites that said writ is returnable "to the district court for said county at the March term, as mentioned in said writ."

On the eighth day of March, 1881, the defendant in error filed in the office of the clerk of the court below, a declaration alleging facts constituting a cause of action against the plaintiff in error for a money demand in the sum of \$2,000 and interest; such declaration having been previously indorsed as follows:

"Filed Sept. 21, 1880.

"JESUS M. TAFOYA,

"*Clerk*."

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Also on the eighth day of March, 1881, the defendant in error filed in the office of the clerk of the court below, the affidavit for attachment above mentioned; the same having been previously indorsed as follows:

"Filed September 21, 1880.

"JESUS M. TAFOYA,  
"Probate Clerk."

Also on the eighth day of March, 1881, the defendant in error, filed in the office of the clerk of the court below, a bond for an attachment against the goods, chattels and estate of the plaintiff in error for the sum of \$2,000 bearing date the — day of September, 1880, and reciting among other things, that whereas, the defendant in error had that day "sued out an attachment before JESUS M. TAFOYA, clerk of the probate court, against Philip Holzman, for the sum of two thousand dollars, returnable to the next March term of the district court, for the county of San Miguel," etc.; the same having been previous to such filing with the clerk of the court below, indorsed as follows:

"Approved by me this 21st day of Sept., A. D. 1880.

{ PROBATE COURT SEAL, }  
 { NEW MEXICO, }  
 { COUNTY OF SAN MIGUEL. }

"JESUS M. TAFOYA,  
"Probate Clerk."

And further indorsed as follows:

"Filed in my office Sept. 21, 1880.

"JESUS M. TAFOYA,  
"Probate Clerk."

On the ninth day of March, 1881, at the regular March term of the court below, the plaintiff in error, filed with the clerk of such court, the following motion, viz.:

"And now comes the said defendant (plaintiff in error), and for the purpose of this motion and for no other, and moves the court to quash the writ of attachment herein for the following reasons, to wit: "

*First.* Said writ of attachment is void on its face.

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*Second.* Said writ of attachment is returnable to an impossible day and impossible term, if to any term at all.

*Third.* Said writ of attachment is returnable before the Hon. L. Bradford Prince, and not before any court.

*Fourth.* The summons in said writ is also returnable before the Hon. L. Bradford Prince and not before the court.

*Fifth.* Said writ bears no teste of any court.

*Sixth.* The said writ has no indorsement containing a brief statement of the cause of action thereon, as required by law.

*Seventh.* Said writ is otherwise uncertain, defective and insufficient in many other respects as appears from the face thereof.

Thereafter at the last aforesaid term of the court below, and before any other proceedings were had in the case, the plaintiff in error appeared for the purpose of said motion, and for no other purpose, and the same being argued by counsel for the respective parties, was submitted and overruled.

Thereafter at the term of the court below last aforesaid, the following and no other proceedings were had in the case as appears from the record, the recital of which is as follows, to wit:

"FELIX MARTINEZ	} <i>Assumpsit begun by attachment.</i>
v.	
PHILLIP HOLZMAN.	

"Now comes the said plaintiff (defendant in error), by his attorney, G. W. Prichard, Esquire, and the defendant (plaintiff in error), although three times solemnly called, comes not, but makes default. It is therefore considered by the court that the said plaintiff ought to recover of the said defendant, his damages by reason of the premises."

Afterwards, at the same term, the record recites the following proceedings in the same court, to wit:

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**"FELIX MARTINEZ****v.****PHILIP HOLZMAN.****} *Assumpsit begun by attachment.***

"Now comes the said plaintiff, by his attorney, G. W. Prichard, Esq., and the said defendant, having made default on a former day of the present term, and no jury being demanded by the said plaintiff, the court, after hearing the evidence, assesses the damages of the said plaintiff by reason of the premises, at two thousand dollars. It is therefore considered and adjudged by the court, that the said plaintiff, Felix Martinez, recover of the said defendant, Philip Holzman, the sum of two thousand dollars, his damages assessed as aforesaid, and also his costs in this behalf expended, taxed to sixty-six dollars and thirty cents, and that he have execution therefor."

A great many errors claimed to appear on the face of the record, are argued on behalf of plaintiff in error, and a multitude of questions are raised in behalf of either party; they cannot all be considered within our limited time.

The question was elaborately argued as to whether there had been a general appearance in the court below on the part of the plaintiff in error.

It has been uniformly held by all the courts of the territory, that when a party appears for the purpose of making a motion for irregularity, and states specifically in the motion that he appears for that purpose, and no other, it is a special, and not a general appearance. It was persistently urged on behalf of the defendant in error, that the giving of the bond by the plaintiff in error for the purpose of retaining possession of the property claimed by the sheriff to have been attached, was in law a general appearance for all purposes, and was a waiver of all preceding irregularities. Numerous authorities were cited to sustain that assumption, but those decisions were all made upon special statutes differing from ours, many of which expressly providing that among

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the conditions of the bond, there shall be one binding the defendant to appear, or suffer default. And all of them providing that such bond shall in effect dissolve the attachment proceedings by transferring the security from the property attached to the bond itself.

No doubt in these cases, the decisions in part were based upon the fact of the regularity of the proceedings so far as to confer jurisdiction upon the court of the subject matter of the suit and over the property attached, as well as of the person of the defendant.

Under our statute, the giving of what is sometimes called a forthcoming bond in attachment, does not release the property from the attachment lien. It simply constitutes the defendant the bailee of the sheriff for the safe keeping of the property, and for its return to the sheriff in case the plaintiff shall recover, and in default of which the liability of the bond attaches to the defendant and his sureties. The doctrine that such a bond constitutes a general appearance on behalf of the defendant, and a waiver by him of all irregularities at a time when no citation has been served on him, and no notice whatever of the cause of the action, either by the declaration or statement in the writ, or otherwise, and that it will so far waive irregularities as to confer upon the court jurisdiction of the subject matter of the suit where none had previously existed, is, in our opinion, manifestly unjust and contrary to sound principles of law.

But outside of these considerations, any question as to whether there was a general appearance in the court below by the plaintiff in error, is determined by the record, which shows conclusively that the damages were assessed by the court, and judgment therefor entered on the ground that there had been no appearance by the defendant below. This was clearly considered and adjudged by the court below.

If there had been a general appearance, then it would have been irregular to proceed to assess damages and enter judg-

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ment before first entering a rule to plead, and showing non-compliance therewith. If this had been the case, then judgment *nil dicet*, instead of for non-appearance, would have been the proper proceeding. The record, therefore, discloses the fact that there was no general appearance of the plaintiff in error in the court below, and no waiver by him of any irregularities in the proceedings of that court.

In case the defendant does not appear, it is always incumbent on the court before proceeding in the cause to see that the preliminary proceedings have been so far regular and sufficient, as to confer not only jurisdiction of the subject matter of the suit, but also of the person of the defendant.

In an attachment case this is to be determined by the affidavit and bond for an attachment, the writ with the officer's doings thereunder, as shown by his return, the declaration and service of a copy thereof, and the authority of the officer issuing the writ. In the present case the affidavit was taken and filed with the probate clerk. The bonds were approved by and filed with him, and even the declaration in the first instance was so filed. The writ was issued by him, and authenticated by the seal of the probate court, and not by the seal of the court below.

The statute under which the preliminary proceedings of this case were instituted before and by the probate clerk is as follows, to wit:

“Any person wishing to sue his debtor by attachment, when the debt or sum claimed exceeds the sum of one hundred dollars, may do so by first filing with the clerk of the district court of the county in which the debtor lives, or before the clerk of the probate court of the county in which the suit is brought, an affidavit and bond, as now required to be done before the clerk of the district court, which shall authorize the clerk before whom said affidavit and bond shall be filed to issue writs of attachment the same as clerks of the district courts; which attachment, together with the affidavit

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and bond, when issued by the clerks of the probate court, shall be by them made returnable to the next term of the district court for the proper county, and shall be by them returned to said district court on or before the first day of said term :” Gen. Laws N. M., Prince’s ed., 140.

The provisions of this statute conferring authority on probate clerks to entertain applications for and to issue writs of attachment returnable to the district courts, in order to be effective, must be considered as repealing, by the remotest implication, so many positive requirements of the law previously existing, especially in the face of the organic act and legislation of congress providing for the appointment of clerks for the district courts of the territories, as to render the authority so conferred on probate clerks exceedingly doubtful and impracticable. For instance, it must be conceded that process of every description cognizable by the district court must be authenticated. “The district court of each county \* \* \* shall have a seal, which shall be kept by the clerk thereof, and with it he shall authenticate all documents emanating from his office needing authentication :” Gen. Laws N. M., sec. 3, p. 116.

By this law the clerk of the district court is made the custodian of its seal, and all process which he is authorized to issue must be authenticated by him with such seal. Without such seal the court will not recognize it as authentic.

The probate clerks are to issue writs of attachment, the same as the district court clerks, with no express provisions in the statute as to how the probate clerks are to authenticate the writs.

The statute provides that the district court clerk issuing a writ of attachment shall approve the bond in attachment, both as to the amount of the penalty and sufficiency of the surety; but there is no express provision for such approval by the probate clerk. Before the clerk of the district court is authorized to issue a writ of attachment, a declaration, as

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well as affidavit, must be filed in his office: Gen. Laws N. M., Prince ed., sec. 2, p. 136 ; but there is no express provision for filing a declaration with the probate clerk. The policy of congress in conferring on the territorial district courts the authority to appoint their own clerks was no doubt to grant to them the exclusive right to determine who shall perform the duties of that office, and to insure to such courts a wholesome supervision over them.

In view of the legislation of congress on the subject, it may well be doubted whether the territorial legislature has the power to arbitrarily create and impose on the courts any other office the duties of which shall be to supersede any of those of their own clerks.

It is not necessary for the final disposition of the case to decide this question.

The record shows that there was nothing before the court below showing that the writ had ever been served on the plaintiff in error, or that the declaration, or any statement of notice of the cause of action was ever served on him. The court below, therefore, at the time the judgment was rendered, had acquired no jurisdiction of the person of the plaintiff in error, and had no authority to render a judgment *in personam* against him.

Under the rules of practice prescribed for the district courts in case of personal service of process, a copy of the declaration must be served before the court can treat the defendant as in default. This was not done.

The service of a writ of attachment is never complete without also serving the petition or other statement of the cause of action: *Ibid.*, subd. 1 of sec. 9, p. 137.

The writ, by its term, was made returnable on a day and to a term of court then past. It was, therefore, returnable on an impossible day and to an impossible term. This rendered the writ void upon its face and all proceedings thereunder void also, and excused the plaintiff in error from pay-



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ing any attention to it, even if it had been served: 3 N. H., 70; 2 Johns., 190; 4 *Ibid.*, 309; 3 Wilson, 341; 3 Mo., 286.

The writ being void and the plaintiff in error not appearing in the court below, except for the special purpose of moving to quash for irregularity, the attachment should be dissolved; the plaintiff in error and his sureties on said forthcoming bond discharged from liability thereon; the judgment reversed, and the case remanded to the court below for issuance and service of proper process and such other and further proceedings as may be in conformity to law, and it is so ordered.

PRINCE, Chief Justice, dissenting: While concurring in much contained in the opinion of the majority of the court in this case, I feel constrained to put on record my dissent from the statement therein appearing that "the writ, by its terms, was made returnable on a day and to a term of court then past. It was, therefore, returnable on an impossible day and to an impossible term." There is no question of the fact that there was a clerical error—a *lapsus calami* in the writ. The question is whether this was sufficiently serious and of a character so liable to cause mistake or deception as to be fatal.

The plaintiff made his affidavit for attachment before Jesus Ma. Tafoya, probate clerk of San Miguel county, on the twenty-first day of September, 1880, as the verification shows. It is also marked filed on that day. Said clerk forthwith issued the writ of attachment which is dated on said 21st of September, 1880. On the next day the goods of the defendant were attached, the defendant Holzman, with two sureties, gave his bond, commonly called a forthcoming bond, which bears date Sept. 22, 1880, and binds the obligors to have the attached property forthcoming when and where the court shall direct, etc.

On receiving his goods, on the filing of this bond, the

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defendant Holzman, also gave a receipt therefor, which is dated on the same 22d of September, 1880. The writ, to the validity of which objection is made, is written in Spanish, and the return day is stated as follows: "Ante la corte del distrito en y por el condado de San Miguel, en el proximo termino de Marzo de 1880," or as translated in the transcript "before the district court in and for the county of San Miguel, at the next March term, 1880." In my opinion, the words "next March term," made the time sufficiently plain and distinct for any one of ordinary understanding to comprehend it. The writ being dated in September, 1880, and the goods attached retaken and bond given, all in the same month, there could be no possible mistake as to what term is meant by the "next March term." The addition of "1880" instead of "1881," is evidently a clerical error, not unnatural or unusual in using the date which the copyist was constantly writing during that year. No one could be deceived by it, taking the whole substance together. The word which controls and fixes the meaning definitely and beyond mistake is "next." It was attempted to be shown on the argument, that "next" meant "nearest," and therefore March, 1880, was as likely to be "next" to the date in September, 1880, as March, 1881. But this is too far-fetched and strained a construction to require much argument or illustration to show its fallacy. When we say "next year," although we may be speaking in February, we do not mean the year past, but the year to come. If even on a Monday, we speak of "next Sunday," we mean the ensuing Sunday, and not the one just past; although the latter is much the nearer in point of time. No one could possibly mistake the meaning in such cases. And so when in September, 1880, a writ names the "next March term," it can have no other signification than the March term ensuing, viz.: that of 1881. A large number of authorities were quoted by the appellant in the endeavor to show that "the writ was void, because returnable on an im-

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possible day," but on examination it will be found that not one of them affects the case in question.

There is no doubt that when a writ is returnable on an impossible day, or a day when there is no term, it is void. This is what was held in *Holliday v. Cooper*, 3 Mo., 285, the writ being returnable on the first Monday of July, 1883, when there was no term till the fourth Monday. The same is the point in *Mills v. Bond*, as long ago as the sixth year of George I, when the process was returnable out of a term time: 1 Strange, 399.

The point decided in *Dame v. Fales*, was that oral evidence was not admissible to vary the written date of a writ: 3 N. H., 70.

Other of the cases cited, are simply to the effect that when a writ is returnable to a term not immediately succeeding its issuance and date, it is void. This is the point decided in the following of the authorities cited in the brief, viz.: *Bunn v. Thomas & King*, 2 Johnson, 190; *Burk v. Barnard*, 4 Johns., 309; *Parsons v. Loyd*, 3 Wilson, 341.

The same has also been frequently held in Illinois and other states. See, *Calhoun v. Webster*, 2 S. C., 221; *Hildreth v. Hough*, 20 Ill., 331; *Elee v. Wait*, 28 Ill., 70; *Miller v. Handy*, 40 Ill., 448; *Hochlander v. Hochlander*, 73 Ill., 618.

These include all of the cited cases that I have been enabled to examine. There is no authority quoted which even tends to show that a term described as is that in the writ in this case, is an "impossible term," and none which on the real point in question, which is, that the word "next" in the writ, fixes the term beyond ambiguity. Were that word not in the writ no doubt it would be fatally faulty, and void under the decisions, but the language being as it is, I hold that it was good, and gave the defendant the legal notice required of the return day. That it gave him actual notice, is evident from the fact that he appeared at the proper time by his counsel.

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Territory of New Mexico v. Kelly.

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THE TERRITORY OF NEW MEXICO, Appellee, v. EDWARD M.  
KELLY, Appellant.

February 1, 1882.

CRIMINAL LAW; PRACTICE. (1) *Admissibility of affidavits and counter-affidavits on application for change of venue.*

SAME. (2) *Change of venue: Requisites of affidavits upon applying for.*

SAME. (3) *Continuance discretionary with court.*

SAME. (4) *Jury: List of talemen need not be furnished prisoner in advance.*

SAME. (5) *Trial: Rule as to removing irons from prisoner.*

SAME. (6) *Trial: Irons should be removed from prisoner while jury is being made up.*

SAME. (7) *Trial: Failure to remove irons from prisoner, review by supreme court.*

SAME. (8) *Review: Bill of exceptions too meagre.*

SAME. (9) *Evidence of threats, admissibility of.*

1. In a criminal case, on an application for a change of venue under Gen. Laws N. M., Prince ed., p. 117, sec. 17, if the proper affidavit is made by the party moving for a change of venue and is supported by the affidavits of two or more disinterested persons, such affidavits are to be considered as conclusive as to the county in which the suit is then pending, and the court has no discretion to refuse such application so far as changing the venue from that county. In determining, however, which is the nearest county thereto, and whether the same be free from exceptions within the meaning of the statute, the affidavits on behalf of such moving party are not conclusive. These are questions the determination of which rests in the sound discretion of the presiding judge, and it is not only proper, but it is the duty of the judge to receive such evidence from whatever source as will satisfy his conscience in the exercise of his discretion. Counter-affidavits held admissible on exception being taken to the county to which it is proposed to send the cause to be tried.
2. The affidavit of the party moving for a change of venue as well as those in support of the same, in order to be conclusive as to the county in which the suit is then pending, must be positive in all material averments and not made on information and belief merely.
3. A motion for a continuance is addressed to the discretion of the court, whose ruling in the absence of a clear abuse of discretion is not reviewable.

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4. The "list of jurors summoned," which by Gen. Laws N. M., p. 288, sec. 20, is to be "given to the defendant in all capital cases twenty-four hours before the trial, and in all other cases before the jury is sworn, if required," refers to the regular panel summoned and accepted for the term, and does not include talesmen summoned to complete the trial jury after such regular panel has been exhausted.
5. A prisoner when brought to the bar of the court for trial, is entitled to have his irons removed before the trial commences, unless the court be of the opinion that their retention upon the limbs of the prisoner is a reasonable precaution to prevent an escape or to insure the safety of the by-standers and the orderly conduct of the prisoner.
6. The calling and examination of jurors is a part of the proceedings of a trial, and it is irregular to compel the prisoner at this stage of the trial to appear at the bar in irons for no better reason than that it would be inconvenient to remove them, or that their removal would cause a delay of a few hours in the trial.
7. When the record affirmatively discloses the fact that there was no reason whatever for placing shackles or manacles upon the prisoner against his protest while undergoing trial, a question of law arises which may be reviewed on appeal and the judgment reversed; but when the record discloses some valid or reasonable ground of apprehension that the prisoner may attempt to escape, or injure the by-standers, or the officers in charge, or will be otherwise disorderly or dangerous, it should be left entirely to the discretion of the trial court to determine whether the prisoner should be ironed or not; and when the record is silent as to whether there was or was not any valid excuse for retaining the irons upon the prisoner during the trial, the appellate court will presume that the court below exercised a sound and reasonable discretion in refusing to order the irons to be removed.

*Held*, In the present case, that had the irons remained on the prisoner during his trial or for any considerable portion thereof, the court would be compelled to reverse the judgment; but as it appeared from the record that they so remained but for an inconsiderable time while a few only of the jurors were being called and examined, and before any of them had been accepted and sworn, it was decided that the prisoner's rights of defense were not prejudicially affected thereby to an extent that will justify a reversal of the judgment on that ground.

8. An objection was made to testimony as to what occurred "on that day." The bill of exceptions did not state enough to show what day was meant. *Held*, that the court could not review a ruling upon such a detached, disconnected fact, evidence of which might or might not be admissible, according to the circumstances.

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9. Evidence of threats, though uncommunicated to the defendant, is competent.

Appeal from the District Court of San Miguel county.  
PRINCE, J.

The defendant, charged with the murder of one John Reardon in the month of October, 1880, was indicted and arraigned at the February term, 1881, of the district court held in and for the county of Santa Fe, and pleaded not guilty. He filed a motion for a change of venue to the nearest county free from exception, declaring against the counties of Santa Fe, San Miguel and Mora. This motion was resisted by the attorney-general, who filed a counter-affidavit, among others of the affiants to which were the foreman and various members of the grand jury finding the indictment against the defendant, alleging a belief that San Miguel county was free from the exception claimed by the defendant. The court overruled and denied the motion, in so far as it applied to changing the venue beyond San Miguel county, to which county the cause was sent for trial.

At the succeeding (March) term of the district court held in and for San Miguel county, the defendant moved for a continuance of his cause until the next regular term the court, urging as a necessity therefor the absence of an important material witness, one Thompson, whose testimony, defendant alleged, by affidavit, could not be produced at the then present term of court, and without which he could not safely go to trial. This motion was resisted by the attorney-general, and, although none of the facts which the defendant alleged could be proved by the witness, were admitted by the attorney-general, the motion was denied. The defendant, subsequently, and during said March term, again moved the court to grant him a continuance, and alleged extraordinary efforts to find and communicate with said witness, who was then reputed to be in the Black Range, in this territory. This motion was also denied.

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This case was called for trial at 7.30 o'clock on the night of the last day but one of the term, and the prisoner brought into court shackled. The defendant, before trial, moved the court to have his shackles removed. This motion was denied and the impanelling of a jury directed to proceed. Seven jurors were accepted during the evening session, some of whom were summoned from the bystanders, or the county at large, before the regular panel was exhausted, and whose names had not been furnished to the defendant twenty-four hours before the trial. On the following day, prior to the incoming of the court, the shackles were removed from the defendant.

During the course of the trial, the defendant offered to show that after the shooting he was jumped upon, kicked, and otherwise abused, by the prosecuting witnesses, and that at the time of the shooting they (prosecuting witnesses) threatened to hang defendant. Also, that defendant had never had any difficulty prior to the killing charged in this case.

The defendant also offered to prove threats of the deceased prior to the difficulty. All of which evidence was ruled out by the court.

The jury found the defendant guilty of murder in the first degree.

The defendant moved for a new trial, which was denied. Defendant then moved an arrest of judgment, which was also denied.

*Cayless & Breedon* for appellant.

It was error for the court to receive a counter-affidavit on a motion for a change of venue: *Barrows v. The People*, 2 Ill., 121; *Baxter v. The People*, 2 Gil., 578; Gen. Laws N. M., Prince's ed., sec. 17, pp. 117, 118, "Shall."

The court erred to the prejudice of the defendant in changing the venue to the county of San Miguel, to which objection was made and shown to exist by appellant's affida-

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vit: Gen. Laws N. M., Prince's ed., sec. 17, pp. 117, 118, "Free from exceptions."

The defendant's application for continuance at the February, 1881, term of the district court for Santa Fe county should have been granted: *People v. Dias*, 6 Cal., 248; *People v. Dodge*, 28 Cal., 445, and cases there cited; *People v. Brown*, 46 Cal., 103.

The defendant was entitled to a complete list of jurors, who were to try him, twenty-four hours before the trial, and the court erred in permitting persons to be sworn and to sit as jurors whose names had not been so furnished the defendant: Gen. Laws N. M., Prince's ed., sec. 20, p. 228; Bishop on Crim. Proceed., sec. 931, and cases there cited; *Woodside v. State*, 2 How. (Miss.), 655.

The defendant should have been relieved of his shackles before being brought to trial, and the judgment should be reversed for a failure so to do: *People v. Harrington*, 42 Cal., 165; *State v. King*, 1 Mo., 438; Bishop on Crim. Proceed., sec. 955; *Lee v. State*, 51 Miss., 566.

Defendant was entitled to show that he was jumped upon, kicked and beaten by prosecuting witnesses, and the court erred in refusing to permit him so to prove, and also to prove that some of the prosecuting witnesses, at the time of the killing, threatened to hang the defendant.

The court erred in refusing to permit the defendant to prove that he never had any difficulty prior to the killing charged in this case.

The court erred in refusing to permit the defendant to prove threats by the deceased not communicated to the defendant: *People v. Scroggins*, 37 Cal., 676; *People v. Crowin*, 34 Cal., 192; *Stokes v. People*, 53 N. Y., 164; Whart. Crim. Ev., sec. 757, and cases there cited; Whart. Crim. Law, sec. 1027; *Holler v. State*, 37 Ind., 57; *State v. Turkin*, 77 N. C., 473; 93 U. S., 465; 19 Vt., 116; 16 Ill., 17.



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The court should have directed the jury to find the defendant not guilty.

The court should have given the instructions asked for by the defendant.

A new trial should have been allowed, and the court erred in refusing the same.

*William Breeden*, attorney-general, for the territory of New Mexico, appellee.

The defendant's application for a change of venue from Santa Fe county was granted; this was all he was entitled to.

The receiving of the affidavits presented in opposition, was in the discretion of the court, and the defendant was not prejudiced thereby.

An application for a continuance is addressed to the discretion of the court, and is not reviewable: 1 *Gildersleeve*, pp. 371, 372; 1 *Bishop Crim. Proced.*, sec. 951, and numerous cases there cited.

The defendant was entitled only to a list of the jurors summoned to attend the term—which he received: *Prince's Statutes*, sec. 20, p. 288. He was only entitled to such list upon requiring the same. It does not appear that such list was required or applied for.

The defendant's shackles were removed before the trial commenced: 1 *Bishop Crim. Proced.*, sec. 955, and cases there cited.

Threats by the deceased, in cases like this, are only admissible when there is a doubt as to which party was the aggressor, or commenced the assault: 19 *Vt.*, 116; 93 *U. S.*, 465; 16 *Ill.*, 17. In this case there was no doubt or conflict of evidence on that point.

The defendant had a right to prove that he had previously been of a good reputation as a man of peace and good order, but evidence of particular facts, or that he had never before had a difficulty were not admissible: 1 *Bishop Crim. Pro-*

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ced., sec. 1117; 2 Ind., 91; 57 N. H., 245; 74 N. O., 591; 119 Mass., 342; 4 Humphrey, 381; 76 N. O., 216.

The instructions asked for by the defendant were clearly improper.

The motion for a new trial was addressed to the discretion of the court, and its action in denying the same is not reviewable: 1 Bishop Crim. Proceed., sec. 1274; 65 Ill., 17 to 24; 57 Ga., 482; 56 Ga., 84; 2 Texas Appeal, 46.

**BRISTOL, Associate Justice:** The material facts disclosed by the record are substantially as follows:

The appellant, Edward M. Kelly, was indicted for the crime of murder in the first degree, at the February term, 1881, of the district court of Santa Fe county, in the judicial district aforesaid; and after being arraigned, and pleading not guilty, at the term aforesaid, the appellant made an affidavit for a change of venue from the county aforesaid to the nearest county free from exceptions. This affidavit, in addition to positive averments sufficient for a change of venue from Santa Fe county where the cause originated, contained the averment that the same objections existed in San Miguel county, and in several other counties specified. Counter-affidavits were received and read under objection and exception by the appellant as to the grounds of exception to San Miguel county, upon appellant's motion for a change of venue upon his said affidavit, which was supported by two other affiants. The court, upon all the affidavits under objection and exception by the appellant, ordered a change of venue to said San Miguel county, in the judicial district aforesaid. The then next succeeding term of the district court for said county of San Miguel commenced on the 7th day of March, 1881. On that day, at such term, the cause was set for trial the following Monday, the 14th day of March, 1881. On the sixteenth day of that month, the appellant made a motion for a continuance to the then next term, based on affidavits

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made by him and by others on his behalf therefor. This motion was overruled, and such ruling excepted to the same day. On the last day but one of the term, at 30 minutes past 10 in the evening, the case was brought on for trial. The prisoner being brought before the court for trial, with shackles on his legs, he moved the court to have them removed, whereupon the sheriff having the prisoner in charge, informed the court, "That the irons were riveted on, and in order to remove them, the prisoner would have to be taken to a blacksmith's shop ; that no such shop was open at that hour, and he did not believe he could find a blacksmith ; and that even in the day time it would take quite a while." Thereupon the court directed the case to proceed without removing the irons, but ordered that before the jury was accepted and sworn the following day, the irons must be removed.

Thereupon several jurors (how many does not appear), were examined as to their qualifications to try the cause, and passed upon.

The next morning before any other proceedings in the case were had, or other jurors examined, or any juror was accepted or sworn, the irons were removed from the prisoner.

The regular panel of petit jurors being exhausted, except as to one Robert Oakley thereon, who, after being called, did not respond, and the sheriff, after being directed to find him, had reported that he could not be found, and neither party requiring an attachment for such absent juror, the regular panel was regarded by the court as exhausted, whereupon talesmen were brought into court for the purpose of completing the trial jury. The names of such talesmen were not furnished to the prisoner twenty-four hours before trial.

A trial jury was finally accepted and sworn. The appellant was tried and convicted of murder in the first degree. Motions for a new trial and in arrest of judgment were interposed, overruled and excepted to. Sentence and judgment

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were pronounced and entered in the usual form upon the verdict.

Upon the foregoing proceedings, errors are assigned as follows:

*First.* That the court erred in receiving and considering counter-affidavits, as to appellant's exceptions to San Miguel county averred in his affidavit for a change of venue.

*Second.* That the court erred in ordering a change of venue to said county of San Miguel.

*Third.* That the court erred in overruling the motion for a continuance.

*Fourth.* That the court erred in permitting the appellant to be tried without being furnished, twenty-four hours before trial, with the names of talesmen summoned after the regular panel of the petit jurors had been exhausted.

*Fifth.* That the court erred in directing the parties to enter upon and proceed with the calling and examination of jurors to try the cause while the prisoner had his irons on, and after he had asked to have them removed.

Covering the first assignment of error in regard to change of venue, the statute provides, as follows: "The venue shall be changed in all cases, both civil and criminal, to the nearest county free from exceptions, when the judge is interested, or when the party moving for a change, shall make oath that he cannot have justice done him in the county in which the suit is then pending, setting forth the cause of such obstruction of justice, which oath must be supported by the additional oaths of at least two disinterested persons, provided that neither party shall be allowed to change the venue in the same case more than twice." General Laws N. M., Prince's ed., 117, sec. 17. The construction we give to this statute is, that if the proper affidavit is made by the party moving for a change of venue, and supported by the affidavits of two or more disinterested persons, such affidavits are to be considered as conclusive as to the county in which

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the suit is then pending, and that the court has no discretion to refuse such application, so far as changing the venue from that county. In determining, however, which is the nearest county thereto, and whether the same be free from exceptions within the meaning of the statute, the affidavits on behalf of such moving party, are not conclusive. These are questions, the determination of which rests in the sound discretion of the presiding judge, and it would be not only proper, but the duty of the judge to receive such evidence from whatever source as will satisfy his conscience in the exercise of his discretion.

The application of any other rule of construction would give to the party moving a change the power of preventing a trial altogether by raising exceptions to every county in the territory.

We will here take occasion to remark, that the affidavit of the moving party as well as those in support of the same, in order to be conclusive as to the county in which the suit is then pending, must be positive in all material averments, and not made on information and belief merely. In this respect the sufficiency of the supporting affidavits in this case is doubtful.

The court having granted a change of venue from the county in which the suit was then pending to the county of San Miguel, there was no error in receiving and considering counter-affidavits to exceptions to the latter county.

This disposes also of the second assignment of error. The overruling the motion for a continuance, which is the third assignment of error, was a matter addressed to the sound discretion of the court. The record does not disclose any such abuse of discretion under the circumstances as will justify the court in disturbing the judgment on that ground.

The statute covering the fourth assignment of error is as follows:

"A list of the jurors summoned shall be given to the

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defendant in all capital cases twenty-four hours before the trial, and in all other cases before the jury is sworn, if required: Gen. Laws N. M., Prince's ed., 288, sec. 20."

The "list of the jurors summoned" within the meaning of this statute evidently refers to the regular panel summoned and accepted for the term, and does not include talesmen summoned to complete the trial jury after such regular panel has been exhausted.

The fifth assignment of error presents a question of more serious import. There can be no doubt that a prisoner, when brought to the bar of the court for trial, is entitled to have his irons removed before the trial commences, unless the court be of the opinion that their retention upon the limbs of the prisoner is a reasonable precaution to prevent an escape, or to insure the safety of the bystanders and the orderly conduct of the prisoner.

Neither can there be any doubt that the calling and examination of jurors to try a cause is a part—and to the prisoner at the bar a very important part—of the proceedings of a trial. It would be irregular at this stage of the trial to compel the prisoner to appear at the bar in irons for no better reason than that it would be inconvenient to remove them, or that their removal would cause a delay of a few hours in the trial.

In the case of the *People v. Harrington*, 42 Cal., 165, the defendant having been indicted for robbery, was brought before the court for trial with irons on his limbs. His counsel asked for their removal, which was denied, the court stating that the defendant should be tried in irons, and that none of his rights were violated by being tried in irons without his consent. The bill of exceptions contained a statement in effect that there were no circumstances or facts before the court showing any excuse or grounds for compelling the prisoner to be tried in irons. Exceptions to this ruling hav-

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ing been taken, the judgment on appeal was reversed on this ground alone.

The judge who pronounced the opinion of the court said: "A prisoner on his trial in court is in the custody of the law, and under the immediate control of and subject to the orders of the court. Should the court refuse to allow the prisoner on trial for felony to manage and control in person, his own defense, or refuse him the aid of counsel in the conduct of such defense, he would manifestly be deprived of a constitutional right, and a judgment against him on such trial should be reversed. In my opinion, any order or action of the court, which without evident necessity imposes physical burdens, pains and restraints upon a prisoner during the progress of his trial, inevitably tends to confuse and embarrass his mental faculties, and thereby materially to abridge and prejudicially affect his constitutional rights of defense; and especially would such physical bonds and restraints in like manner materially impair and prejudicially affect his statutory privilege of becoming a competent witness and testifying in his own behalf. Again, to require a prisoner during the progress of his trial before the court and jury, to appear and remain with chains and shackles upon his limbs without evident necessity for such restraint, for the purpose of securing his presence for judgment, is a direct violation of the common-law rule."

The case of the *State v. King*, 1 Mo. Appeals, 438, was decided in 1876. The defendant having been indicted for murder in the criminal court of St. Louis, was brought to the bar of that court for trial, being ironed with handcuffs or manacles upon his hands and wrists, his counsel made a motion to the court for their removal, which was overruled, the court stating as a reason, that the prisoner had made an assault on J. G. Broemson, the husband of deceased, in open court, when the accused was last in court, and exceptions

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were taken. The trial proceeded, resulting in a conviction and sentence to be hanged.

On appeal to the St. Louis court of appeals, the judgment was reversed on this ground alone, and on appeal therefrom to the supreme court, the judgment of the court of appeals was affirmed: 64 Mo., 591. In this case the court made a distinction between manacles on the hands or wrists and shackles on the legs, holding that while the latter might be permitted in cases of necessity to prevent an escape, it would be error under all circumstances to compel the prisoner to be tried with irons upon his hands, and quotes Hawkins (2 P. O., ch. 28), as authority.

In the *Case of Laver*, 16 Howell's St. Tr., 94, the rule is clearly laid down as to when or what stage of the proceedings the irons should be removed, and in this respect a distinction is made between the argument and trial. On this point the Lord Chief Justice said:

"No doubt when he comes upon his trial, the authority is that he is not to be *in vinculis* during his trial, but should have the use of his reason and all advantages to clear his innocence. Here he is only called on to plead by advice of his counsel, he is not to be tried now; when he comes to be tried, if he makes that complaint, the court will take care that he shall be in a condition proper to make his defense; but when he is only called on to plead and his counsel by him to advise him what to plead, why are his chains to be taken off this minute to be put on again the next?"

A rule somewhat in conflict with that laid down in 42 Cal., 165, and 1 Mo. Appeals, 438, *supra*, has been adopted in the more recent case of *Faire v. State*, reported in Southern L. J., 348. In this case it is held that the right to manacle persons during trials exists, and should be left to the discretion of the court. The prisoner had been tried with shackles on his feet or ankles, though his counsel, on his behalf, asked their removal. The prisoner was found guilty of murder.



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The reason given by the court for refusing to order the shackles to be removed, was that the prisoner had threatened that, if found guilty, he would never come out of the court house alive, but that he would escape, or that the officers would have to shoot him.

The case was appealed for the reason that the court below had ordered the prisoner's feet to be shackled during his trial. The appellate court refused to reverse the judgment, and held that, while it ought to require an extreme case to justify the placing of shackles or manacles upon the prisoner when undergoing trial; yet, whether it is necessary or not should be left to the discretion of the trial court, and cannot be reviewed on appeal: Central L. J., Dec. 2, 1881, 426.

This decision, in our opinion, comes nearer to the enunciation of the true rule of law founded in sound reason than any that has preceded it. We cannot, however, concur in this decision to the extent that no case of this kind is reviewable on appeal.

The better rule would seem to be that when the record affirmatively discloses the fact that there was no reason whatever for placing shackles or manacles upon the prisoner against his protest, while undergoing trial, a question of law arises which may be reviewed on appeal, and the judgment reversed; but when the record discloses some valid or reasonable ground of apprehension that the prisoner may attempt to escape, or injure the bystanders, or the officers in charge, or will be otherwise disorderly or dangerous, it should be left entirely to the discretion of the trial court to determine whether the prisoner should be ironed or not; and when the record is silent as to whether there was or was not any valid excuse for retaining the irons upon the prisoner during trial, the appellate court will presume that the court below exercised a sound and reasonable discretion in refusing to order the irons to be removed.

In the present case, had the irons remained on the prisoner

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during his trial, or for any considerable portion thereof, we would be compelled under this rule to reverse the judgment; but as it appeared from the record that they so remained but for an inconsiderable time, while a few only of the jurors were being called and examined, and before any of them had been accepted and sworn, we are of the opinion that the prisoner's rights of defense were not prejudicially affected thereby to an extent that will justify a reversal of the judgment on that ground.

The bill of exceptions brings into the record only detached and disconnected parts of the testimony. There is no evidence before the court showing, or even indicating, any of the facts and circumstances attending or connected with the killing of the deceased by the appellant; for this reason we are unable to perceive whether the rulings of the court below on questions raised in taking this testimony were erroneous or not.

For instance, on the cross-examination of Martin H. Barber, one of the witnesses for the prosecution, as appears by the bill of exceptions, this detached and disconnected question was asked by appellant's counsel, to wit:

"Did you, or did you not, hear any party or parties order Kelly and Thompson to be hung at any time on that day?" To which the witness answered: "I didn't hear anybody order it, but I heard some of the parties holler, 'hang him, hang him!'"

The witness was then asked this question: "Did you hear any of the prosecuting witnesses say that?"

This question was objected to on behalf of the prosecution, the objection sustained by the court, and the ruling of the court excepted to by appellant's counsel.

Was this ruling of the court error? We are unable to determine from the record what day or occasion is referred to in the first mentioned question by the words, "at any time on that day"—whether it was on the day of the killing,

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or some other day and occasion wholly disconnected therefrom. Unless there is enough before us to determine whether there was error or not, we must presume that the ruling of the court below was proper.

On the cross-examination of this same witness this detached and disconnected question was asked, viz.:

"Did you, on the day of this occurrence, hear the deceased make any threats toward the defendant?"

This was objected to on behalf of the prosecution, "on the ground that threats of the deceased to be admissible must first be proved to have been communicated to the defendant."

The objection was sustained by the court and such ruling excepted to.

In a proper case, threats, though uncommunicated to the defendant, would be admissible as competent testimony. There is nothing before us to show whether this was a proper case to render such testimony admissible or not.

Errors may have occurred during the progress of the trial, but the evidence appearing in the bill of exceptions is too meagre and disconnected to enable us to discover them.

The judgment is affirmed

All concur.

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THE TERRITORY OF NEW MEXICO, Appellee, v. ELIJAH FRANKLIN, Appellant.

*February, 1882.*

CRIMINAL LAW. (1) *Murder: Intoxication as a defense.*

SAME. (2) *Practice, right of judge to comment upon evidence.*

SAME. (3) *Jury: Review of verdict by supreme court.*

- I. Where the evidence given on a trial for murder shows the prisoner to have been drunk at the time of the killing, it is not erroneous to

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during his trial, or for any considerable portion thereof, we would be compelled under this rule to reverse the judgment; but as it appeared from the record that they so remained but for an inconsiderable time, while a few only of the jurors were being called and examined, and before any of them had been accepted and sworn, we are of the opinion that the prisoner's rights of defense were not prejudicially affected thereby to an extent that will justify a reversal of the judgment on that ground.

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- I. Where the evidence given on a trial for murder shows the prisoner to have been drunk at the time of the killing, it is not erroneous to

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instruct the jury to the effect that if the defendant was conscious of and understood what was done and said by himself and others present at the time of the killing so as to give an intelligent and true account of it at the trial, in that case he is responsible for his conduct at that time.

2. *Quare*. Whether the statute forbidding the judge to comment upon the weight of evidence applies to criminal cases.

A statement by the court to the jury that a man cannot at the same time be drunk and sober, conscious and unconscious, responsible and irresponsible, is not a comment upon the weight of evidence, but merely a statement of a truth in mental philosophy.

8. It is the province of the jury to pass upon the facts, and their finding will not be reviewed except where clearly contrary to the evidence or manifestly the result of prejudice. Finding that defendant was guilty of murder in the first degree affirmed.

Appeal from District Court of Grant county. BRISTOL, J. Murder. The facts appear in the opinion of the court.

PARKS, Associate Justice: At the A. D. 1881 term of the district court of Grant county, the defendant was tried and convicted of murder in the first degree, was sentenced to death, and appealed to this court. The record shows that during the trial, his counsel admitted that the defendant killed the deceased at the time and place and with the weapon described in the indictment, but claimed that the killing was accidental. For a proper understanding of the case, we will quote part of the testimony and instructions. The evidence we reproduce here is somewhat lengthy, but as it substantially and fairly, as we think, represents the whole case on both sides, it will obviate the necessity for any extended argument or lengthy opinion by the court. For the prosecution James H. Fowler testified as follows:

"I live in Central City, in this county; I know the defendant, Elijah Franklin here (here the witness points out the prisoner and identifies him); I know the deceased, Thomas Williams; I was in Central City when he was shot; I did not see the defendant shoot him, because Tom Williams was between me and Franklin at the time; I saw the smoke from

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Franklin's pistol, and just about that time Tom Williams ran and grabbed for a pistol; this was in my saloon in Central City, Grant county, territory of New Mexico; there were five or six persons in the saloon at the time, Catarino Maldonado, Jack Winters and others were in there; the prisoner and Tom Williams were the parties to the difficulty; there was a table right in front of me and Tom was standing near the corner of the table and near the wall; he then came around to the corner of the table next to the stove and sat down; he was sitting in a chair and was lying with his head in his hands on the corner of the table; while he was in this position I heard the prisoner say: 'Boys, good-bye,' and then he turned to some others and said: 'Let us go home;' just at that time I heard a shot fired, and some one in the crowd says: 'Tom Williams is shot;' the deceased was sitting in a chair with his head on the corner of the table; Franklin had just at that time come around to the corner of the table where the deceased was sitting and shot him in the left side; just before he shot he bid the boys good-bye and said he was going home; right away after the shot, the deceased got up from his chair; he looked like he had been asleep and he waked up and went around by the bar and fell; I don't think deceased had a pistol about him; I told him he was shot, and he said: 'No, I ain't shot, let me alone;' this was all he said; I saw the prisoner up to the time the deceased fell; then he (the prisoner) ran out of the house; the first I noticed of the pistol being in Franklin's hand, was after the shot was fired that killed Williams; at the time of the shooting, the other parties, some of whom were around the stove and some around the table; the defendant was just around the corner in front of them; the deceased was only shot once; he was shot through the left side; the ball did not go through him; Williams died a few minutes after the shot, so I afterwards understood; that is all I know of the circumstances."

John H. Winters, testified as follows:

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"I was present when this shooting took place. It was on the 27th of November last, that the defendant and two other soldiers came into the saloon in Central City; Franklin had a pistol, similar to the one produced here (here the witness was shown a pistol by the district attorney); Williams the deceased, was a deputy sheriff at the time. The deceased told the defendant he must take his pistol off; defendant said he was going home and would not take it off; deceased then told him to go home, and if he came with his pistol on any more he would have to arrest him; defendant then said 'neither you nor Jesus Christ couldn't take this pistol from me; it is my property, and I bought and paid for it;' after this, Franklin and some one or two others went out and were gone for a little while; when after a while defendant came in, he had fell into an adobe hole outside, near the house; he told me he had fell into this hole, and said somebody had taken his pistol; I got a light and went out to where he said he had fallen, and I found the pistol in the adobe hole; when the defendant came into the saloon, he laid down on some benches and went to sleep; the deceased and a man by the name of Morales had went out the second time after defendant come there, and after a little while came back, and the defendant was still asleep; there were several others came in about the time Williams and Morales came, and then they all commenced singing; the singing waked Franklin up; he then got up and stood some time; the deceased was then sitting down on a corner of a bench with his head on his hand, leaning on the corner of the table; the table was in something like the same position of this table in the court room; I was sitting at the centre of the table, and Mr. Fowler was sitting beyond me, near the stove; he was further over on a bench with his back towards the wall; Williams was sitting at the other corner of the table; while they were singing, Lockey said he was going up to the post, and Franklin said he would go up with him;



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just about this time the defendant told me to make a cigarette for him, which I done; Franklin while sitting there had a pistol in his hand; the muzzle of it was pointed towards me; I turned the muzzle of the pistol the other way, as I didn't care about having it pointed toward me; after I gave him the cigarette; he said, 'I will go home now;' just then he pulled his pistol, pointing it at the deceased and fired; I was close enough to the defendant at this time to put my hands on him; I saw the defendant and was looking at him when he raised the pistol; he pointed at the deceased; he pulled his pistol off—(By the Court), is the pistol in the court, Mr. Garrison? Yes, sir. (Here the witness took the pistol in his hand and held it in a horizontal position, pointing it and illustrated how the prisoner held it when he shot deceased). (Witness) The pistol was a self-cocking pistol, and will fire off either by cocking it or pulling the trigger."

The defendant testified as follows:

"I was down in Central City on Saturday night; I don't know what date of the month it was; before I left the "post," I went to the sutler's store and got two bottles of whisky there; I then went down and played billiards, and afterwards went into a man's saloon by the name of Jim; I don't know his other name; he was a white man.

Q. Was it Mr. Fowler here?

A. Yes, sir; that is the man; we went into his saloon and got a drink in there; then I went to Mr. Vest's house and got more whisky; after I staid there a little while, I went into Carrol's house again and got more whisky there; then I came back, and by this time, I was pretty drunk. I laid down on the bench to take a sleep, and the pistol fell out of my pocket; I picked it up and put it back, and it fell out again; I was so drunk at this time that I could hardly walk, and a man in there asked Winters what was the matter; I didn't hear what Winters said; then he asked me what was the matter with me; I didn't say anything; I laid

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a little while, I don't know how long, and I fell off the bench ; I got up again somehow, and I laid down on the bench again ; I soon got up again and thought I would go home, but I could not walk, I was so drunk, so I laid down again, and staid for some time ; after a while I started out of the house intending to go home, and I got from the house a little piece when I fell into a hole where they had been making adobes ; I was there some time before I could get out, and after I got out, I seen I was too drunk to undertake to go to the post, so I came back to the house again, and when I came back some one asked me what I done with my pistol ; I said I didn't know, and one of the boys said " You carried it out with you when you said you were going to camp ; " I said " If it is gone, why let it go ; " when I left camp that day I never took any pistol with me at all ; I never carry a pistol ; I had a pistol of my own, but did not take it with me ; the pistol that I had at the saloon was not mine ; I don't know how I came by it that day ; the only way I can account for having it somebody must have put it in my pocket when I didn't know it ; after I came back, when I got out of the adobe hole, somebody brought the pistol in and said they found it in the adobe hole and gave it back to me. While I was laying down, several Mexicans came in and, after awhile, commenced singing ; that woke me up, and when I awoke I was very sick ; I wanted to vomit ; I sat up a little while on the bench I was lying on near the stove, and took out a bottle of whisky and passed it around ; I then went around to the corner of the table and Jack Winters gave me a cigar and also gave Lacadue one ; I sat there awhile, and I says to Jack " I can't smoke it, " and he says " You are too drunk. " I had the pistol on the corner of the table, because I did not want to carry it in my pocket, as it had fell out of my pocket twice before, and I was afraid if it fell on the floor it might go off ; after I started to get up off the corner of the table, the pistol went off ; I don't know how it came to go off ; I

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know that I had no intention of shooting anybody, because I had nothing against anyone there ; I do not recollect of seeing Tom Williams at all until after the pistol went off ; Jack says, " Franklin, you shot Tom ;" I said, " No, what would I shoot Tom for," and I looked around and saw Tom standing out on the floor ; I started towards Tom, and they all said, " Shoot him " (meaning defendant), and I says, " No, gentlemen, I didn't shoot him ;" I didn't think I had, because I hadn't seen Tom at all before that, and I never had a thing against him ; as soon as they all commencing hallooing " Shoot him," I started to walk out of the door, and they said, " You shot Tom Williams ;" I said I didn't come here to shoot any one, that the shooting was done accidentally ;" some one in the house then came up and struck me over the head with a six-shooter ; I told them not to kill me, that if I shot Tom Williams, I did not mean it, that it was done accidentally, that I did not come here to shoot any one ;" I went to the outside of the door, and they carried me back to the house inside ; then I went and asked Tom if I shot him ; that if I did, I have no recollection of it, that it was accidental ; he said, " Go away, don't bother me, you shot me," and I said no more to him.

Q. How long did you know Tom Williams ?

A. I had known him twelve years.

Q. Now take this pistol and explain to the court and jury the position it was in when it went off ? (Here the witness takes the pistol and goes to the corner of the table in the court-room and sits on the corner of the table in a leaning position with his right arm across his leg and resting on it, with pistol in right hand and the muzzle of it in range with the table, the end of the barrel ranging downwards and nearly touching the table ; the position of the witness and the manner in which the pistol was held rather indicated indifference and carelessness—REPORTER.) Explain to the jury the position of the pistol when it was discharged.

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A. I am not certain that this is the pistol—the pistol—I had never saw it before that night; I just picked the pistol off the table like, and took hold of the stock, as near as I can remember; I never owned a pistol like this in my life, and didn't know anything about it; I have a government pistol, but did not take it with me that day; if I had wanted to shoot anybody, I could have taken it along with me; the pistol I did have was like this (the one in court).

Q. Was this pistol you had there a self-cocking pistol?

A. I don't know whether it was or not; I never had it in my hand before that day.

Q. Can you tell me how it came the pistol went off; that is, what caused it to be discharged?

A. No, sir; I cannot tell what caused it to go off.

Q. Where did you take your first drink on that day?

A. I took it at the hospital, and a short time after me and Bill Bemkins took two drinks apiece more, and then Bank came down to the hospital with a bottle of brandy and two cigars, and we drank again; we must have drank six or seven drinks apiece; then we went down to the sutler shop and got two bottles of whisky over there; we staid in there some time, and came out and took another drink; we staid around there until we must have taken four or five drinks more out of the bottle; then we took two or three drinks more on the road to Sam's; we got more whisky at Carrol's, and drank two or three times there; I was drinking all the time since the time I took my first drink at the hospital until the time I left the saloon that night, except about a half an hour. I laid down on the benches at the saloon.

Q. Who all were in the room when this accidental shooting occurred?

A. I don't recollect who were there except Jack Winters, Lacadue Henderson; I don't know the Mexicans who were in.

Q. Were you drunk when the shooting occurred?

A. I don't recollect whether I was drunk or not; I know

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I had a great deal of liquor in me, and I tried to go home and couldn't; I went out of doors once to go home, and I was so drunk I had to come back, because I couldn't make my way, and when I came back I had to set down; this was just before the shooting; if I started to go home, I knew I was liable to fall down somewhere and get lost; I didn't see Williams in the room at all that night; the first time I saw Williams was when I first went down to Central City; I remember the thing he said, to put that pistol up; I said I bought that pistol, and paid for it; I might have said that neither he nor Jesus Christ could take it from me; I don't remember what I said; I suppose I talked like a drunk man would; I cannot say whether I made that remark or not; somebody must have put the pistol in my pocket at the quarters; I know I never had the pistol in my hands before that night, I have seen the same pistol before; I know who it belongs to.

By the Court—You say you know who it belongs to?

A. Yes, sir. (Here witness was again asked to describe the position he occupied and the manner he held the pistol when it was discharged, and he related the position substantially as given before—REPORTER.) When I picked the pistol up it went off, but I cannot caused it to go off; I did not intend it to go off. When I took hold of it I think I must have placed my finger on the hammer; if it was not a self-cocking pistol, it never could have went off in the world; that was the reason the pistol must have went off; when I lifted the pistol up, I intended to go home; I didn't see Williams at all then.

Q. You say you had no trouble with any one that was there that night?

A. No, sir; I had nothing against any one there.

Q. Did you ever have trouble with any one in that neighborhood?

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A. There was a man by the name of Davis who said he "allowed to kill me if he caught me."

There was other testimony, but it does not materially change the case made by the evidence of these three witnesses. There is no ground of reversal in the action of the jury in finding a verdict of guilty on this evidence. They evidently thought that the pistol went off because the defendant desired it to do so, and we cannot say from the evidence that they were wrong in this opinion.

As to the instructions excepted to they expressly leave the mental condition of the defendant to be formed by the jury. It is true the court told the jury in effect that a man cannot at the same time be drunk and sober, conscious and unconscious, responsible and irresponsible, a truth about as obvious as that two bodies cannot occupy the same space at the same time.

This was not a comment on the weight of evidence. It was merely the statement of a truth in mental philosophy, which formed the foundation of the instructions objected to by defendant.

This objection assumes that the statute forbidding the judge to comment on the weight of evidence applies to criminal cases, which is by no means settled, and which it is unnecessary now to determine.

Changing the form but not the obvious meaning of the instructions may be expressed thus:

If the jury believe from the evidence that at the time of the killing, the defendant was so drunk as to be unconscious and irresponsible, in that case his testimony as to what took place while he was in that condition is of little or no value. Or, transposing it, if the jury believe from the evidence that the defendant was conscious of and understood what was done and said by himself and others present at the time of the killing so as to give an intelligent and true account of it

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at the trial, in that case he is responsible for his conduct at that time.

The instructions did not advise, direct or instruct the jury what to find, but left them free to exercise their own judgment.

The motion for a new trial was properly overruled, and the judgment is affirmed.

Instructions omitted (accidentally) in the opinion:

If the defendant at the time the pistol was discharged, resulting in the death of Williams, was so intoxicated that he was totally unconscious of the events transpiring around him, and particularly of his own acts and the operations of his own mind, then he was incapable of any motive or intention, and was quite irresponsible for his acts, and that being the case, he is not guilty.

In determining this question you will well consider all the facts and circumstances in proof and bearing on this point, and particularly as to the accuracy and clearness of his recollection now as to what then took place. If he was so drunk at that time that he was unconscious of his own acts and of what took place, then his evidence now is of little or no weight as to what took place.

If he does now clearly recollect any of the circumstances then transpiring at the time of the shooting of Williams, it would tend to show that at that time he had his consciousness and knew what he was about. It is exclusively your province to determine from the evidence whether he knew what he was about. If he did, then he is responsible for any criminal act he may have committed.

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King v. Warrington.

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ROBERT N. KING, Appellee, v. NELSON WARRINGTON, Appellant.

*February, 1889.*

**MORTGAGES.** (1) *Absolute deed held a mortgage: Right of redemption.*

1. A conveyance which on its face is an absolute, unconditional deed, may be made a mortgage by the agreement of defeasance of the parties. Such agreement may be proved by parol, and a right of redemption exists in the grantor and descends to his heirs. No tender is necessary to preserve that right.

The appellee, King, brought his bill in equity in the district court of the third judicial district of the territory of New Mexico, within and for the county of Grant, against the appellant, Warrington, to have the deed therein mentioned, declared a mortgage, and for redemption of the same. The bill charges and the answer admits that the deed, although absolute on its face, was given as a mortgage to secure the payment of the sum of \$110 due from King to Warrington. According to the plaintiff the property was to be redeemed at any time within five years, according to the defendant, two years, which would expire in September, 1879, and which was fixed as the time. Both parties agree in the statement that Warrington was to do the assessment work necessary to hold the property under the mining laws of the United States.

Warrington sets up in his answer and testifies that he afterwards extended this time to December 15, 1879, and says that he then told King that if he did not pay the money by that time he might not get the property. This is what the defendant calls the "new contract." • On December 3, 1879, \$100 was paid Warrington by King towards the extinguishment of the debt. Prior to the filing of his bill King caused the sum of \$500, which was in excess of the amount due to



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Warrington for the original loan and for advances made by Warrington for annual assessment work on the mine, to be tendered to Warrington, who refused to accept the same, claiming that he owned the mine absolutely. There was a decree for the complainant, and Warrington appeals.

*Conway & Risque*, for appellee.

I. The deed, though absolute in its terms, but given simply as security for the payment of money, is a mortgage with all the incidents of that instrument, and the rights and obligations of the parties are the same as if the deed had been subject to a defeasance expressed in the body thereof or executed simultaneously with it: *Odell v. Montross*, 68 N. Y., 499; *Perry on Trusts* (8d ed.) vol. 1, foot note 5, p. 272; *Story's Equity Jurisprudence*, vol. 2, p. 202, sec. 1018; *Hilliard on Mortgages*, vol. 1, p. 32, sec. 2.

II. The subsequent agreement set up in the answer is not sustained by the proof, but even if it were, it would be invalid and could not cancel the complainant's right to redeem. A mortgage being intended simply for security, and the nature of the transaction affording opportunity and temptation to the lender to take advantage of the necessities of the borrower, courts of equity have strenuously resisted all attempts to abridge the right of redemption, and held express agreement for that purpose to be wholly void. The maxim upon which they proceed is: "Once a mortgage, always a mortgage." *Hilliard on Mortgages*, vol. 1, p. 69, *et seq.*; *Kent's Commentaries*, vol. 4 (11th ed.), pp. 173-4, sec. 159, foot note C.

So inseparable, indeed, is the equity of redemption from a mortgage, that it cannot be disannexed even by express agreement of the parties. If, therefore, it should be expressly stipulated that unless the money should be paid at a particular date, or by or to a particular person, the estate should be irredeemable, the stipulation would be utterly void: *Story's Equity Jurisprudence*, vol. 2, p. 203, sec. 1019. An agree-

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ment subsequent to the making of the mortgage between any one intrusted as mortgagee and the mortgagor or his assignee to limit the right of redemption to any certain time, is held invalid: Hilliard on Mortgages, vol. 1, p. 90, *secs.* 26 and 27.

The decree in this case is equitable and just in its terms, warranted by the pleadings and evidence, and in accordance with the principles above laid down, and should be sustained.

**PARKS, Associated Justice:** This was a bill to redeem. The court below decreed that the complainant pay to the respondent four hundred and fifty-seven dollars in five days, and that upon such payment, respondent convey the property in question to complainant. Respondent brings the case to this court.

The rules governing this case constitute a remarkable illustration of the powers of a court of chancery. They are that a conveyance which on its face is an absolute, unconditional deed may be made a mortgage by the agreement of the parties, and that the agreement may be proved by parol; that being a mortgage hardly any failure or neglect of the parties can change its character; that the right to redeem is so sacred that as a general rule it descends to the heir unimpaired by any act or omission of the ancestor, and that no tender is necessary to preserve that right. In discussing the humane and generous principles upon which it will administer upon the doctrine of mortgages, Chancellor Kent seems to exult in the power of a court of chancery. That great judge, in speaking of the almost unalienable right of the debtor to redeem, becomes truly eloquent. No lawyer can read his splendid eulogy upon courts of equity, without feeling that the office of administering justice upon such principles is a noble one.

We have examined this record and find no error in it. The answer admits that the deed was given to secure the debt.

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The decree is a proper one upon the case made by the proof, and is affirmed.

Decree affirmed.

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THOMAS J. BULL, Appellee, v. JAMES W. SOUTHWICK,  
Appellant.

JOHN D. BAENCASTLE, Appellee, v. MARTIN AMADOR,  
Appellant.

EVANGELISTO CHAVES, Appellee, v. MAXIMO CASTENADA,  
Appellant.

*August and November, 1882.*

ELECTIONS. (1) *Duties of canvassing boards ministerial, not judicial.*

SAME. (2) *Judges of election; their failure to take oath does not vitiate their returns.*

SAME. (3) *Canvassing boards, duty of, as to counting votes returned.*

SAME. (4) *Contest to be made in district court.*

SAME. (5) *Rules returns rejected as evidence.*

SAME. (6) *Mode and form of making up returns.*

SAME. (7) *Contest, amendment of pleadings in.*

SAME. (8) *Contest, pleadings, failure to deny, admits allegations.*

SAME. (9) *Contest, nature of proceeding.*

SAME. (10) *Quo warranto not superseded by statutory proceedings to contest.*

1. Canvassing boards of elections have only ministerial functions to canvass and count votes as returned by the judges of election, to ascertain and declare the respective majorities of votes received by the respective candidates for office from the aggregate number of votes so returned by the judges of election. They have no judicial powers whatever to pass upon and decide as to the illegality of individual votes received and returned to them by the judges of election.
2. The canvassing board of elections cannot reject as illegal the votes of any precinct, on the ground that the judges of election in such precinct did not take and subscribe the oath of office as required by law. The judges of election of such precinct, notwithstanding they may not have taken and subscribed the oath required by the statute, are

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nevertheless *de facto* judges of election, and their official acts otherwise regular, are entitled to full faith and credit. Their omission to take the oath, while it might render them liable to prosecution and severe penalties, can not in any way affect the legality of votes received and returned by them; and it is the duty of the canvassing board to canvass and count all such votes for the respective candidates for whom they are cast.

3. Whenever votes have passed the judges of election, and have been received by them as votes, and as such returned by them to the canvassing board, as having been cast for certain candidates respectively—the returns showing in an intelligible manner the number of votes, and for whom cast—it becomes the ministerial duty of the canvassing board to count all such votes, and declare the result from such returns alone, without sitting as a court of review—in the absence of the parties interested—for the purpose of passing upon the illegality or legality of individual voters whose votes have been so returned to them.
4. After votes have been received and regularly returned by the judges of election, and questions as to the illegality of any such votes shall subsequently be raised, the respective candidates for whom such votes are cast are on principle and as a matter of law, as much entitled to their day in court, and to be heard thereon before such votes are rejected, as are the litigants in any other form of judicial proceeding. The only lawful tribunal having original jurisdiction to determine questions of this kind is the district court, which is to proceed in the mode prescribed by the act of 1876: Prince's Laws N. M., 184.
5. When the election returns of a certain precinct were false, in that certain persons were therein stated to have voted, who did not in fact vote at such precinct at all, and it further appeared from such returns that all the voters at such precinct voted in *alphabetical order*, and it could not be ascertained from the poll books and returns of such precinct, for whom or what ballot any voter voted, it was held that they were not evidence that any of the persons whose names were recorded in such poll books and returns voted, and that to determine this matter a resort must be had to evidence *aliunde*.
6. The mode and form prescribed by law for making out poll books and election returns, is as follows: The ballot of the first voter appearing at the polls and voting is to be numbered one by the judges of election. The same number is to be put down by them in the poll books, and opposite the same number in the proper column therein. is to be written the name of such voter. The ballot so numbered is then to be deposited in the ballot box.

The ballot of the second voter appearing and voting is to be num-

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bered two, and the same number put down in the poll book next in order after No. 1, and the name of the voter voting that ballot so numbered is to be written down opposite that number in the poll book, and the ballot then deposited in the ballot box.

The same numerical order and record is to be observed and kept with each voter as he appears and votes.

At the close of the polls the names of the respective candidates voted for by each ballot so numbered and recorded are to be written down in the appropriate columns, and in the proper column under the name of each candidate so voted for, and opposite the same number in the poll book which the ballot bears, and opposite the name of the voter voting the same, is to be recorded the vote showing that the voter has cast one vote for each candidate so voted for by him.

The poll books of the several precincts with the proper certificates attached and so filled out, constitute the returns of the judges of election, to be transmitted to the canvassing board.

7. The notice of contest alleged the illegality of sixty-nine votes. The respondents failed to deny this allegation in their answers, but some time after the expiration of the time allowed by law for them to answer in, moved for leave to file a supplemental answer denying this allegation, urging that the failure to deny in the first answer was solely owing to the negligence and omission of counsel. This motion was overruled.

*Held*, that the statutory provisions as to the time of filing and serving the notice of contest, answer and reply are in effect, statutes of limitation, taking from the judge all discretion as to extending the time.

8. The failure to deny such allegation admits it to be true, and if evidence is taken, as if an issue had in fact been made by filing a denial in proper time, such evidence will be disregarded as immaterial.
9. A proceeding to contest an election is a proceeding exclusively between rival candidates for office, and the people are in no sense parties to it.
10. The proceedings authorized by statute to contest elections do not supersede the proceeding on behalf of the people by writ of *quo warranto*, to oust from office one who was not elected thereto by a majority of legal votes. PRINCE, Chief Justice, dissents.

### Appeals from the District Court of Doña Ana county

These were proceedings under the statute to contest the respective elections of appellants to the offices of sheriff, treasurer and judge of probate for the county of Doña Ana, at

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an election held on November 2, 1880. By stipulation of counsel the three cases were heard and determined together in the court below, and they were in like manner argued and submitted in this court.

In the first case Thomas J. Bull served and filed notice of contest upon the respondent, James W. Southwick, for the office of sheriff of Doña Ana county. In the notice of contest, the contestant used printed forms, alleging, among other things, illegal votes cast and counted for respondent at the last election for said office, and set out various causes, rendering said votes illegal. The contestant also alleged irregularity of the returns of the election at the Las Cruces precinct.

The respondent replied, serving and filing his answer within the time required by the statute, specifically denying the allegations in contestant's notice, except that in the denials, which were made in the order of the allegations in contestant's notice, by a clerical error, one of the allegations is not specifically denied.

Following the several specific allegations touching the individual voter, the contestant, in his notice, alleges generally that the vote, etc., was unlawfully registered, received, and counted, etc. These allegations are specifically denied by the respondent's answer.

The contestant filed his replication, and served the same within the time contemplated by law.

The respondent applied to the judge to fix the time within which to take testimony, and at the same time applied for leave to file an amendment to his answer, which motion for leave was overruled by the court, and the respondent excepted. Thereafter, upon notice by respondent to contestant, testimony was taken. Contestant took testimony regarding quite all the votes alleged by him to be illegal votes. The contestant introduced no proof to sustain his allegations as to the Las Cruces precinct, except the poll-book and tally

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list of votes. The respondent introduced proof to show the regularity of the election at Las Cruces precinct, etc., etc.

The respondent asked again for leave to amend his answer. The court overruled motion for leave to amend, and ruled out certain evidence, to wit, all evidence of the respondent's touching the legality of the votes alleged by contestant's notice to be illegal votes, and without finding that the contestant received a majority of the votes cast at said election, rendered judgment in favor of contestant. To all of which respondent excepted.

On June 1, 1881, the case was argued and submitted, and on December 14, 1881, the court rendered its judgment.

The facts found and the conclusions drawn by the court are the following :

That it appears from the returns of the judges and clerks of election, from each of the precincts in the county, that the contestant, Thomas J. Bull, received for the office of sheriff two more votes than the respondent, James W. Southwick; contestant, Barncastle, received nine more votes for the office of treasurer than respondent, Amador, and respondent Castañada, received twelve more votes than contestant, Chaves, for the office of judge of probate.

That the board of county commissioners, acting under the statute as, *ex officio*, a board of canvassers, illegally assuming judicial functions, went behind the returns and rejected certain votes as illegal, in such manner as to show a majority for Southwick of nine votes, for Amador of two votes, and for Castañada of twenty-three votes, and (wrongfully as to the first two) issued to them, respectively, the certificates of election to the several offices.

That the returns of the judges and clerks of precinct No. 3, which gave a majority of fifty-six votes for Southwick, of sixty votes for Amador, and of eighty-nine votes for Castañada, were so false, contradictory and unreliable as to render

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it impossible to determine therefrom what persons voted for the respective offices.

That the testimony taken before the master on the part of respondents against the objection of contestants, tending to show that the sixty-nine persons before mentioned had been residents of the county for three months immediately preceding said election, was irrelevant, improperly taken and not to be considered, and that said sixty-nine votes for respondent were illegal, as appeared by the pleadings.

The contestant Bull received a majority of the legal votes cast, and was entitled to the office of sheriff. The same result followed in the other two cases, and judgment was accordingly entered, from which the respondents respectively appealed to this court.

No motion for a rehearing or in arrest of judgment appears to have been made.

The other cases are the same in facts and questions of law as *Bull v. Southwick*.

*S. B. Newcomb, W. L. Rynerson and John D. Bail*, for appellants.

The judge did not, in his opinion, find facts upon which to base his judgment.

The court below erred in refusing the amendments to supply what is plainly a clerical omission. This is evident from the answer itself: Act of N. M. Legislature, 1878, par. 54, p. 1220, Prince's Statutes.

The special law of 1876 in regard to the mode of procedure in contested election cases has been changed and modified by statute of 1878 above cited, and secs. 1, 2 and 5, at p. 54, Session Laws 1878.

The main question to be decided by this court is: Did the court below err in refusing to allow the appellants to amend their answers? In order to arrive at a true solution of this question, it will be necessary to briefly review the general principles underlying all election laws in reference to contesta.



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The rule is universal that the person having a legal majority of the votes cast must prevail. And to arrive at this determination the case must be considered upon the merits. It is true different states have different laws and methods of trying cases of this description, but they all have the same end in view; all conform to the same universal doctrine, that the will of the people, as expressed through the ballot box, must be respected; in other words, whoever has received a majority of the legal votes cast shall be entitled to and shall receive the office to which he was elected by the people.

Such proceedings are not to be strangled by technicalities, but examined upon their merits, and the courts are to adjudge and decree which of the candidates received the highest number of legal votes: *Re Duffy*, 4 Brews. (Pa.), 531; United States Digest, new series, vol. 4, p. 259, sec. 24.

"Mistakes should always be corrected, and in determining this and similar questions, on cases of contested elections, it should be kept constantly in mind that the ultimate purpose of the proceeding is to ascertain and give expression to the will of the majority as expressed through the ballot box and according to law. Rules should be adopted and construed to this end and to this end only:" McCrary, p. 137, sec. 132.

The problem is to secure, first, to the voter a free and untrammelled vote, and secondly, a correct record and return of the vote. It is mainly with reference to these two results that the rules for conducting elections are prescribed by the legislative power. But these rules are only means. The end is freedom and purity of elections. To hold that these rules are mandatory and essential to a valid election, is to subordinate substance to form, the end to the means:" McCrary, p. 155, sec. 200.

An election with us is the deliberate choice of a majority or plurality of the electors. Any doctrine which opens the way for minority rule in any case is anti-Republican and anti-American: McCrary, p. 209, sec. 234.

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The broad doctrine was asserted that in this country an election by a minority of the persons voting is not to be tolerated under any circumstance: *Id.*, sec. 235.

A contested election case, whatever the form of the proceedings may be, is in its essence a proceeding in which the people are primarily interested: *Id.*, sec. 316; *Whisor v. Kidder*, 48 Cal., 237; *Saunders v. Haynes*, 13 Cal., 154; *Learey v. Snow*, 15 Cal., 118.

Nowhere does a different doctrine obtain. Can it be conceived, then, that it has been left to New Mexico alone to run counter to all recognized law and authority on this subject? Did the legislators of New Mexico intend to make a law that would turn a man out of an office to which the people had duly elected him, because, forsooth, his attorneys had made a mere slip of the pen? The learned judge below admits that Castañeda was duly and fairly elected. Still he turns him out and puts into his place a man whom the people had rejected. Could the makers of the law ever have intended or even contemplated the possibility of such a proceeding? To state so startling a proposition is to answer it.

Keeping in view these well settled principles, how should our statute be construed? So that the will of the people should be disregarded and minority candidates inducted into office, or rather that the will of the people should be respected and the candidate who received a majority of the votes cast, should be declared elected?

That the candidate receiving a majority of the legal votes cast, shall in all cases prevail, the authorities say, is the chief object of all legislation on this subject; and, indeed, our own statute—this arbitrary, tyrannical, technical statute, as counsel for appellees would have us believe—positively enacts that whoever receives the majority of the legal votes shall be declared elected; thereby conclusively showing that they never intended that a minority candidate should receive the office under any circumstances whatever.

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Counsel for appellees say that the words in the statute, "within the time aforesaid," render it mandatory and nullify the clause that a majority shall prevail. This we deny. We say the majority clause qualifies and explains the limitation clause. We have clearly shown that all election laws must be construed to give effect to the will of the people as expressed at the ballot box. To this end all such laws are made. In the construction of statutes, affirmative words enjoining the performance of an act by a public officer are generally regarded as directory only; negative words make a statute imperative: Dwaris on Statutes, 175; *Stephenson v. Lawrence*, Brightley's Leading Cases on Elections, p. 527; Bacon's Abridgment, vol. 9, p. 234.

In our statute no negative words are employed. It is in effect the same as the statutes of other states, where they provide that whatever is not specifically denied in pleadings shall be taken as true. The Iowa statute provides that "a reply shall be filed before noon of the day succeeding that on which the answer was filed," and if not so filed, the material allegations of the answer shall be deemed true. Under this statute the court allowed a reply to be filed after the time allowed for the filing had elapsed: *Williams v. The Niagara Fire Ins. Co.*, 50 Iowa, 562.

California has a similar statute, and there amendments are allowed: *Fish v. Redington*, 31 Cal., 185 to 195.

The Illinois statute provides that a person desiring to contest an election "shall, within thirty days after the person whose election is contested is declared elected, file with the clerk of the proper court a statement in writing setting forth the points on which he will contest the election."

The supreme court decided that such could be amended after the expiration of the thirty days: *Dale v. Snow*, 78 Ill., 171.

Here we have three supreme courts, under statutes in effect the same as ours, deciding that amendments should be al-

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lowed. No case can be found where a contrary doctrine has been held under like statutes.

We understand that the chief justice of this court allowed (and properly) full and liberal amendments to petitions in contested election cases, under our statute, after the time limited by said law had elapsed.

It is undoubtedly a well-established principle in the exposition of statutes that every part is to be considered, and the intention of the legislature to be taken from the whole. It is also true that when great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature is plain, in which case it must be obeyed." *Fisher v. Blight*, 2 Cranch, 386; Marshall, C. J.

Can it be contended that the meaning of the legislature is plain that no amendments can be allowed in these cases under our statutes in furtherance of justice? From the principles and authorities above quoted, it is evident the legislature never intended to deprive a legally elected candidate of his office on a mere mistake or clerical error, or failure to make a mere denial. Is not the great inconvenience to the public plain here? They are deprived of their choice by a narrow, illiberal and technical construction of an election law, which all the authorities say should be liberally construed, and with the sole end in view of seating the candidate whom the people elected—who had a majority of the legal votes.

A material admission in an answer against a defendant even after evidence taken, upon application should be amended: United States Digest, first series, vol. 1, secs. 1211, 1212, 1213, 1214 and 1215, p. 238; *Taylor v. Dodd*, 5 Porter (Ind.), 246; *Stringer v. Davis*, 30 Cal., 318.

As to amendments generally, see United States Digest, first series, vol 1, secs. 422, 424 and 437, p. 202; *Ib.*, sec. 772, p. 218; *Ib.*, sec. 1034, p. 232; *Soper v. Soper*, 5 Wend. (N.

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Y.), 112; Wait's N. Y. Digest, vol. 2, secs. 2042, 2048, p. 1333.

The learned judge below raises a point, viz.: That the answer of Castañeda was not served until after the twenty days allowed by law. A sufficient answer to this objection is that the contestant Chaves replied to the answer and went to trial without objection. He thereby waived the irregularity, if any there was; under these circumstances it would make no difference if the answer had never been served. This principle is so well settled that we hardly deem it necessary to quote authorities. We may refer, however, to McCrary on Elections, sec. 394, p. 330, and Wait's N. Y. Digest, secs. 70, 71, p. 1396.

When a court has a discretion to allow amendments and refuses on the ground of want of power, such refusal is error: Ct App., *Russell v. Conn.*, 20 N. Y. (6 Smith), 81; 3 Wend., 336; Hill & Denio, 103; 12 Abbt., 16; Wait's N. Y. Digest, vol 1, sec. 9, p. 79.

As to Cruces precinct, No. 3. Informality in making election returns not allowed to operate to disfranchise voters: 29 Ill., 414; *People v. Cook*, 14 Barb., 259; *Andrews v. Saucier*, 13 A., 301; *Weaver v. Given*, 1 Brewster (Pa.), 140, Contested Election, 5 Phil. (Pa.), 102.

Names arranged alphabetically, no objection: McCrary, sec. 100; *Hogan v. Pile*, 2 Bartlett, 281.

Ballot implies secrecy: U. S. Digest, new series, vol. 4, sec. 10, p. 258; McCrary, sec. 413, p. 353, also same, p. 455, Maine court.

Our own statutes provide for a secret ballot: Compiled Laws, sec. 22, p. 436.

As to the second count of ballots, we contend that the county commissioners had no authority to reopen the ballot boxes and recount the ballots. The only semblance of authority for such proceeding is to be found in sec. 22 of the act of 20th of July, 1851, p. 426, Compiled Laws. The

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mode of contesting elections under that law, was entirely different from the present (see secs. 48 to 55, of said act), the whole machinery of which has been repealed, this recounting section included. The law simply states that the result (of such recount) shall be forwarded to the powers authorized by law, to determine the legality of the election. The law entirely fails to state what "the powers" shall do with it, when they get it, and what effect it shall have. This is certainly not conclusive evidence. It might possibly be used to assist the court in the examination of the case, as briefs of counsel, but can have no greater effect. We consider this proceeding an unlawful and unauthorized interference with the ballot boxes, and at least gave an opportunity for tampering with the ballots. This recounting of the ballots after the result has been declared, is not favored by the courts: *Mc Crary on Elections*, secs. 98 to 96, 279, 280.

We are satisfied that the recount in the case of *Bull v. Southwick*, was not correctly made; that there are no such ballots as "Aimes Sandi" or as "Sandique." We believe this latter ballot will be found to read upon examination, "Saudique," the Mexican way of spelling Southwick, and the first named ballot will be found to read "limes saure," also the Mexican way of spelling James Southwick.

As to imperfect ballots, the whole law on the question of imperfect ballots is fully laid down in *McCrory on Elections*, secs. 895 to 898, inclusive.

The county commissioners, in their pretended recount of January 6th and 7th, 1881, have reported the following, as imperfect ballots voted for the office of sheriff, to wit:

T. J. Bull,	-	-	-	-	-	-	-	6
Thomas Bull,	-	-	-	-	-	-	-	3
T. Bul,	-	-	-	-	-	-	-	1
Th. Bull,	-	-	-	-	-	-	-	2
James Southwick,	-	-	-	-	-	-	-	4
Southwick,	-	-	-	-	-	-	-	3

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James M. Soulhowyck, -	-	-	-	-	-	1
J. M. Southwick, -	-	-	-	-	-	3
James Southwith, -	-	-	-	-	-	1
Sandique, -	-	-	-	-	-	5
Aimes Sandi, -	-	-	-	-	-	1

We think that the ballots written "Thomas Bull," and "James Southwick," are not imperfect ballots. A man's middle name, is no part of his name in law. Therefore we think the three votes cast for "Thomas Bull" and the four cast for "James Southwick," should be counted for Thomas J. Bull and James W. Southwick respectively, without proof *alimnde* as to their identity.

The law is well settled, that if ballots are cast for a candidate, written with merely the initials of his first name, or even his surname alone without initials, if proof be introduced showing that they were cast for that candidate, such as, that there was no other person of that name running for that office, or that the candidate commonly wrote his name in that way, or that others commonly wrote his name in that way, etc., the ballot must be counted for the party intended.

The contestant, Thomas J. Bull, has entirely failed to offer any evidence tending to show that any of these imperfect ballots were intended for him; therefore, none of them can be counted for him; while on the other hand, the respondent, James W. Southwick, has introduced evidence plainly showing that the ballots written "James Southwick," "Southwick," "J. W. Southwick," "James Southwith," "James W. Soulhowyck," "Sandique" (reported by commissioners "Sandique"), "limes saure" (reported by commissioners "Aimes Sandi"), were intended and cast for him. The ballots James W. Soulhowyck and James Southwith, although poorly spelled, are so evidently intended for the respondent, that, in fact, they prove themselves upon their face; they are in fact *idem sonans*. As to the ballots "Sandique" and "limes saure," it will be remembered that they are written

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by Mexicans in the Spanish language, and in the manner in which they spell and pronounce "Southwick," as shown by the evidence.

By a strict construction of law none of the imperfect ballots can be counted for the contestant, Bull; but respondent's proof as to the imperfect ballots is amply sufficient to admit them for him. The presumption is very strong, that the judges and clerks of election counted these imperfect ballots for the persons for whom they were intended; for this reason, we think it fair that they all be counted for the respective parties, as certified by the judges and clerks of the respective precincts, but we are not willing that they should be counted for the contestant, and any of the respondent's thrown out.

There is another question worthy of the serious consideration of the court: From the fact that no allegation has been made on either side in reference to these imperfect ballots, will the court go behind the certificate of the judges and clerks of election to ascertain for whom they were cast? Or, in other words, will the court, in the absence of all allegations in the pleadings, change the count as certified by the judges and clerks of election, and reject these votes, simply on the ground of their informality?

The identity of parties will be presumed from identity of names. It was intimated by contestants' counsel that the respondents, in proving up the three months' residence of the voters challenged by contestants, failed to prove the identity of the men examined by them, with that of the men challenged by contestants. We reply that "the identity of name is *prima facie* evidence of the identity of the person." See *People v. Thompson*, 28 Cal., 215; *Garwood v. Garwood*, 29 Cal., 515; *Douglass v. Dakin*, 46 Cal., 50; *Thompson v. Maureu*, 1 Cal., 428; 1 Greenleaf on Evidence, sec. 575, note 1.



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We again call the attention of the court to the legal points made by us in the beginning of this case.

*First.* The question to be decided in this case, is: Which party really received a majority of the legal votes cast? This question must be determined by the proofs: Brightley's Leading Election Cases, p. 381; McCrary on Elections, secs. 132, 544.

*Second.* A liberal construction should be given to election laws, with the view of ascertaining and giving effect to the will of the people, as expressed by them at the polls: McCrary on Elections, secs. 387, 554, 353; U. S. Digest (new series), vol. 9, sec. 20, p. 259.

*Third.* The ordinary rules of procedure and practice ought not to be strictly applied, because the people as well as the adversary parties are interested, whatever the form of the procedure—whether by *quo warranto*, or under a special statute: *Budd v. Holden*, 28 Cal., 139; McCrary on Elections, secs. 316, 374, 382.

*Fourth.* The case must be determined upon the merits, and judgment rendered for the party which the proofs show received the majority of the legal votes: Prince's Statutes, p. 346, sec. 8. And judgment cannot be given upon the pleadings; the law itself negatives such a conclusion. And this is the principle running through all the authorities: *Keller v. Chapman*, 34 Cal., 640; *Searcy v. Grow*, 15 Cal., 119; *Minor v. Kidder*, 43 Cal., 236, 237, 238; McCrary on Elections, sec. 359; United States Digest (new series), vol. 4, p. 258, secs. 19, 24.

*Fifth.* The court below erred in refusing to allow respondents to amend their answers. See authorities cited on this and last page. The pleadings can be amended at any time in the furtherance of justice: *Kneass's Case*, Brightley's Leading Election Cases, p. 337, *et seq.*, and note; McCrary on Elections, secs. 283, 285. And this may be done *nunc pro tunc* at any time before judgment or decree.

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In conclusion, according to the returns, as certified to by the judges and clerks of election of the respective precincts, the whole number of votes cast and counted for the respective parties hereto, stood as follows: Thomas J. Bull, sheriff, 643; James W. Southwick, sheriff, 641; J. D. Barncastle, treasurer, 638; Martin Amador, treasurer, 629; Evangelisto Chaves, probate judge, 629; Maximo Castañeda, probate judge, 641.

The following statement shows the state of the poll of the respective parties, after deducting the illegal votes cast, as shown by the evidence:

Thomas J. Bull,	-	-	-	-	-	643
Illegal votes,	-	-	-	-	-	63
						<hr/>
Legal vote for Bull,	-	-	-	-	-	580
James W. Southwick,	-	-	-	-	-	641
Illegal votes,	-	-	-	-	-	15
						<hr/>
Legal vote for Southwick,	-	-	-	-	-	626
Majority for Southwick,	-	-	-	-	-	46
John D. Barncastle,	-	-	-	-	-	638
Illegal votes,	-	-	-	-	-	66
						<hr/>
Legal vote for Barncastle,	-	-	-	-	-	572
Martin Amador,	-	-	-	-	-	629
Illegal votes,	-	-	-	-	-	15
						<hr/>
Legal vote for Amador,	-	-	-	-	-	614
Majority for Amador,	-	-	-	-	-	42
Evangelisto Chaves,	-	-	-	-	-	629
Illegal votes,	-	-	-	-	-	66
						<hr/>
Legal vote for Chaves,	-	-	-	-	-	563
Maximo Castañeda,	-	-	-	-	-	641
Illegal votes,	-	-	-	-	-	15
						<hr/>
Legal vote for Castañeda,	-	-	-	-	-	626
Majority for Castañeda,	-	-	-	-	-	63

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We claim that the three votes proven to have been illegal, in the evidence taken in the case of *Chaves v. Castenada*, above alluded to, should be deducted from the number of votes cast for Bull. This would leave Southwick's majority 49.

It will be observed that we have conceded in the above statement that the contestants have proven that fifteen of the votes cast for respondents were illegal. We think this is a liberal estimate, and that we have over, rather than under, stated the number. This concession is made, upon our view of the law, and understanding of the evidence; applying the same rules to these fifteen persons, which we insist should be applied to the sixty-six, which we claim should be deducted from contestants.

Finally, we insist that the evidence is conclusive that all the respondents were fairly elected by a majority of all the legal votes cast. That the will of the people, thus expressed at the ballot box, should, and we believe will, be respected by the court, and judgment given for the respondents accordingly.

*A. J. Fountain, Catron & Thornton and Fiske & Warren*, for appellees.

As to the pleadings. The court below correctly held that "any material fact alleged in the notice of contest, not specifically denied by the answer, within the time aforesaid, shall be taken and considered as true." This is the clear and unmistakable language of the act of 1876; Prince's Comp., p. 344.

Was there any material fact so alleged and not denied? It is incontestable, and stands admitted, that the notice named sixty-nine different persons who voted for appellant, as to each of whom it is distinctly charged that "he had not resided in said county of Dona Ana for three months immediately preceding said election." That this is a "material fact" must be conceded: Act of 1868, Prince's Comp.,

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339. That no specific denial of this fact, within twenty days, was made, is also undisputed. The inevitable conclusion is that reached by the trial court, that this fact was admitted by the pleadings, and hence, that these sixty-nine persons did not possess one of the indispensable qualifications, and their ballots were absolute nullities in contemplation of law.

Inasmuch as these sixty-nine illegal votes are essential to give appellants any pretense of a majority, under any claim whatever, it would seem unnecessary to pursue the matter further, unless there be some authority higher than the legislative assembly to negative its plainly expressed will, or some mysterious power of construction vested in the courts which, while admitting the plain enactment, can dispense with obedience to its requirement.

Counsel for the appellants say the case must be determined upon the evidence and the merits, and that judgment cannot be given upon the pleadings, yet they allege as error that the court below refused leave to appellant to amend his answer.

It would seem an idle thing to ask leave to amend a pleading which cuts no figure in the proceedings; and if counsel really believed that the judgment of the trial court in this statutory proceeding must be based only upon the evidence produced, without regard to the pleadings, they surely would not have asked leave more than fifty days after the time had elapsed for answering, after the reply had been filed and evidence taken, to amend the answer or to file a supplemental answer; or, if they did so, they would not assign as error in this court, the refusal of such leave. By their own act they admit that which is too evident for argument, that their proposed amendment, denying the allegation of notice of contest as to the three months' residence in the county of the sixty-nine voters in question, was material and necessary.

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The only point to consider is whether the refusal of leave to amend constituted error sufficient for reversal.

This is a special statutory proceeding. The legislature has spoken in plain language, and there is no room for judicial construction or legislation. The answer must be filed within twenty days, and any material fact "not specifically denied within the time aforesaid, shall be taken and considered as true."

The court has no discretionary or dispensing power, even in matters of practice when the legislature has spoken: Sedgwick on Stat. and Const. Law, p. 322; Dwarris on Stat. Law, p. 477. Where a statute declares that a judge at chambers may direct a new trial if application is made within ten days after judgment it has been said "he can no more enlarge the time than he can legislate in any other matter:" *Seymour v. Judd*, 2 Const., 464; *Bleeker v. Wiseburn*, 5 Wend., 136.

When a statute fixes the time within which an act must be done, the courts have no power to enlarge it, although it relates to a mere question of practice. So, where an appeal to be valid must be made within ten days, it is void if taken on the eleventh: *Bleeker v. Wiseburn*, *supra*; *Seymour v. Judd*, *supra*; *Ex parte Ostrander*, 1 Denis, 680-1; *Barclay v. Brown*, 7 Paige, 245; *Caldwell v. The Mayor, etc.*, 9 Paige, 572; *The Queen v. The Mayor, etc.*, 11 A. and E., 512; Hobert, 298 (K. B., 1625); Siderfin, 56 (K. B., 1670); Strange, 1125 (K. B., 1710); 2 T. Rep., 395; *The Bank, etc.*, v. *Widner*, 11 Paige, 529.

The proceedings in cases of contested elections are properly regulated by territorial legislation under the organic act. It is "a rightful subject of legislation."

Each state has provided for itself some summary method of proceeding in such cases, incorporating such provisions as seemed to its legislative power wisest and best adapted to its peculiar condition.

The power of each state is only limited by constitutional

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restriction, state or federal, and that of each territory only by the constitution and acts of congress.

In the absence of such restriction, the act of our legislative assembly is supreme, and it is the plain duty of the courts, as of all others, to give it obedience.

The diversity of state legislation upon the subject renders the local decisions of one state of little aid in construing the election laws of another. Each act must be viewed in the light of the legislative will, as expressed, and hence the citations of authorities by appellee under the particular enactments of different states, such as California and Pennsylvania, are inapplicable here.

In California an election may be contested by any elector, and "the court must be governed in the trial and determination of such contested election, by the rules of law and evidence governing the determination of questions of law and fact, so far as the same may be applicable: Codes of Cal., vol. 2, secs. 11,111-11,122.

In other words, the general law governing other actions are expressly made applicable to this special proceeding, so far as applicable.

In Pennsylvania the statute, as appears in *Boileau's Case*, 2 Parsons, 503, cited in Brightley's Leading Cases on Elections, p. 268, required the court to proceed "upon the merits" of the election, but this is not held to mean that the pleadings are not to be considered.

In *Kneass's Case*, Brightley, 338, *et seq.*, which seems to be much relied upon by appellant, the Court of Quarter Sessions, Philadelphia, simply held that under their statute there was nothing to prevent the exercise by the trial court of the common law discretionary power of permitting amendments under certain circumstances.

Such is not the case under our statute, which we are justified in saying stands unexcelled among the many similar

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enactments, not only for clearness and simplicity, but for wise precautions against frauds and partisan manipulations.

While the fullest opportunity is afforded both parties for the vindication of their rights, the delays and subterfuges by which justice is so often defeated, are effectually prevented.

It was not intended to, and does not, leave anything to the "discretion" of the court, and in this respect, it profits by the universal experience of mankind as expressed in the often quoted language of Lord Camden cited in the note to *Knoass's Case*, *supra*.

"Any material fact alleged in the notice of contest not specifically denied by the answer, within the time aforesaid, shall be taken and considered as true."

No precedent can be found among the most extreme instances of judicial legislation, for pretending that this language is merely directory, and not mandatory. The words, "within the time aforesaid," were wholly unnecessary unless for the express purpose of limiting the time, and where the legislative purpose appears in the act, no court has ever gone to the extent of disregarding it. The widest latitude allowed is that "when statutes direct certain proceedings to be done in a certain way, or at a certain time, and a strict compliance with these provisions of time and form does not appear essential to the judicial mind, the proceedings are held valid, though the command of the statute is disregarded." Sedg. on Stat. Law, p. 368.

And this is only when the language used fails to enjoin a strict compliance, and when the requirement relates to some immaterial matter, where a compliance is a matter of convenience rather than of substance." *The People v. Schermerhorn*, 19 Barb., 540 ; Sedgwick, p. 374.

Of course the provision of the civil procedure act in regard to amendments of pleadings in actions generally do not apply to this special proceeding. It is complete in itself.

We might well submit this point, upon the plain proposi-

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tion that the court, in refusing leave to amend the answer, was simply acting in obedience to the law.

But even if the court had possessed either the statute or common-law power of permitting the amendment in question, there can be no possible doubt that the exercise of the power was a matter resting in the sound discretion of the trial court, which this court will not review.

The case in Pennsylvania cited by appellant is conclusive upon this subject. The court says: "From these and many other authorities which might be cited, it is well settled that amendments not regulated by the act of 1806 must be granted or refused under the exercise of a sound discretion of the court, for the furtherance of justice, and is not the subject of revision by a higher court; in short, it is an appeal to the conscience of a judge:" *Kneass's Case*, 2 Parsons 553; *Harrison v. Colton*, 31 Iowa, 16; *Bloom v. Price*, 44 Miss., 73; *Mott v. Mustian*, 43 Ga., 380; *Clark v. Spencer*, 14 Kan., 398; *Culvet v. Hide & L. Bank*, 78 Ill., 625; *Cross v. Johnson*, 30 Ark., 396; *Scarlett v. Academy*, 43 Md., 203; *Dobson v. Chambers*, 78 N. C., 334; *Reid v. Allen*, 18 Tex., 241; *Forrest v. Forrest*, 25 N. Y., 501; *Phinole v. Vaughan*, 12 Barb. (N. Y.), 215; *Sayre v. Frazer*, 46 Barb. (N. Y.), 26; *Walden v. Craig*, 9 Wheaton, 576; *Mandeville v. Wilson*, 5 Cranch, 15; *Church v. Syracuse*, 32 Conn., 372; *Schermerhorn v. Wood*, 30 How. (N. Y.), Pr., 316; *Moore v. Shaw*, 47 Me., 88; *United States v. Buford*, 3 Peters, 12; *Ensworth v. Barton*, 67 Mo., 622.

If the court should go farther, and wish to review the action of the court below, we respectfully refer to the record to show that, so far from the refusal of leave to amend being an abuse of discretion, permission, if given, would have been a gross outrage upon the contestant, and would virtually have deprived him of his rights under the law.

It will be seen that leave was not asked until February 17, 1881; this was fifty-five days after the answer was filed—



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forty-eight days after the reply had been filed and served, calling specific attention to the omission—and forty-eight days after the period of taking testimony had commenced to run, which was limited by law to three months, or ninety days. Contestant was not bound to take evidence on this point before: *Moore v. Sanborin*, 42 Mo., 490.

Of course the effect of the amendment would have been to require proof on the part of contestant as to the residence of these sixty-nine voters, and to deprive him of the time which had elapsed, and which the law gave him; and in support of this application the respondent filed no affidavits and furnished no excuse for their delay which could be considered by the court.

Assuredly the court, under such circumstances, exercised a most sound discretion in refusing an application which would have enabled the respondent, by means of his own laches, to deal the contestant so fatal a blow.

BRISTOL, Associated Justice: The above three contested elections cases for the respective offices of sheriff, treasurer and judge of probate, are here by appeal from the third judicial district court for the county of Dona Ana.

Over seventy cases of illegal voting on various grounds are alleged by each of the contestants, and between two hundred and three hundred by each of the respondents.

The testimony is very voluminous, each alleged ground of illegality in voting presents a separate and distinct issue to be ruled upon. I will consider the several cases together without reference to the testimony taken before the master, except so far as may be necessary for a final disposition of the case.

The official returns of the judges of election for each of the precincts in the county are in evidence.

From these returns it clearly appears that the contestant, Thomas J. Bull, for the office of sheriff, received two more

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votes than the respondent, James W. Southwick. That the contestant, John D. Barncastle, for the office of treasurer, received nine more votes than the respondent, Martin Amador, and that the respondent, Maximo Castañada, for the office of probate judge, received twelve more votes than the contestant, Evangelisto Chaves.

Castañada having received a majority of votes, very properly received his certificate of election from the canvassing board.

This same canvassing board, however, refused to issue certificates to either Bull or Barncastle, but instead thereof gave certificates of election to the minority candidates, Southwick and Amador.

Why was this ?

There is nothing before me to clear up this mystery, except certain undisputed facts in relation thereto, appearing on the face of the pleadings, and the official returns of the judges of election of the several precincts.

The notice of contest for the office of sheriff, among other things, contains the allegations substantially, that the judges of election of precinct No. 2, returned to the canvassing board for the contestant, Bull, sixty-four votes; that of said votes the canvassing board unlawfully, designedly and fraudulently neglected and refused to canvass and count for the contestant one of said votes.

Also that the judges of election of precinct No. 8, returned to said canvassing board forty votes for said contestant, Bull; that of said votes the canvassing board unlawfully, designedly and fraudulently neglected and refused to canvass and count for the contestant two votes.

And also that the judges of election of precinct No. 9, returned to said canvassing board nineteen votes for the contestant, Bull; that of said nineteen votes the canvassing board unlawfully, designedly and fraudulently neglected and re-

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fused to canvass and count for the contestant each and every one of said votes.

The respective notices of contest for the offices of treasurer and probate judge contain the same allegations as to the return of votes from precincts Nos. 2, 8 and 9 respectively, except that for treasurer. Barncastle received sixty-six votes in precinct No. 2, and forty votes in precinct No. 8. Also that the contestant, Chaves, received sixty-seven votes in precinct No. 2, and thirty-nine votes in precinct No. 8.

The answers of the respective respondents to these allegations are somewhat peculiar, and deserve especial notice. Each of these answers is to the same effect, and one will answer for all. I will take that of the respondent, Amador, for office of treasurer as a sample. He denies generally:

"That the said county commissioners failed at any time or neglected or refused to count, canvass, or allow for said contestant the full number of votes returned as having been cast for him, said contestant, at said county for said office of treasurer, and denies that said commissioners as a canvassing board at the canvass of returns of said election did wrongfully, unlawfully or fraudulently neglect or fail or refuse or omit to count, canvass and allow you, the said contestant, for said office of treasurer twenty-two votes or any number whatever which appeared from said returns to have been received by said contestant for the said office of treasurer; and he, said respondent, denies that at said canvass of the election returns of said election for said office of treasurer the commissioners unlawfully or fraudulently or without sufficient cause threw out or refused to consider or canvass the returns of precinct No. 9 of said county, or to in any manner deprive him, said contestant, of nineteen votes or any vote or votes whatever. This respondent denies that the county commissioners sitting as a canvassing board as aforesaid, ever at any time wrongfully or fraudulently or in violation of law, did omit or fail or neglect or refuse to count and canvass and allow for said

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contestants the full number of votes returned as having been cast and counted at precinct No. 8, or any other precinct of said county at said election for said office of treasurer; and denies that said contestant was by said commissioners then and there as aforesaid deprived of the benefit of any votes whatever, which or any of which had been lawfully cast, counted or returned for said contestant at said election for said office of treasurer.

"This respondent avers the fact to be that at the election aforesaid at precinct No. 2, the vote of Adolph Lea was received by the judges of election at said precinct, which vote was illegal and not entitled to be cast, canvassed or counted; the said Adolph Lea not then being registered at said precinct, nor having a certificate of registration as required by law.

"And that at precinct No. 8, aforesaid, the votes of Atanacio Rivera and Senobio Nevares, were each and both received by the judges of election at said precinct; which votes and each of them were illegal; they, the said Atanacio Rivera and Senobio Nevares, and each of them not then and there being citizens of the United States, and not then and there being registered as voters as provided by law; and this respondent charges and specifies that the votes of said Adolph Lea and of Atanacio Rivera and Senobio Nevares, and each and every one of them so illegally voted and received, were voted for you for said office of treasurer, and wrongfully attempted to be counted for you, said contestant. \* \* \*

"And" (this respondent) "avers the fact to be that the returns and papers to wit: poll books and registration lists of said precincts, to wit: precincts Nos. 2, \* \* \* 8 and 9 respectively, \* \* \* show that at precinct No. 2 aforesaid, John D. Barncastle received but sixty-five votes \* \* \* at said precinct No. 8, John D. Barncastle received but thirty-eight votes, at said precinct No. 9, John D. Barncastle received no votes."

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Answers substantially the same were made to these allegations in the notices of contests for the offices of sheriff and probate judge by the respective respondents, Southwick and Castañada, with the exceptions of the averments in the answer of Southwick that Bull received but sixty-three votes in precinct No. 2, and but thirty-eight in precinct No. 8; and in the answer of Castañada that Chaves received but sixty-six votes in precinct No. 2, and but thirty-seven in precinct No. 8. The logic, significance and effect of these several answers to the allegations under consideration, are virtual admissions that the canvassing board threw out one vote for the contestants from precinct No. 2, also two votes from precinct No. 8, and the entire returns from precinct No. 2, accompanied, however, by the general denial that this was done unlawfully or fraudulently.

That in precinct No. 2, one vote, that of Adolph Lea, was received by the judges of election for the respective contestants, and counted and returned by them as such to the canvassing board; but, as is claimed by the respondents, such vote being an illegal vote, was no vote, and being no vote, the several contestants received in that precinct one vote less than the number returned by the judges of election, and on that ground the canvassing board canvassed and counted for the contestants one vote less from that precinct than was returned by the judges of election.

That in precinct No. 8, two votes, those of Atanacio Rivera and Senobio Nevares, were in like manner received by the judges of election for the respective contestants, and counted and returned by them to the canvassing board as legal votes, but such votes being illegal were not votes, and not being votes, the contestants received in said precinct No. 8, two votes less than were returned by the judges of election, and therefore the canvassing board canvassed and counted for the contestants two votes less than were so returned.

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And that in precinct No. 9, neither of the contestants received either nineteen or any votes whatever—and therefore none were or could be canvassed and counted by the canvassing board for either of the contestants.

That is to say, the canvassing board usurped the functions of the judges of election and assumed the powers of a judicial tribunal—in the absence of the parties interested—to decide and determine the legality of the vote of Adolph Lea in precinct No. 2, as also the legality of the votes of Atanacio Rivera and Senobio Nevares in precinct No. 8.

The returns from precinct No. 9 by the judges of elections certainly show that nineteen votes were cast for each of the contestants. These returns in every respect are in strict conformity to the requirements of the statute, except that the printed form of the oath to be taken by the judges of election is not filled up and signed by them, nor is there any evidence appearing thereby that they took such oath. It may be fairly assumed, therefore, that the only ground on which the canvassing board and the respondents considered or pretended that neither of the contestants received any votes at all in precinct No. 9, is that the judges of election thereof did not take and subscribe the oath required by law, and therefore, in consequence of that omission, all the votes cast in that precinct were illegal, and being illegal, were not votes, and were not and ought not to be counted or canvassed by the canvassing board. In this instance, also, the canvassing board assumed the functions of a judicial tribunal to pass upon the legality of the votes cast in precinct No. 9.

Long before these answers were put in by the respondents, these same questions came before me in a *mandamus* proceeding instituted to compel this canvassing board to canvass and count for one of these contestants said nineteen votes so thrown out by them from precinct No. 9; also said two votes from precinct No. 8, and the one vote from precinct No. 2, so thrown out by them.

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There were various delays in consequence of the case not being properly presented with all the facts, but it was finally presented with all the returns and data that were before the canvassing board, and upon which they based their action in the premises, and all these questions arose upon a motion to quash the alternative writ of *mandamus*.

The law was carefully considered, precedents and authorities were cited and read. The motion to quash was overruled, and the canvassing board ordered to canvass and count said votes or show cause to the contrary by a certain day. An evasive return was put in, which was quashed and the board ordered to file a proper return by another day. In the meantime, the board went out of office and a new board became their successors, and the case was never pressed for a final determination.

On the motion to quash the alternative writ of *mandamus*, all the questions were ruled upon. It was then decided that the canvassing board had only ministerial functions to canvass and count the votes as returned by the judges of election, to ascertain and declare the respective majorities of votes received by the respective candidates for office from the aggregate number of votes so returned by the judges of election. That they had no judicial powers whatever to pass upon and decide as to the illegality of individual votes received and returned to them by the judges of election, and particularly so as to precinct No. 9. That the judges of election of that precinct, notwithstanding they may not have taken and subscribed the oath as required by statute, were nevertheless *de facto* judges of election, and their official acts otherwise regular, were entitled to full faith and credit; and that their omission to take such oath, while it might render them liable to prosecution and severe penalties, could not in any way affect the legality of votes received and returned by them; and that it was the duty of the canvassing board to

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canvass and count all such votes for the respective candidates for whom they were cast.

In making these rulings, I simply followed the uniform decisions of the courts on the subject. I had not then, nor have I now, any doubts as to their correctness. Each of these respondents in their answers has substantially reiterated the same grounds so ruled against, in justification of the acts of the canvassing board in throwing out the returns from precinct No. 9; one vote for the contestants in precinct No. 2, and two votes in precinct No. 8.

In precinct No. 9, nineteen votes were cast for each of the contestants, eleven for each of the respondents. By throwing out the returns from this precinct by the canvassing board, the result of the election, as shown by the returns, was changed so that the contestant, Bull, instead of having a majority of two for the office of sheriff, his competitor, Southwick, had a majority of six. And the contestant, Barncastle, instead of having a majority of nine votes for the office of treasurer, had only one majority. And the respondent, Castañada, instead of having a majority of twelve for the office of probate judge, had a majority of twenty; and by throwing out one vote for each of the contestants in precinct No. 2, and two votes in precinct No. 8, the result of the election, as shown by the returns of the judges of election, was further changed so as to give Southwick, for sheriff, a majority of nine; to Amador, for treasurer, a majority of two, and to Castañada, for judge of probate, a majority of twenty-three.

This then, is the explanation, and the reason why Southwick received from the canvassing board the certificate of election for sheriff, instead of Bull; and why Amador received the certificate of election for treasurer instead of Barncastle.

The powers and duties of the county commissioners as a



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canvassing board are clearly and specifically defined in the ninth subdivision of section 4, of the act of 1876.

The provision of the act is as follows:

"Said board of commissioners shall" \* \* \* "also act as boards of canvassers of the elections within their respective counties; and shall count the votes cast in any election within their respective counties, and shall determine the result thereof from the returns of the judges of election of the various precincts, and shall declare the result of said election, and shall immediately issue a certificate to the person that may have received the highest number of votes for any office." \* \* \* "The votes cast in any election shall be canvassed and counted within the time now prescribed by law, and the said board of commissioners shall discharge all the duties, and shall exercise all the powers now exercised by the several probate judges, relative to elections, as now required by law, and shall be subject to the same penalties for any failure in the discharge of their duties, or abuse or usurpation of power:" *Vide* laws of N. M., by Prince, chief justice, page 226, sub. 9, sec. 14. This law is concise and plain. Whatever votes have passed the judges of election, and received by them as votes, and as such returned by them to the canvassing board as having been cast for certain candidates respectively—the returns showing in an intelligible manner the number of votes and for whom cast—it becomes the ministerial duty of the canvassing board to count all such votes, and declare the result from such returns alone, without sitting as a court of review—in the absence of the parties interested—for the purpose of passing upon the illegality or legality of individual voters, whose votes have been so returned to them.

But it was suggested by one of the counsel for respondents, that at and previous to the date of the act creating county commissioners and conferring upon them the powers of a canvassing board and of probate judges in regard to elections,

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the judges of probate did possess some sort of judicial power to determine the illegality of votes at the time the returns were canvassed; and that under the provisions of the statute last above quoted, the canvassing board could exercise the same functions in determining the illegality of voters.

The only provision of statute at any time in force, on which any such suggestion could be based is contained in the act of July 20th, 1851, which provides as follows:

"Within six days after the election, the probate judge shall call to his assistance one of the justices of the peace of the county, and publicly examine the votes polled for each candidate, giving notice thereof two days previous, which notice shall be posted up at the court house for the information of the people where the examination is to be held, and any citizen shall have the right to question the legality or illegality of any vote:" Laws N. M., Prince's ed., sec. 17, p. 328.

Whatever significance may be given to this statute, it certainly never conferred the power on the canvassing officers to determine the illegality of votes and to reject them on that ground, for section 55 of the same act specifically prescribes the mode in which the illegality of votes shall be determined and the votes rejected. That section provides as follows:

"To reject any illegal votes that may be polled at any election in this territory it shall not be necessary to contest or question them at the polls, but they may be rejected by the authorities qualified by law to determine the validity of said elections, by being proved, after due notice is given by the party contesting said election to the opposing party; said notice in any county election shall not be less than eight days, and shall, in all cases be within thirty days thereafter:" Laws N. M., Prince's ed., sec. 55, p. 333.

This, then, was the only mode by which illegal votes received and returned by the judges of election could be deter-

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mined and rejected under the former administration of the probate judges; and that mode certainly was not to be executed by the canvassing officers at the time the returns from the several precincts were canvassed by them.

It is a well authenticated fact that one of the most disgraceful episodes in the history of the politics of this same county was, some years ago, enacted by a judge of probate and justice of the peace, acting as a canvassing board under the supposed authority of sec. 17 of said act of 20th July, 1851.

As such board of canvassers, they assumed judicial power to pass upon the illegality of and reject votes without any other ceremony than because partisan bystanders challenged them as illegal.

In this way hundreds of votes were thrown out and the result of the election thereby arbitrarily changed. This is but another illustration of what experience has long since demonstrated, which is, that if such judicial power should be conferred upon mere canvassing boards, to be exercised at the close of a hotly contested election—in the absence of the real parties interested, and almost always with the partisan advisors of such boards in the background—their sittings would be marked by the exercise of arbitrary power that would be more aggressive and odious than that of the ancient court of Star Chamber.

After votes have been received and regularly returned by the judges of election, and questions as to the illegality of any such votes shall subsequently be raised, the respective candidates for whom such are cast are, on principle and as a matter of law, as much entitled to their day in court and to be heard thereon before such votes are rejected, as are the litigants in any other form of judicial proceeding.

The only lawful tribunal having original jurisdiction to determine questions of this kind is the district court: Act of 1874, Prince's Laws N. M., 344.

The only mode by which such questions can be determined

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by the district court in a proceeding between rival candidates alone, is that prescribed by the act of 1876: Prince's Laws N. M., 134.

For the reasons assigned it is clearly my opinion, as a matter of law that the canvassing board, wrongfully and without authority of law, issued certificates of election to Southwick and Amador; that such certificates ought to have been issued to Bull for sheriff, and to Barncastle for treasurer; that by reason of said certificates so as aforesaid wrongfully issued, the respondents, Southwick and Amador, have improperly held the respective offices in question, pending the termination of these contested election cases; that in the meantime, though said respondents have been such officers *de facto*, and their official acts entitled to full faith and credit as such, yet they have not been such officers *de jure*.

I have gone over this branch of the case very much in detail and as thoroughly as I was able, because the questions involved are really important, and have not, to my knowledge, ever been ruled upon by our courts. If there is any misapprehension in the minds of canvassing boards as to their precise powers and duties, it is of the greatest importance to the public, as well as for their own protection against severe statutory penalties, that the matter should be settled and determined by the courts.

There is another branch of the cases, bearing upon certain duties of judges of election, that is of sufficient importance to merit some attention.

The judges of election of precinct No. 3 returned 114 votes for the respondent, Southwick, for sheriff, and 58 for the contestant, Bull; also 114 votes for Amador for treasurer, and 54 for the contestant, Barncastle; also 120 votes for the respondent, Castañeda, for probate judge, and 40 for the contestant, Chaves; all the respondents receiving large majorities.

In each of the notices of contest for the respective offices

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in question there are allegations, substantially, that the returns and poll books of this precinct show upon their face that they are so contradictory, unreliable, defective and tainted with fraud as to render them entirely worthless as election returns, because: 1st. It cannot be determined from said returns and poll books, with any degree of certainty, how many or what particular persons voted thereat for said officers respectively. 2d. Because the numbers written respectively on the tickets voted thereat do not conform to the respective numbers set opposite the names of voters on the poll book. 3d. Because the whole conduct of the election officers who held said election at precinct No. 3, then and there amounted to such a disregard of their official duties as to render their doings unintelligible and unworthy of credence, and the results of their action unreliable for any purpose. 4th. Because it appears from the poll books of said precinct that S. H. Newman voted for each of said respondents for the said respective offices for which they were candidates, whereas, in truth and in fact, said Newman did not vote at said precinct at all, and did not vote at said election for either of the respondents. 5th. Because it appears from the poll book that one Jacinto Armijo then and there voted for the respondents, Southwick and Castañeda, and for the contestant, Barncastle, whereas, in truth and in fact, he did not then and there so vote. 6th. Because it appears from said poll book that one S. M. Blun voted for each of said respondents, whereas, in truth and in fact, he did not so vote; and, 7th. Because it appears from such poll book of precinct No. 3 that S. B. Newcomb and Wm. L. Rynerson voted at said precinct at said election, whereas, in truth and in fact, neither of them then and there voted.

In response to these allegations the respective respondents in their answers deny all fraud, negligence and irregularity on the part of the judges of election of this precinct.

As to the allegations in regard to the voting of S. H.

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Newman, Jacinto Armijo and Wm. L. Rynerson, they simply deny that they, or either of them, at said election, voted at said precinct; thus virtually admitting the allegations in respect thereto contained in the notices of contest.

There is no answer to the allegations in regard to the voting of S. B. Newcomb and S. M. Blun—which allegations are of course admitted.

In further answer to such allegations the respondents aver that the county clerk, Horace F. Stephenson, a strong partisan of the contestants, wilfully, corruptly and fraudulently neglected and refused to deliver the poll books and ballot box of said precinct to the judges of election thereof, for the purpose of obstructing and preventing a full and fair election thereat; and that he left the same locked up in his office on the morning of the day of said election, and absented himself, so that said poll books and ballot box could not be obtained at the time for opening the polls for said election, nor were they obtained until the doors of his office had been forced open, when they were conveyed to said judges of election.

In further response to said allegations they aver that any irregularity touching said returns from precinct No. 3 was the result of said action on the part of said Stephenson. They further aver that by the numbers on the ballots and the numbers opposite each voter's name on the poll books it can be determined by whom and for whom each and every ballot was cast.

Now, it is apparent from an examination of the returns of this precinct, that in some respects either these returns are false, or these answers are false. For instance, these answers aver that said S. H. Newman, Jacinto Armijo and W. L. Rynerson did not, at said election, at said precinct, vote in any manner whatever; whereas the judges of election thereof certainly recorded in the poll books and returns that said S. H. Newman did vote thereat ballot numbered 161, for each

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of the respondents; also that said Jacinto Armijo thereat voted ballot numbered 3, for each of the respondents, Southwick and Casteñada, and for the contestant, Barncastle; also that said W. L. Rynerson voted ballot numbered 183, for no candidate whatever; that is to say, he voted a blank ballot so numbered. These poll books and returns further show that said S. M. Blun voted thereat ballot numbered 41, for each of the respondents, and that S. B. Newcomb voted ballot numbered 160, for Manuel Nevares, for justice of the peace, and for no other candidate.

But the returns from another precinct (No. 10), show that thereat, at said election, said S. B. Newcomb voted ballot numbered 3, for each of the respondents, on a certificate of registration from precinct No. 3; also that the returns from precinct No. 18 show that W. L. Rynerson voted thereat ballot numbered 112, for each of the respondents, on a certificate of registration from said precinct No. 3.

On examining the poll books and returns from this precinct, No. 3, the first thing that must impress anyone as extraordinary and incredible is the fact that, according to such returns, all the voters at said precinct marched to the polls and voted in alphabetical order.

That is, all those voters whose surname commenced with the letter "A"—thirty-nine in all—voted before anyone else with names commencing with any other letter voted. Those voters under the initial "A" are recorded as having voted ballots numbered from and including ballot numbered 1, to and including ballot numbered 39, in regular numerical order.

After these had all voted, then all those voters, the initial letter of whose surnames was "B," voted in regular numerical order ballots numbered from and including ballot numbered 40, to and including ballot numbered 60—twenty-one in all. Then, in like manner, all those under the initial "C" voted, and then those under the initial "D," and so on through

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the entire alphabet in regular numerical order, until the initial "Q" is reached. The "Qs" commenced with ballot numbered 175. One voter, the first under this initial—one Jesus Qnesada—is recorded as having voted that ballot. Those under the remainder of this initial "Q," and extending through the initials R, S, T, U, V, W and Y, in regular alphabetical and numerical order—fifty in all—from and including ballot numbered 176, to and including ballot numbered 225, are recorded as having voted blank ballots.

The law in regard to making out these poll books and returns is very plain and simple. The statute has not only prescribed the mode, but has prescribed a form for executing that mode. The judges of election of precinct No. 3 had one of these forms in print, with appropriate columns marked and with suitable headings, also in print, indicating precisely how the poll books and returns should be made out.

The mode and form prescribed by law is as follows: The ballot of the first voter appearing at the polls and voting is to be numbered one by the judges of election. The same number is to be put down by them in the poll book, and opposite the same number, in the proper column therein, is to be written the name of such voter. The ballot so numbered is then deposited in the ballot box.

The ballot of the second voter appearing and voting is to be numbered two, and the same number put down in the poll book next in order after No. 1, and the name of the voter voting that ballot so numbered is to be written down opposite that number in the poll book, and the ballot then deposited in the ballot box.

The same numerical order and record are to be observed and kept with each voter as he appears and votes.

At the close of the polls the names of the respective candidates voted for by each ballot so numbered and recorded are to be written down in the appropriate columns, and in the proper column under the name of each candidate so voted



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for, and opposite the same number in the poll book which the ballot bears, and opposite the name of the voter voting the same, is to be recorded the vote, showing that the voter has cast one vote for each candidate so voted for by him.

The poll books of the several precincts with the proper certificates attached and so filled out, constitute the returns of the judges of election to be transmitted to the canvassing board.

With these printed forms of poll books and returns before them, what excuse was there for the judges of election of this precinct to make out false returns as to who voted and how they voted? If the clerk, Stephenson, was guilty of the charges alleged in the answers, he certainly merits the severest censure, and ought to be prosecuted for gross breach of duty.

But I am unable to perceive how this breach of duty, under the circumstances, could be the occasion for or constitute any justification for making out a false return in any respect. The judges of election could not proceed without the ballot box and poll books. There may have been some delay in procuring them. But it seems they did procure them and proceed with the election. They had the legal forms before them. They filled out these forms in a certain illegal mode, so as to bear falsity on their face in the respects I have pointed out.

It is quite clear that it cannot be ascertained from the poll books and returns of this precinct how or for whom or what ballot any voter voted, nor are they in and of themselves any evidence that can be relied on that any of the persons whose names are recorded in the poll books and returns voted at all, and that to determine this matter a resort must be had to evidence *aliunde*.

In these answers it is averred that from the ballots cast at this precinct the number of votes for each candidate may be determined. That may be true, but the ballots sealed up

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and locked up in the ballot box and deposited for safe keeping pending any election contest that might be instituted, constitute no part of the returns of the judges of election to be canvassed by the board of canvassers.

The contestants complain—and I think justly—that in consequence of the falsity of the returns from this precinct, in recording the names of votes opposite the numbers of ballots which they did not vote, it was impossible for them to ascertain therefrom what illegal votes, if any, had been cast for the respondents, and that thereby they were prevented from including any such illegal votes in their notices of contest. If this was designed, it was certainly a fraud.

Whether designed or not, it was an infringement of the rights of candidates desiring to contest the election.

Whether there was or was not any fraud committed at this precinct, one thing is quite certain, and that is, that by reason of the falsity of the returns that I have pointed out, the door was opened whereby the grossest frauds might have entered, and the greatest obstacles thrown in the way of their detection.

The notices of contest for the respective offices of sheriff and treasurer were duly served on the respective respondents, Southwick and Amador, on the fourth day of December, 1880, and the notice of contest for probate judge was served on the respondent, Casteñada, on the seventh day of December, 1880.

The provisions of statute under which the cases are brought, so far as they relate to the question involved, are as follows :

“In all cases of contested elections triable in the district court, the notice of contest when filed and served as now provided by law, shall be taken and considered as the only petition and process necessary for the court to acquire jurisdiction.”

“The respondent shall file his answer to the notice of con-

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test within twenty days from and after the service of such notice of contest upon him exclusive of the day of such service; and any material fact alleged in the notice of contest, not specifically denied by the answer within the time aforesaid, shall be taken and considered as true."

"The respondent may allege in his answer any matter material to the issue, showing that the contestant is not legally entitled to the office in controversy; and if he claims that illegal votes have been cast or counted for the contestant, he must specify in his answer the name of each person whose vote was so illegally cast or counted, the precinct where he voted, and the facts showing such illegality."

"The contestant shall file his reply to any new matter set up in the answer, and serve a copy thereof on the respondent within twenty days from and after the service of the answer, exclusive of the day of such service; and any new matter in the answer material to the issue not specifically denied by such reply within the time aforesaid, shall be taken and considered as true:" Act 1876, Prince's General Laws N. M., 344-5.

Under the foregoing provisions of law, the time for answering and specifically denying each material allegation in the respective notices of contest for the offices of sheriff and treasurer, and filing and serving the same expired at the end of the 24th day of December, 1880, and the time for so answering and denying the allegations in the notice of contest for probate judge, and filing and serving the same expired at the close of the 27th day of December, 1880.

Each of the notices of contest contained allegations that sixty-nine voters, naming them and the precincts where they voted, voted at said election for each of the respondents.

That each of said voters was not qualified to vote, on the ground, among others, that he had not resided in said county for three months immediately preceding the election.

These allegations, of course, are material, and if true rend-

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ered the vote of each of said voters illegal and void ; and whatever the number of illegal votes the testimony may show were cast for the contestants, it is clear they are insufficient in numbers to overbalance these sixty-nine alleged illegal votes for respondents ; and that if these allegations are to be considered as true, then it necessarily follows that each of these cases must be decided in favor of the contestants, Bull, Barncastle and Chaves.

The respondents, Southwick and Amador, filed and served answers on the 24th day of December, 1880, that being the last day on which the same could be done. But in neither of said answers is there any denial of any of the aforesaid allegations as to the illegality of these sixty-nine votes.

The respondent Casteñada, filed an answer on the 27th of December, 1880, that being the last day for such filing ; but such answer was not served until the expiration of the time for such service, to wit : on the 22d day of that month. Neither does this answer contain any denial of the aforesaid allegations touching the illegality of said sixty-nine votes.

On the 17th day of February, 1881, fifty-nine days after the expiration of the time for Southwick and Amador to answer, and fifty-two days after the time expired for Casteñada to answer, each of the respondents made a motion for leave to file a supplemental answer denying the allegations as to the illegality of said sixty-nine votes, a proposed supplemental answer being attached to the motion in each case.

These motions were set down for hearing on notice to opposing counsel on the first day of February, 1881. A hearing was had on that day—all the parties appearing by counsel, and the application for leave to file such supplemental answers was denied and overruled by the court.

Notwithstanding this ruling, the respondents, under objection by contestants, have taken testimony before the master, tending to show that said sixty-nine voters had been residents of the county for three months prior to the election.

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This testimony has been reported by the master. On the final hearing of the causes, the respondents renewed their motions for leave to file said supplemental answers, for the purpose of having the pleadings conform to the evidence. These motions also, were overruled by the court, and excepted to by respondents.

It is my opinion that this evidence was improperly taken, and ought not to be considered; the same not being responsive or pertinent to any issue in either of the cases.

It is also my opinion that the very object of the statute, in regard to the pleadings and practice in contested election cases, is to afford, and at the same time to compel the observance of, a speedy mode for conducting and terminating such cases. Its language is plain and free from all ambiguity. There is no room for mistaking its purport and meaning, and I cannot conceive of any reasonable excuse for not following its provisions by either party.

These statutory provisions, as to the time of filing and serving the notice of contest, answer and reply, are in effect statutes of limitation, taken from the judge all discretion as to extending the time.

In my opinion this is one of the most salutary of our statutory laws. Experience has demonstrated that without some such compulsory mode as to the time of making up issues and their trial in contested election cases, subterfuges and delays might, and would be successfully resorted to, so that a final determination could not be reached before the term of office would expire.

At the time the motions for leave to file the supplemental answers were made and heard, no excuse whatever was presented for the delay, nor was any excuse at any time offered, except the negligence and oversight of counsel for the respondents.

If any error was committed by the court below in the premises, it was in overruling the motions in the first instance.

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After such ruling, the contestants and their counsel had a right to consider that issue disposed of, and were excused from offering any evidence in support of their allegations.

Nevertheless it was claimed by respondents' counsel on the argument of the cases, that inasmuch as the people were interested in securing the officers of their choice, the contestants were bound to prove those allegations, though not denied by the answers.

In reply to this, it may be said, 1st, that it is absurd to introduce evidence to prove the truth of what the law declares "shall be taken and considered as true;" 2d, that this is a proceeding exclusively between rival candidates for office, in which the people in no sense are parties.

That it is competent for an officer to resign—to admit facts that will deprive him of an office and give it to another in a proceeding between them—or by his own negligence in conducting his defense, to produce the same result, there can be no doubt.

If by any such means the candidate should obtain the office, who, in fact, was not elected in a majority of legal votes, and this could be shown by competent evidence, the people would have their remedy in a direct proceeding on their part, by writ of *quo warranto*. And if successful, while it would not restore to office the candidate who had lost it by his own act or omission, it would oust the other candidate. Both would then be out of office, and the vacancy could be filled in the mode prescribed by law.

The theory of our statute in regard to the institution and prosecution of contested election cases between rival candidates undoubtedly is, that such candidates, being personally interested and desirous of obtaining and holding the office in question, will do all that is necessary to secure their respective rights under the law.

It must be conceded that this statute, when followed by the parties, affords a speedy, consistent and effectual rem-

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edy, whereby the rights of the parties, as well as the interests of the people, are well protected.

It is clear, however, that this statutory remedy does not supersede the proceeding by writ of *quo warranto*, on behalf of the people. It is also clear that under this statutory remedy no act or omission by either party can jeopardize the rights of the people, and if by any such act or omission the wrong candidate should obtain office, the people could resort to their remedy by *quo warranto*.

This statutory proceeding between rival candidates alone is a special proceeding complete in itself, conferring a special jurisdiction on the district court, and to which the general law and rules of the court as to the time of pleading and the discretion of the district judge in extending such time, do not apply.

The special proceeding, therefore, must be strictly followed. It is so plain that there can be no excuse for not following it. When followed, no occasion can ever arise for resorting to a writ of *quo warranto*.

From the opinion herein expressed, it follows that the record discloses no error, and that the judgment of the court below in each of these contested election cases ought to be affirmed.

PARKS, Associate Justice: Nearly a year since in a contested election case in my own district, I was obliged to examine and construe the statute which is in question in this. I then held that the law was mandatory, and have not found any reason in the argument or in the examination of this case to change my opinion.

The correct rule for the interpretation of such statutes is that "no specific requirement of a statute may be dispensed with except when it is clearly manifest that the legislature did not deem a compliance with it material, or unless it appears to have been prescribed simply as a matter of form." "If it is evident from the ordinary grammatical construction

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of the words used that it intended a right should be enjoyed only upon some specified conditions, there is no power in the courts or elsewhere to dispense with the conditions imposed, or to hold that a thing which it deemed essential to be done at one time, may nevertheless be done at another."

It is insisted that the statute is directory and that the court had the right in its discretion to give the respondents time to amend their answer in a vital point or to extend the time for answering on one material point, which is substantially the same thing, and that the refusal of the court to do so was an abuse of its discretion. One and a sufficient answer to this is, that leave to amend the answer or to file an amended answer was not asked for till nearly eight weeks had elapsed after the time for answering had expired, and that a corresponding liberality in the court in the exercise of its discretion in all other respects, would defeat the manifest object of the law, which is a prompt and speedy trial of election contests. It is laid down in *McCrory on the Law of Elections*, that amendments should be immediate and for reasons too obvious to need statement here. If the district court had the discretion to permit amendments as claimed, that discretion must be reasonably exercised, and could not be extended so as to relieve the respondents in this case from the consequences of their long and unreasonable delay in asking leave to amend. The authorities cited on the argument were numerous, and many of them not applicable. Mr. McCrory's doctrine that election laws are only means to an end, is not applied by him and cannot be properly applied by anybody to the trial of contested election cases, and the eloquent opinion of the supreme court of Maine, quoting the still more eloquent speech of Mr. Lincoln, is subject to the same objection.

It is not intended to review these authorities. Many of them are profitable study, but none of them are conclusive of this case. It is the duty of the court to avail itself of all



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such lights, but to use its own judgment in construing this statute and not permit it to be practically repealed by a construction not only too liberal to be wise, but too loose to be safe.

The opinion of the district court is filed with the record in this case, and is believed to be correct. It is so full and complete as to obviate any necessity there might otherwise be for a more lengthy and thorough opinion by this court.

The judgment of the district court is affirmed.

PRISON, Chief Justice, dissenting: In the argument on the appeal in these cases it was agreed, in substance, that the question of fact relating to the legality of votes and eligibility of voters raised by the evidence should not be considered, but that the question as to the correctness of the ruling of the judge below in denying the application of the respondents for leave to amend their answer to the notice of contest, should alone be discussed. It was also stipulated by counsel that all of the three cases should be argued and considered together, as they were substantially the same, involving the same questions, and differing only in immaterial details. They will, therefore, be treated here as one case.

The judge presiding in the second district, who decided the appeal herein by affirming the decision of the court below, not having filed an opinion, and it being uncertain whether an opinion will be filed by Judge Bristol, it appears necessary, in order to lay a foundation for the proper understanding of the reasons which constrain me to dissent from the decision of the court, to recapitulate briefly the facts of the case.

At the general election, held in November, 1880, in the county of Doña Ana, James W. Southwick was declared elected sheriff over Thomas J. Bull, Martin Amador was declared elected treasurer over John D. Barncastle, and Maximo

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Castañada was declared elected probate judge over Evangelisto Chaves.

The provisions of the territorial statutes relating to contested election cases, so far as they relate to the time of pleadings, etc., are briefly as follows: The act of 1874 provides that the contestant shall file his notice of contest within 30 days after the day of counting the votes: Laws of 1874, chap. 29 (General Laws, p. 341). The act of 1876 provides that "the respondent shall file his answers to the notice of contest within thirty days from and after the service of such notice of contest upon him: Gen. Laws, chap. 26, sec. 2, p. 344. The contestant shall file his reply to any new matter set up in the answer, and serve a copy thereof within twenty days after the service of the answer: Gen. Laws, chap. 26, sec. 4, p. 345.

On December 1, the above-named candidates not declared elected, viz., Messrs. Bull, Barncastle and Chaves, filed notices of contest, and shortly after (December 4 on Southwick and Amador, and December 7 on Castanada), notice was served on the respondents to answer such notices.

These notices were similar in their character, each averring that a large number of illegal votes had been fraudulently and unlawfully cast, counted and returned for the respondents, praying the court that upon the trial of contest such votes should be stricken from the poll and disallowed, and alleging that when such illegal votes were thus subtracted from the number returned for the respondent, the contestant would be found to be elected by a substantial majority.

In the only one of the cases in which the full record is before me—that of Barncastle against Amador—the number of votes thus alleged to have been illegally cast and counted for the respondent is 71, but the number does not differ materially, if at all, in the other cases. For all practical purposes the cases are exactly similar.

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It may be remarked here that only in four instances out of the 71 does the notice of contest give to the respondent any definite information as to the facts which it was claimed made the vote illegal.

In the case of Francisco Lucero, the allegation is that the voter had been convicted of a felony; in the case of Gregorio Miranda, that he was not a citizen; in the case of Rafael Abalos, that he was not a citizen and was also under age; in the case of Omogon Armijo, that he had not resided in the county and precinct for the required length of time; but in the other sixty-seven cases the allegation does not particularize any specific cause of disqualification whatever, but enumerates for each individual of the sixty-seven (using a uniform printed blank for the purpose), every one of the five disqualifications known to the law, viz.: that he was an alien, that he was under age, that he had not resided in the territory six months, nor in the county three months, nor in the precinct thirty days.

In no one out of the sixty-seven, so far as the record shows, and as is conceded as matter of fact, was this true; nor was any attempt made to prove it by evidence—the effect of such a kind of statement being, of course, to deprive the respondent of any information whatever as to the real issue to be met in the case of these sixty-seven voters. This was a flagrant and manifest evasion, if not violation of the law, the intention of which is to give the respondent precise information as to the cause of contest, and the objection raised to each vote, in order that he may be ready, in the required time, either to admit or deny the allegations. Such a vicious system of pleading, unless legally objected to, and the notice ordered to be made specific, could only be answered in one way to be effectual, and that was by denying, *seriatim*, the five allegations thus made as to each of the challenged voters.

On the 24th and 27th days of December, respectively, the

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respondents filed their answers as required by the law of 1876, above cited.

These answers, so far as they relate to seventy of the seventy-one voters referred to in the notice of contest (the one excepted being Francisco Lucero), are written on printed forms, the first portion of which reads as follows:

"This respondent denies specifically that at said election held on the said second day of November, A. D. 1880, for the said office of ——— at the said county of Doña Ana, and at, to wit, Precinct No. —, of said county, certain persons named in contestants' notice of contest, to wit, ———, and each and every one of them were not then and there citizens of the United States or minors under the age of twenty-one years, and denies that they and each and every one of them had not resided in said territory for a period of six months immediately preceding said election, and denies that they and each and every one of them had not resided in said precinct No. —, of said county, for a period of thirty days immediately preceding said election, and denies that they and each and every one of them were then and there disqualified by the laws of said territory from being registered as voters and from voting at the said election."

It will be observed that this specifically denies each allegation with regard to each voter, except that which states that he "had not resided in said county of Doña Ana for a period of three months immediately preceding said election."

The answer then goes on to charge that various illegal votes had been cast and counted for the contestant, using a printed blank for the purpose, and the charge in most cases in the same general and improper manner adopted by the contestant.

On the sixth day of January, 1881, the contestant filed and served his reply, in which, after specifically denying all the new matter in the answer, he says that "a certain material fact in and by said notice of contest, specifically alleged and

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charged, to wit, that at said election so held at said county of Doña Ana, on the second day of November, 1880, for the the office of treasurer, certain persons, to wit: (naming them) did each and every one vote for the said respondent for said office of treasurer, and that they and each of them had not then and there resided in the said county of Doña Ana for a period of three months immediately preceding said election, is not by the said answer specifically denied or attempted to be denied," and, therefore, prays that said alleged fact be taken as confessed. On the seventeenth day of February, 1881, the respondent filed an amended answer, verified by Mariano Barela, containing the specific denial omitted in his original answer, and to the omission of which attention was drawn by the language just quoted from the reply of the contestant; with a motion for leave to file such amended answer. The judge set down the motion for hearing on February 21, at Chambers at Mesilla, where an extended argument took place, and the court, after consideration, overruled and denied the motion for leave thus to amend.

It is conceded that this decision was not made as an exercise of the discretionary power of the judge as to allowing amendments, but upon the distinct ground that the judge possessed no power or discretion in the matter; to use the language of the learned judge in his written opinion, that the statutory provisions "are really statutes of limitation taking from the judge all discretion as to extending the time." Counsel for the respondents stated in their argument on appeal that it was on account of the early announcement of this opinion of the judge, that they did not then present the affidavits which they had prepared, explaining the clerical error in their original answers and the reason for the lapse of time before their application to amend, which affidavits were only appropriate or useful if the subject was considered within the discretion of the judge.

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An order of reference having been made, the respective parties thereupon commenced the taking of proofs before the master; and in the course of the proceedings the respondent insisted on introducing evidence in support of the legality of the sixty-nine votes called in question by the notice of contest and affected by the omission of the clause as to ninety days' residence in the printed blank used by respondents in their answer. This was objected to by the contestant on the ground that the respondent, by failing to deny the allegation of the notice as to the ninety days' residence of those voters, had admitted the truth of that allegation; that the fact thus alleged and not denied was under the law to "be taken and considered as true," and hence that the subject of the legality of those votes was settled, and not subject to be changed by proof. The evidence as to the residence of these voters was then taken by the master, subject to the objection, and reported to the judge.

On the final hearing on the 1st of June, 1881, after the coming in of the master's report, the respondents again moved (having filed the motion, May 24), to be allowed to amend their answer by a denial of the allegation of non-residence, with a request that the amendment be filed *nunc pro tunc* as of the date of filing the original answer, when it was intended by said respondents' counsel to include in his said answer the substance and words of this said amendment." This was supported by the affidavit of Col. Rynerson, one of the counsel for the respondents, setting forth that in his draft of the answer sent to the printer, the denial of non-residence in the county had been properly inserted, but that the printer inadvertently dropped it out in setting up the matter in type, and that the omission was not observed by respondents' counsel until about the time of the first motion to amend.

After long consideration, the judge refused to allow the

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amendment, and rendered a decision in favor of the contestant in each case (December 14, 1881).

The respondents appealed to this court. While the testimony is very voluminous and the briefs and arguments are of great length, yet the real questions necessary to be decided are few.

1. The respondents held that although their answers did not contain any specific denial of the allegation relative to residence in the county, yet as they did contain a denial that the voters in question "were then and there disqualified by the laws of said territory from being registered as voters and from voting at said election," that this general denial of disqualification put in issue every separate allegation of cause of disqualification, and brought up the whole question to be determined by the proofs as fully as if every separate allegation had been distinctly, separately and specifically negatived.

In this I think the respondents are wrong. The case in 31 Cal., 185 (*Fish v. Redington*), and others cited by counsel, seem almost conclusive as to this; but apart from any authorities I should have no doubt on the point. The law distinctly says that "any material fact alleged in the notice of contest, not specifically denied by the answer, shall be taken and considered as true."

The object of the law is, evidently, to frame a distinct issue as to each vote called in question.

The notice of contest is to state distinctly the ground of objection, and the answer is to deny the same specifically, or else it will be taken as confessed.

It is true that, in this case, the contestants disregarded or evaded the law, by not specifying in sixty-seven instances any particular ground of objection; but this fault should have been remedied by application to the court to have the notice made more definite. When the respondents answered they waived the impropriety of form, and subjected them-

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selves to answering the notice just as it was. The law, in terms, requires a specific denial of each allegation, and no general denial could take the place of the specific denials required. Were this so, every contestant would simply deny, in general terms and in bulk, all the allegations contained in the notice, and thus the clear and distinct issue which the law was intended to provide for would be lost. It is plain, therefore, that under the pleadings (notice and answer) as they stood at the time of the reference—unamended—the respondents had no right to introduce evidence as to the county residence. That was not at issue, but by the default of the respondents was to “be taken and considered as true.” If the judge had committed error in not allowing them to amend by inserting the omitted clause, their rights were all preserved by an appeal.

2. The respondents claimed that inasmuch as this was a kind of proceeding in which the people at large had an interest, no default or neglect on the part of the respondent could obviate the necessity of the case of contestant's being actually proved by evidence before the master.

In this, also, I think, they were in error. The object of the law, as before said, was to frame distinct issues as to each vote called in question. The notice might charge A with being an alien, B with being under age, C with not being registered, etc., etc.

On examination, the respondent might discover that the charge against B was correct. He would then deny, specifically, the allegation respecting A and C, but by silence admit the truth of that relating to B.

In such case, it would, obviously, be unnecessary to produce testimony as to B. No issue as to him is presented. It is conceded that his vote was illegal. So the law says very properly that in such cases the fact thus admitted by lack of denial “shall be taken and considered as true.”

In this instance the allegation as to non-residence in the



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county for the required length of time was uncontradicted and so was "taken as true," without proof.

This I believe to be the correct rule and practice, and the authorities are to that effect. See *Moore v. Sanborin*, 42 Mo., 495, etc.

On the case, then, as presented by the pleadings, as they went before the master, I consider that the subsequent proceedings and judgment were regular and correct.

This brings us to the main and vital question involved in the case, viz.: whether the application of the respondents for leave to amend their answer should have been granted; or, rather, whether the court has power in a proper case and in furtherance of justice to grant such an order.

In the instance before us, it is obvious that the omission of a specific denial of this one of the five allegations against the respondents was the result of accident, either from carelessness in writing the manuscript from which the form of this part of the answer was to be printed, or by omission in setting the type from which it was printed. The printed form of answer follows the printed form of the notice, with the exception of this omission; and the five words at the end of the preceding clause "had not resided in said territory for a period of six months immediately preceding said election" being exactly the same as those of the omitted clause, "had not resided in said county of Dona Ana for a period of three months immediately preceding such election," made it very natural for the compositor to skip the clause by thinking that he was at the end of the latter when really at the end of the former.

But however the mistake occurred, it is not questioned that the respondents intended to deny the allegations of the notice *seriatim*, as they were stated.

The failure to do so was practically giving up their case in advance.

An answer containing such an omission was equal to no

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answer at all. The contestant was as fully entitled to judgment on this one omission, as if the denials of the entire series of allegations in the notice had been omitted, and, of course, no one would intentionally incur the trouble and expense of a protracted litigation on pleadings known to be defective as a foundation.

It was argued by counsel for the contestant that under the circumstances could the decision of the court below in denying the motion to amend be reviewed here, because :

1st. If the provisions of the election law are mandatory, then the judge had no power to grant an amendment, and his refusal of course cannot be reviewed ; and,

2d. If those provisions are not mandatory, and hence the judge below had power to allow an amendment, then the subject was one of those entirely within his sound discretion—appealing to his judicial conscience—and not subject to revision on appeal.

But in this they ignored a third possible situation, viz. : If the judge below possessed the discretionary power to allow an amendment, but believed that he did not possess it, and consequently denied the motion not in the exercise of his judicial discretion, but distinctly on the ground that he did not possess any power or discretion at all.

In this last case, the action of the judge would be founded on a mistake of law, and consequently reviewable, and the appellate court in overruling his decision, would simply remand the question to the judge for the exercise of that sound discretion which he had declined to act upon before, because he believed that he did not possess the power.

The allowal or refusal of an amendment is generally a matter of discretion with the judge to whom the application is made ; and had the learned judge below considered this application upon its merits, and decided it in the exercise of his judicial discretion, it is at least doubtful whether this court could have properly overruled his determination on appeal.

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On this point the contestant's counsel argued ably and fully, producing a long array of authorities to sustain their position, that the execution of this discretion is not reviewable in an appellate court, but I do not think that this question really enters into the consideration of this case; for, as appears from the language of the judge himself, in his written opinion, and as was conceded by all parties on the argument, the judge denied the motion for leave to amend, not on its merits or in the exercise of his discretion, but on the express ground that the judge in such cases has no discretion at all to exercise.

His words are, "these statutory provisions as to time of filing and serving the notice of contest, answer and reply, are really statutes of limitation, taking from the judge all discretion as to extending the time."

This, then, is the real question for consideration, "whether the judge, before whom an election contest is being tried in a proper case, has a discretionary power to grant leave to amend after the expiration of the time for answering fixed by statute?"

There is no doubt that where such power really exists, and a judge declines to exercise it for the avowed reason that he believes he does not possess such power, it is good ground for reversal.

"Where a judge at circuit has a discretion to allow an amendment of the pleadings, but refuses to exercise it, on the ground of want of power, such refusal is error of law and ground of appeal." See *Russell v. Conn.*, 20 N. Y., 81, and other cases cited; 1 Wait's N. Y. Digest, 79; 17 Minn., 296, in analogous.

Before proceeding to examine the question of power, I think it not out of place to remark that in the first judicial district, it has been exercised in various cases since the enactment of the existing law, and without a single suggestion by counsel, even in contests exciting much public interest, that

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there was doubt of the existence of such power, or the propriety of its exercise.

Thus in the case of *Santos Munes v. Juan Sanchez*, which was one of the so called "Taos election cases," which created some excitement in 1879, the notice of contest was filed December 11th, the answer was not filed till February 11th, the time having been extended by consent; on February 28th a replication was filed; and as late as April 9th notice was given by the respondents of a motion to amend their answer by inserting new matters. It was not opposed, although the case was being strongly contested, and an order was made granting the leave, yet the amendment was a very material one, involving no less than 107 votes in ten different precincts, which were then for the first time alleged to be illegal. This was of course a far stronger case than that now in question, in which simply a denial, obviously omitted by accident, was to constitute the amendment, but it is only referred to as showing that the power of the judge, in the execution of his judicial discretion to allow such an amendment, had not been doubted hitherto in the first district.

The territorial statutes relative to election contests contain nothing whatever as to amendments.

It is at least very doubtful whether the liberal provisions of law relative to amendments in ordinary civil cases, which have existed in this territory for over thirty years (see Act 27 of July 12, 1851), apply to a contested election case under the recent statutes. So that we are compelled to look for guidance to the rules of the common law, and the general principles which should govern such cases.

Much stress has been laid by counsel on the words "within the time aforesaid" in section 2 of the act of 1876, p. 344, General Laws, and the precise technical signification and power of those words gave rise to a large amount of discussion.

On the one side it was contended that they were "words of

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limitation ;" that they absolutely and irremediably limited the time in which a denial of the alleged facts could be interposed, and that on the expiration of that time there was no power in the courts to extend it or allow an amendment of such denial, no matter how strongly the application might appeal to its sense of right and justice. Though the sickness of the contestant, or the death of his counsel, might have delayed the filing of the answer ; though the messenger charged with it might have been waylaid on his journey ; though by accident, or fraud or collusion, some material words might be omitted from it ; though evidence of gigantic fraud might be discovered the day after the expiration of the twentieth day ; though it might become patent to all that the will of the people was being disregarded and subverted, yet, according to this view, these words presented such an absolute and positive barrier to any remedial action by the court, that all opportunity for relief was cut off.

On the other hand, it was argued that these words, while they fixed the time in which, in ordinary cases and without the direct action of the court, the answer should be served, and the issues made up, yet that neither by the language used, nor according to the intent and purpose of the law, were they so distinctly mandatory and absolutely prohibitory, as to prevent the court, in a proper case, in furtherance of justice, and in the exercise of its sound judicial discretion, from allowing an amendment afterwards.

So far as the precise language employed is concerned, it was shown that it does not differ materially from that used in many statutes in various states as to times for pleadings both in ordinary cases, and also in election contests, in construing which the courts have held not only that the limitation did not prohibit the allowance of an amendment in furtherance of justice, but that the time might be extended in a proper case and for good cause shown, for the filing and serving of the entire pleading. Not to go outside of cases

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of election contests for precedents or illustrations, the case of *Dale v. Irwin*, 78 Ill., 171, is an important one, and specially so with us, because the statute under which the election contest, which is its subject, was conducted, is quite analagous to ours.

This statute is chapter 46 of the system of laws which, under the new constitution, went into effect July 1, 1872.

Section 113 provides that the persons desiring to contest an election, shall, "within 30 days" after the declaration of the result, file with the clerk of the court, a statement in writing, setting forth the points on which he will contest the election.

The election in question was held April 13, 1874, and the "statement" was filed within 30 days. At the October term of the court, the defendant moved to quash the petition, and the motion was granted.

"Whereupon the petitioner obtained leave to amend the petition, which was done." Afterwards, at the same term, leave was granted to the petitioner to amend his amended petition, which was done.

The defendant moved to strike the amended petition from the files, and subsequent to the second amendment, again moved to strike from the files, both of which motions were disallowed.

On appeal, the court says, "The ground assumed by the appellee in his exception to the order allowing the petition to be amended is, that this being strictly a statutory proceeding, the petitioner should be confined to the points made in his original statement, or petition; that the proceeding being neither in chancery, nor at the common law, the court had no power to allow amendments of any kind, but should be guided by the statute alone, and as no provision is made therein for amendments, the court was powerless to allow them. \* \* \* We cannot think the position taken by defendant as to the meaning and purpose of this act, tenable or just. If he is right in seeking to confine the contestant

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to the points contained in his original statement, great injustice might be done in many cases." And the court sustained the amendments.

It will be observed that in this case the amendments were made five months after the prescribed time had expired, and when the period for actual trial had arrived.

Again, the act of congress as to contested elections (Feb. 19, 1851), provides that the contestant shall, "within thirty days after said election, give notice," etc. Yet the allowance of amendments and of more time to prepare and file this notice are frequent, and in one case (*Wright v. Fuller*, 1 Bartlett, 112), the true rule of construction was tersely stated as follows: "This statute shall receive a reasonable construction; one that will carry out and not defeat its spirit and purpose."

A case very nearly analogous is found in *Stevenson v. Lawrence* tried in Pennsylvania, in 1862. This was a contested election case, and the question which arose was based on the following language in the statute, being part of the fifth section of the act of July 2, 1839: "The court shall hear and determine such contested election at the next term after the election shall have been held." On the one side it was contended that no action having been taken by the court at the "next term" after the election, its jurisdiction had ceased and its power was gone; that the language was mandatory and imperative, and the limitation absolute.

On the other hand, it was insisted that the provision should be counted to be merely directory, and that there should not be a denial of justice and a disregard of the expressed will of the people at the polls, simply on account of an informality in the method or time of bringing the matter before the court. The decision of the court sustained the latter view, and the following language of the opinion delivered then is so appropriate, that it might almost have been written for this case, and is well worthy to be reproduced here. It was as

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follows: "The design of the law is to secure an investigation of a matter in which the citizens generally and the candidate claiming title to the office by election are deeply interested. Questions are involved in such an issue of the gravest importance, affecting alike the highest principles of honesty and fair dealing between man and man, the purity of the ballot box, and the vindication of the elective right of the citizens of the commonwealth; to guard these rights, each of them sacred and worthy of legislative protection, the courts are enjoined to investigate the merits of the case, and finally determine the same according to law. \* \* \*

Is the law to be regarded as a dead letter? Are the citizens and contestants alike to be turned away and told that the stroke of the clock has paralyzed the arm of the court, and that they must go without remedy for an alleged violation of public and private rights, because that which was not of the essence of the thing to be done had not been complied with by the officer of the law, either with or without cause? I think not. I can gather no such meaning from the act, and can regard the command as to time only in the light of an injunction to the judges to speed the cause, and at the next term, if possible, fulfill the material requirements of the law, by finally determining the case upon its merits. Any other view, it seems to me, reverses the natural order of things; prefers the unimportant to the material; gives to the minor consideration, namely, the time within which a decision is to be rendered, precedence of the more substantial and weighty matters of the law under consideration, for, certainly, it is far more essential that the courts shall decide the main question than allow it to fall dead before the judges, who are enjoined to decide upon it finally, and upon its merits, by language quite as explicit as that used to indicate the time within which it ought to be determined." Brightley, p. 532. The only words, according to the established rules of construction, which are absolutely prohibit-



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ory, *per se*, are words of negation. Negative words are required in order to make a statute so imperative as to cut off all remedial power of the courts.

Bacon's Abridgment, vol. 9, p. 234, under the title "Statute," states the proposition distinctly, and gives a number of illustrations, among which are the following: If a statute without any negative words declare that deeds shall have in evidence a certain effect, provided particular requisites are complied with, this does not prevent their being used as evidence, though the requisites were not complied with: *Jackson v. Bradt*, 2 Caines, 169.

"Though 54 Geo. III, c. 84, enacted that the Michaelmas quarter sessions shall be held in the week next after the eleventh of October, it is held merely directory, and those sessions may still be held at another time; but negative words would have made the statute imperative:" *Rea v. Justice of Leicester*, 7 Bar., etc., 6.

In Dwarries on Statutes, 2d London ed., 417, after laying down this distinction very clearly, and enforcing it by a number of cases, the following example is cited, which seems quite pertinent to the question now under consideration: "So, where the question was whether an appointment of overseer, made after the expiration of the time limited by a statute for such appointment was valid, it was held to be so, for the statute (43 Eliz., c. 4) ought to receive a liberal construction. Although the statute be introductory of new law, no negative ought to be implied:" *Rea v. Sparrow*, Bolt, 11.

Had the language of our law under consideration been, "within the time aforesaid and not afterwards," or had it contained some such provision as, "and no pleading shall be filed, and no amendment thereto allowed, after the time hereinbefore designated," the language itself would have been in such form as to have admitted of no question as to its mandatory character. The negative words would have shown that the legislature's intent was absolutely to prohibit

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any action after the periods designated, and we should have been precluded from any other construction, however unfortunate such a provision might have been in its results, or however strongly such an imperative limitation might appear to work against the object intended to be accomplished by the law.

For it is the first principle of the legal construction of statutes that courts cannot alter by judicial interposition or construction that which is clear and unambiguous in the law itself. Thus Vattel says, "the first general maxim of interpretation is that it is not allowable to interpret what has no need of interpretation." Domat expresses the same idea as follows :

"If the language of a law clearly expresses its meaning and intent, that intention must be carried out" (sec. 284), and Sedgwick briefly states the proposition, that "where the statute is plain, no room is left for construction:" Sedgwick on Statutes, etc., 231, citing *Forber v. Blight*, 2 Oranch, 358 and 399.

But in the statute in question, no such negative words appear. Those employed are affirmative, and while they certainly direct as to the manner in which the legislature desired the proceedings on the contest to be conducted, yet we are not precluded from considering whether the fulfillment of the intent of the law and the accomplishment of its objects, may not be of such paramount importance as to justify a court in the execution of its sound discretion in allowing an amendment to a pleading even after the time so designated.

The object of a law is always the first thing to be considered. Laws are passed by legislatures with the intention of accomplishing something—not of being mere aggregations of words in the statute book, without force or effect. And when that object is clear and obvious, it is unreasonable to suppose that the legislature intended that some provision as

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to the details of the methods arranged for its accomplishment should be so strictly construed as to defeat the attainment of the object itself. This would be making the means paramount to the end, and elevating the form above the substance. Sedgwick says, in examining such matters, the first matter for consideration is "the object to be attained," the second, "the means to be employed : " Const. Stat. Law, 229. And this is but putting into language what is the common sense of the matter, because the object is not selected in order to provide certain means, but the means to carry out the object. The methods prescribed are of no consequence of themselves, they are simply valuable in order to attain the object sought. If they do not succeed in accomplishing that, they are useless ; if they actually prevent its accomplishment, they are worse than useless. They then cease to be means, and become obstructions.

Now let us apply these suggestions to the law before us. The object of the law as to contested elections is obvious. There is and can be, no dispute about it. It is to carry out the will of the people as expressed at the election, by putting into office the persons really elected. That is its object and only object.

To accomplish this, it provides certain methods of procedure ; that an issue shall be framed as to disputed points and submitted to a court, and that in such framing each party shall have a certain time in which to file his statement, etc. These are convenient and proper provisions, looking to the orderly administration of justice in such cases. But these details of practice are not to be construed as of such cast-iron rigidity as to defeat the whole object of the law itself.

Had the power of decision been delegated to a clerk or some ministerial officer, whose authority could extend no further than the simple counting of votes, and declaring a result, there might have been no redress in case of accident or mistake. But the law very properly provides for adjudi-

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cation by a court or a tribunal which has the inherent power subject to the limitation of statutes, to allow amendments in furtherance of justice, and to construe uncertain expressions in laws so as to uphold rather than defeat their primary object.

Several cases cited by the counsel for contestant apparently opposed to this view, will be found to refer only to a failure to file and serve the first notice in the case, that which is its initiatory step, in the time specified: *Costillo v. St. Louis County Court*, 28 Mo., 259; *Corbett v. Bradley*, 7 Nev., 107, etc. But that is an entirely different proposition, for this particular failure goes to the jurisdiction of the court itself. If the case is not commenced within the prescribed period, then the court has no jurisdiction of it, and it cannot possibly give to itself jurisdiction by any act of its own—it cannot allow an amendment or grant an extension, in a matter which is not legally before it at all; but when its jurisdiction has once been gained by a proper commencement of the proceedings, then the court has full power to do whatever is necessary for its proper progress in future.

Again, it was argued, and several authorities were cited to sustain the proposition, that courts should not look with favor on applications to amend made after the time prescribed because the party injured by the defective pleading is in that position by his own fault, laches or mistake, and if he has neglected the proper measures for defense, he must abide the result of his own carelessness; and that in the construction of statutes which prescribe precise and definite times for the performance of certain things, this principle should be applied and a strict construction be adopted.

But this rule, while applying generally to actions between individuals, I think is too narrow to be necessarily followed in cases where far broader and more extensive interests are involved.

In most cases which involve only the rights of the respec-

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tive parties and affect no one else, a party may lose his rights and remedies by laches, inattention or mistake of law, and this is necessary for the prompt adjudication of questions and is perhaps but a fair and proper penalty for the carelessness of the party or his attorney. He only is interested, and he can by consent or stipulation or default abandon all his rights, as fully as he has power to control, give away or waste his property if he is so disposed.

But there are certain classes of cases which are not simply between the parties appearing on the record, but by which the whole community is affected, and in which it has an interest.

In divorces, for example, there are questions of public policy and the maintenance of the institutions of society involved, which are considered by the law as paramount, even to the desires of the individuals concerned, and no decree can be obtained by the laches, the default or even the consent or request of the parties alone.

Such a course would be *contra bonos mores*, would place an institution which lies at the basis of the frame-work of modern society at the mercy of the caprice of individuals, and could not be tolerated for a moment without an entire change in our civilization.

In the case of an election the public interest is even broader.

The official is not elected solely for his own gratification or emolument, but for the public good. The people select him as their chosen representative to perform the duties of a particular position, and it is they who have the primary and greatest interest in the result of the election. In many states the performance of the duties of certain offices is made obligatory on those elected or appointed; they are not permitted to decline to act, and are subject to penalties for a failure to perform the duties.

In no case can an elected officer, by declination or resigna-

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tion, alter the intention of the people so far as to elect some one else, whom they have not chosen.

It may be broadly stated that the minority cannot elect in any case. Thus, in this country, it is well settled that where it appears that the majority candidate is ineligible, and, therefore, cannot assume the duties of the office, yet that does not elect the candidate having the next highest number of votes. It has been evident, by the result of the election, that he is not the choice of the majority, and he cannot be forced into office by the courts after being rejected by the people: *Commonwealth v. Cluley*, 56 Pa. St., 270; *Saunders v. Haynes*, 13 Cal., 145; *State (Wisconsin) v. Giles*, 1 Chand., 112; *State v. Smith*, 14 Wis., 497; Opinion of Judges, 32 Me., 597; *State v. Boal*, 46 Mo., 528, etc.

If A and B are candidates for an office, and A receives 300 votes and B 200, A cannot, by declining or resigning, put B into the office. It is not a question between A and B, but one in which the people, who are to elect, have the highest and most vital interest. In such a case, whether A accepts the office or not, it is certain that B is not their choice; and no action on the part of the one individual A can change the expression of the popular will, or put into office a man not elected by the people. And if A cannot do this by resignation, it is equally obvious that he cannot do it by stipulation or consent, or abandonment, or collusion, or by any act of his own. He is not the electing power, but the whole people of the state, county or district are. The object of a popular election is to ascertain the choice of the people, and the object of laws relating to elections and election contests, is to carry into effect the people's will, as there expressed.

The language of Chief Justice Field of California, now of the Supreme Court of the United States, tersely states what I believe to be the true doctrine in cases of this nature.

"The public is interested in a contest of this character; it is not a matter solely between the parties to the record, and

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the popular will is not to be set aside upon a mere failure of a party to respond:" *Slaroy v. Grove*, 15 Cal., 119.

From a consideration of the whole subject, I believe that there was no intention on the part of the legislature which enacted our contested election law so to restrict and hamper the action of the courts as to prevent the accomplishment of the great object for which that law was enacted, and to put into office those rejected by the people, instead of those elected. I am satisfied that after the court had once obtained jurisdiction, it had the power, in the exercise of a sound discretion, to do all such things as would tend to a determination of the contest in accordance with the facts; and bring about a judicial result in conformity with the expressed will of the people at the polls. I have no doubt, as the law in terms says (sec. 8) that, "judgment shall be rendered in favor of the party for whom a majority of the legal votes shall be proven to have been cast at the election," that when it is shown to a judge that by a clerical error such a judgment is rendered impossible, unless such error be corrected, it is the duty of that judge to entertain an application to amend such error and decide on such application as the facts shown and the expressed intent of the statute require.

So believing, I think that the learned judge below erred in not considering the motion to amend the respondent's answer on its merits, and in holding that he had no power or discretion to allow any amendment.

The case, in my opinion, should be remanded to the judge presiding in the third district for the exercise, by him, of his judicial power and discretion in the decision of the motion made by respondents for leave to file their amended answer on the facts as presented on their application.





CASES DETERMINED  
BY THE  
SUPREME COURT OF NEW MEXICO,  
JANUARY TERM, 1888.

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THE TERRITORY OF NEW MEXICO, Appellee, v. MILTON J.  
YARBERRY, Appellant.

*January, 1888.*

- MURDER. (1) *Indictment, in whose name to be found.*  
SAME. (2) *Practice on review: Objections to grand and petit jurors not considered.*  
SAME. (3) *Evidence, statements of prisoner before and after committing the crime not part of res gestæ: Rule as to res gestæ.*  
SAME. (4) *Instruction as to reasonable doubt held properly refused.*  
SAME. (5) *Evidence of conversation prior to shooting held not admissible.*  
PRACTICE. (6) *Exceptions to charge of court, must be specific.*  
MURDER. (7) *Instruction as to nature of crime.*  
PRACTICE. (8) *Matters outside of record not reviewable.*  
NEW TRIAL. (9) *Not granted for newly discovered evidence merely cumulative.*  
MURDER. (10) *Assessment of punishment by jury.*  
MURDER. (11) *Trial: Presence of accused necessary: (12) and will be presumed.*

1. An indictment for murder found in the name of the territory of New Mexico for a violation of territorial law, is proper. It need not be in the name of the United States of America, for a violation of a United States statute.
2. Objections to grand and petit jurors not taken until after trial and conviction for murder, cannot be considered by the Supreme Court on appeal.  
The defendant Yarberry, on trial for murder, was a peace officer whose duty it was to disarm persons carrying concealed weapons.

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Shortly after hearing a shot in the street in the evening, he went out in company with two other men, Yarberry making some remark just before the three went in the direction of the shot. Then going on, Yarberry found the deceased, Campbell, a stranger to him, and unarmed, slowly leaving the place where the shooting occurred. Yarberry called upon Campbell to stop and to hold up his hands, and at the same instant he and one of his companions, Boyd, immediately commenced firing at Campbell, who fell forward on his face and instantly expired, pierced by six balls, all from behind—all entering his back. Yarberry, without going near the body of the deceased, turned and went into a saloon. At this place, four or five minutes after the shooting, the sheriff asked Yarberry "What is the trouble, Milt?" to which he made some reply. At the trial, counsel for defendant asked witnesses three questions, which were ruled out by the court, as to what Yarberry said when he and his companions started to go to the scene of the shooting, what he said in reply to the sheriff's question, and what he said just prior to the shooting.

*Held*, that the questions were properly disallowed, what the defendant said at the times mentioned not being part of the *res gesta*. The cries of bystanders while the thing is being done, are original and not hearsay evidence, because they are part of the *res gesta*, but a defendant may not manufacture evidence for himself, either before or after or in the moment of the assault, and claim its admission as part of the *res gesta*. In no just sense can words spoken several moments before or after be considered a part of the thing done.

4. Under such a state of facts as shown above, an instruction to the jury that "if you have reasonable doubt growing out of the evidence as to whether or not Milton Yarberry, the defendant, inflicted mortal wounds upon Charles Campbell which caused his death, you must acquit the defendant," is properly refused by the court, as it would have put the jury upon an unnecessary inquiry and tended to confuse their minds.
5. It is not admissible, on a trial for homicide, to show a conversation between the deceased and a bartender prior to the shooting, the defendant and the deceased being strangers to each other and such conversation not being in the nature of threats, it not having been shown that the deceased had committed, attempted or threatened to commit a felony, and the conversation not having come to the ears of the defendant, Yarberry.
6. A general exception to the charge of the court to the jury will not be considered by the Supreme Court on review. The several matters excepted to must be distinctly specified.
7. Instruction to jury that the evidence showed the offense with which

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the defendant was charged was either murder in the first degree or justifiable homicide, held not erroneous.

8. A point not made a part of the record will not be considered.
9. Newly discovered evidence that is merely cumulative will not warrant the granting of a new trial.
10. Where the indictment charges murder in the first degree, the punishment for which is fixed by law as death, a verdict that the jury "unanimously find the defendant guilty as charged in the indictment," is not objectionable for not assessing the punishment.
11. In cases of felony, the defendant must be personally present during all the proceedings and must so appear on record. But a formal averment of defendant's presence during trial is not necessary when it can be inferred from the record, from averments therein as to his being present at arraignment, his giving evidence, his presence when the verdict was rendered and at the motion for a new trial.
12. The presence of the prisoner during trial for a felony is presumed.

Appeal from the District Court for Bernalillo county.

*John H. Knaebel*, for appellant.

1. The defense was clearly entitled to prove what was said by the deceased, shortly before the homicide, in the presence of the witness Greenleaf; and the objection to the said statement, namely, that it was incompetent and irrelevant, ought not to have been sustained.

1. If the course of examination was objectionable on any other ground, the failure to specify such other ground amounts to a waiver of further objection, and the prosecution can now insist only on the ground actually specified: *Marston v. Gold*, 69 N. Y., 220-228.

2. The prosecution objected prematurely, and having, in making the objection, assumed that the suppressed statement would, if permitted to be proved, disclose incompetency and irrelevancy, such objection was bad, unless such statement could not in any view be competent or relevant.

3. The prisoner was entitled to the benefit of the statement, if anything at the interview in question could possibly have been said by the deceased that would have been competent, relevant and material evidence for the defense.

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4. The prisoner was not bound to ask leading questions, or, in the absence of any inquiry from the court, to make any statement or offer respecting what he intended to prove by the witness.

5. Every intendment is against the prosecution for suppressing the testimony, and in favor of the importance of the latter. See *Stokes v. People*, 53 N. Y., 183.

6. Therefore the appellant is now entitled to claim that, if the statement of the deceased had been allowed in evidence, it would have established animosity on his part against the appellant, and the utterance by the deceased, shortly before the homicide, of threats against the appellant.

7. Such proof would have been material, and possibly controlling in the appellant's favor, when taken in connection with the other circumstances of the killing, as presented in the appellant's evidence.

It would have tended directly and effectually to the corroboration of the appellant's account of the occurrence: *Stokes v. People*, 53 N. Y., 164, 175; *People v. Arnold*, 15 Cal., 476; *People v. Scroggins*, 37 Cal., 676; *Wiggins v. People*, 93 U. S., 465; *Davidson v. People*, 4 Col., 145.

II. The defense was also entitled to prove, as part of the *res gestæ*, first, by the witness Ronan, what appellant said, after the "first shot" was fired, and immediately preceding the tragedy; and, secondly, by the witness Annijo, what the appellant said to the sheriff who arrested him, in response to a question of the latter, four or five minutes after the tragedy.

1. It must always be borne in mind that the appellant was an officer of the law (a constable), charged with the duty of arresting the deceased for the latter's infraction of the law against carrying and using deadly weapons: *Prince's Laws*, 314, secs. 9, 13; see, also, *Id.*, p. 258, secs. 4, 5; and for malicious and disorderly conduct: *Id.*, p. 259, sec. 5, chap. 8; and that, in this view, the *res gestæ* commenced, as soon

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as, by the information and pursuit, the appellant was brought into official relation with the deceased, pursuing and attempting to arrest the latter on complaint made, no warrant or display of official badge or authority being necessary: Prince's Laws, 314, sec. 9; *Caufort v. People*, 5 Ill., 404, *Head v. State*, 44 Miss., 731; *McKee v. People*, 36 N. Y., 113; *Commonwealth v. McPike*, 3 Cush., 181, 1 St. Ev., sec. 108, and note; Opinion, Thatcher, J., 9 Cush., 36.

III. The newly discovered evidence upon which the motion for a new trial was in part based, was highly relevant and material, and had it been before the jury it would undoubtedly have changed the result.

1. The affidavit of Reese (the coroner) shows that the evidence was not communicated to the prisoner or his counsel before the trial, and it is evident, or highly probable, that it was not only not obtainable, but actually concealed from the prisoner and his counsel, by unscrupulous accusers.

2. Such evidence would have strongly corroborated the prisoner's account of the affray, and have tended to prove him either guiltless, or answerable only for a less offense.

3. It would also have contradicted some of the most important testimony of the prosecution—that which tended to show the deceased to have been a harmless, unarmed man, wickedly set upon by a malicious murderer—and would have afforded a basis for the effective employment against such testimony of the maxim *falsus in uno, falsus in omnibus*.

IV. There being no proof of a conspiracy or common purpose existing between the appellant and his companion, the court erred in refusing to charge the fifth instruction requested.

V. The judge's charge amounts to a "comment on the weight of evidence." See *Stokes v. People*, 53 N. Y., 182.

VI. The judge was required to charge "the law of the case"—that is to say, comprehensively and fully, not in part only, nor upon a particular theory of guilt. He failed in his

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charge to comply with this duty, so interpreted: Prince's Laws, 126, § 23; and see *Stokes v. People*, 53 N. Y., 182.

VII. The "Crimes' Act of 1790" (1 St. 112, § 3; U. S. R. S., § 5339), is in force in New Mexico as a "district of country" within its terms; and therefore the indictment ought to have been in the name of the United States for violation of the United States law of murder, instead of in the name of the territory for violation of the territorial law; the grand jury had no jurisdiction to find the indictment; and the court below had no jurisdiction of the person of the accused or of the offense charged against him.

1. New Mexico is a "district of country." Compare the terms "district" and "district of country" in various statutes and legal opinions: U. S. R. S., § 5339, etc.; Const., art. 1, § 8, sub. 7, 17; McLean, J., in *Scott v. Sandford*, 19 How., 541, 543; 1 St., 51, note; also *Id.*, 29, 73, 94, 98, 99, 101, 106, 123, 130, 189; *United States v. Terrel*, Hamp. C. O., note.

2. The statute should be construed according to its terms: *Tynan v. Walker*, 35 Cal., 642. *Franklin v. United States*, 1 Col., 84, to the contrary, is a bad precedent.

3. The northwestern territory was probably not within the act: Construction, 98, note. Nor the lands claimed by the Indian tribes: Wheaton Int. Law, 69, 70; 3 Kent Com., 382, 383, etc.; *Worcester v. State of Georgia*, 6 Pet., 515; see *vide United States v. Rogers*, 4 How., 572.

4. Notwithstanding the general rule as to the continuing force of foreign laws in territory acquired, not by discovery: 1 Bl. Com., 107; 1 Kent Com., 343, 473; 1 Story Cons., §§ 147, 148; *Town of Pawlet v. Clark*, 9 Cranch, 333; *Bogardus v. Trinity Church*, 4 Paige, 178, 198; *Canal Appraisers v. The People*, 17 Wend., 584, 622; *Van Rensselaer v. Hays*, 19 N. Y., 93; also, 1 Kent Com., 473, note; but by conquest or peaceable cession: Authorities *supra*; *American Ins. Co. v. Canter*, 1 Pet., 542, 543; *United*

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*States v. Perchman*, 7 Pet., 87; *Mitchel v. United States*, 7 Pet., 87; *Leitensderfer v. Webb*, 20 How., 177, 178; 17 Wend., *ubi supra*, also, 585, 586, 587, 588; the Crimes Act ought to be held to extend over New Mexico, *ex proprio vigore*: 1 Bl. Com., 108; *Scott v. Sandford*, 19 How., 393; also, the second clause of Article VI. of the Constitution; *United States v. Seveloff*, 2 Sawyer, 311; *Cross v. Harrison*, 16 How., 78; *United States v. Hudson*, 7 Cranch, 32; 1 St., 930, art. 9; 15 St., 542, art. 3; Bowyer Universal Public Law, 160, 327, 365.

5. That act has by various enactments been extended over all, or nearly all, newly acquired territory, in pursuance of a cautious legislative policy: 4 St., 729, § 25 (and previous Indian country acts); 2 St., 383, § 7; 2 St., 743, §§ 4, 16; 3 St., 654, § 9; also, District of Columbia Act (U. S. Laws, 1871). See *United States v. Guiteau*, not reported; see, also, various territorial acts.

6. The 17th section of the organic act declares such extension in New Mexico; that section being equivalent to a declaration that the general laws should extend to and have full force and effect in this territory. Compare similar clauses in various acts admitting states and organizing territories.

The indictment is fatally defective, because it is drawn in the name of the territory, for violation of the territorial law, instead of in the name of the United States, for violation of the act of congress, relating to the crime of murder.

The Crimes Act of 1790 (1 St., 113, § 3), provides "that if any person or persons shall, within any fort, arsenal, dock-yard, magazine, or in any other place or district of country, under the sole and exclusive jurisdiction of the United States, commit the crime of willful murder, such person or persons on being convicted thereof shall suffer death."

Substantially the same provision is embodied in the United States Revised Statutes, under the general head of "Maritime

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and Territorial Jurisdiction of the United States." United States Revised Statutes, sec. 5339.

Although the necessity of exercising the constitutional prerogative of legislation over places ceded (a large part of New Mexico was ceded to the Union by the state of Texas—*vide* Organic Act, 981, 446), or to be ceded to the Union by the state, for military, naval and governmental purposes: Const., art. 1, sec. 8, subd. 17, may have prompted the enactment of certain provisions of the Crimes Act; yet it is evident that the act, taken in its whole scope and purpose, was intended as an assertion of the sovereignty of the Union, for the protection of its citizens throughout the national jurisdiction, against the more aggravated forms of lawlessness, by which their lives or property might be imperilled.

On the adoption of the constitution, the United States became a nation, with the rights and duties of exclusive sovereignty within a constitutionally limited jurisdiction, whose territorial extent was susceptible of indefinite extension by means of cessions from the several states and of foreign acquisition.

Although the political duty of protecting the citizens was constitutionally imposed on the nation, and the nation was vested with the correspondent power to declare and punish crimes, yet, until action under this power, there could be no practical protection to the citizens against criminal offenders; for the constitution did not adopt the common law code of crimes, but left to congress the establishment of all criminal laws: 1 Kent Com., 331; *United States v. Hudson*, 7 Cranch, 32.

The first crime which received the attention of congress was treason, which threatens the nation's life; the next crime was murder, which threatens the life of the citizen: 1 St. 112, sec. 1, 2, 3. And, as in the former case, the first Crimes Act defined treason and provided for its punishment, commensurately with the existing political necessity, and



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hence so as to comprehend the offense whenever committed within the national jurisdiction, so, in the latter case, the same act declared the crime of murder and provided for its punishment whenever the crime should take place upon territory under "the sole and exclusive jurisdiction of the United States."

The political duty to provide for the punishment of the high crime of murder, when committed within the exclusive jurisdiction of the United States, was self-evident at the time of the enactment of the Crimes Act; the words of the act are so comprehensive as to imply that the act was passed in recognition of this duty and for its full discharge; and it would stultify the national legislature, and entail public disaster, so narrowly to construe its provisions as to cramp and obstruct its operation and energy.

If the statute was needed to supply a political want, and a literal construction of the statute will fully supply that want, it is the part of the courts to give to the words employed their plain and natural meaning, and not to seek by technical subtlety to defeat the legislative intent.

The purpose of the section under discussion was to declare that murder, which, by the law of nature, is a high crime, but which for artificial reasons could not be punished within the exclusive jurisdiction of the United States, without a statutory provision, is, in the estimation of this nation, a crime deserving of death, and amenable to that punishment whenever committed within its exclusive jurisdiction.

It has been suggested that the specification in the statute in question of "fort, arsenal, dock-yard, magazine," ought, under the rule of *ejusdem generis*, to control the succeeding words, "any other place or district of country," so as to restrain the application of the latter to cases of establishments similar to those specifically enumerated.

But the rule of *ejusdem generis* is much misunderstood. Fairly stated, it is the rule which requires that when in any

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statute there is a specific enumeration of things to which it applies, followed by a general word evidently intended to include all other things of similar nature, and when the statute does not in its origin or purpose contain or imply reason for a more liberal construction, the general word shall be deemed limited in signification to things of the general nature of those actually specified. There are, however, two reasons why this technical rule is not applied.

1st. So narrow a construction would violate the intent of the law, which was to provide for all cases of murder occurring upon territory "under the sole and exclusive jurisdiction of the United States."

"It is a universal principle of construction that courts must find the intent of the legislature in the statute itself. Unless some ground can be found in the statute for restraining or enlarging the meaning of its general words, they must receive a general construction, and the courts cannot arbitrarily subtract from or add to it:" *Tynan v. Walker*, 35 Cal., 642, citing *Beckford v. Wade*, 17 Vesey, Jr., 87.

To illustrate the proposition that the technical rule must yield to the real intent otherwise gathered, I cite the second clause of the second section of the fourth article of the constitution, which provides for the recaption of fugitives from justice. Such a fugitive is referred to as "a person charged in any State with treason, felony or other crime," yet, the general word "crime" is not judicially construed as signifying only crimes *ejusdem generis* with "treason," and "felony," but as meaning literally all crimes, even inclusive of merely statutory offenses: *In re Fetter*, 3 Zabriskie, 311; *In re Clark*, 9 Wend., 212; *In re Haywood*, 1 Sand., S. O., 701; *Johnston v. Riley*, 13 Geo., 97; see also *Regina v. Edmundson*, 2 E. & E., 75.

2d. Both the word "place" and the term "district of country" were employed, not as indefinite expressions for whose interpretation a resort might be had to the previous

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specific words, but rather as definite certain expressions limited in signification by the succeeding words, "under the sole and exclusive jurisdiction of the United States." While certain establishments were referred to specifically in order to make it plain that congress intended to include all the military and naval places specified in the constitution (*ubi supra*), yet a broader phraseology was used, for the purpose of extending the enactment to all places within the exclusive jurisdiction of the United States. Although according to the views here maintained the words "any other place" might fairly be construed as bringing within the operation of the statute all places over which congress had the right of exclusive legislation, yet, the framers of the statute, having apparently in view the possible application of the rule of *ejusdem generis*, in restriction of the ordinary meaning of the word "place," and desiring to avoid the possibility of such abortive construction, added the words "district of country," in order to make the legislative intent absolutely clear; for, whatever plausibility there is in the suggestion that a general word, following specific words, and having a signification suggestive of a genus to which all the specific words appropriately belong as species, ought to be limited in its application to subjects analogous to those intended by the specific words, such plausibility does not attach to a distinct term or phrase introduced in the same sentence, after and in addition to such general word (*e. g.* after the word "place") and not appropriate as a general term to cover the specific words previously enumerated. On the contrary, the use of such independent phrase indicates a new subject, and makes it manifest that the legislative mind in framing the statute passed from the subject-matter previously considered to the consideration of a new and different subject.

No one would think of characterizing either "fort," "arsenal," "dock-yard," or "magazine," as a "district of coun-

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try," although each of such establishments might be properly characterizd as a "place."

Indeed, the very authorities which may be cited as tending to show that the narrow rule of construction in question applies, admit that congress intended by the act to provide, not only for forts, arsenals, dock-yards, magazines, and like places, but also for the "District of Columbia," then in contemplation, although not a "place" *ejusdem generis* with "fort," etc.; and that the words "district of country" were employed so as to comprehend the new district.

This admission of course destroys all the force of the suggestion that the restrictive rule applies. And, inasmuch as the words "district of country," qualified in meaning by the preceding adjectives "any other," are not limited to any particular district, but are used with reference to any "district of country" within "the sole and exclusive jurisdiction of the United States," we must hold the same to include whatever national territory can fairly come within the term in its ordinary sense. The statute says, "*any other place or district of country.*" It employs a term signifying any unorganized extent of country. So far from intending simply the contemplated "District of Columbia," it avoids the use of any limiting term and adopts language emphatically general. The constitution, in providing for the seat of government, does not refer to a "district of country," but simply to a "district not exceeding ten miles square," and it implies a much more limited area than the general term "district," or the term "district of country," as used in the statute. "District" is a very large and comprehensive term. It is used in ordinary conversation, in military orders, in municipal laws, and in geographical description, to designate large tracts of country over which civil or military authority is exercised. Thus we have judicial districts, revenue districts, military districts, and police districts. We have the "District of Columbia."

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Justice McLean, in *Scott v. Sanford*, 19 How., 541, says: "The word 'territory,' according to Worcester, means 'land, country, a district of country under a temporary government.' The words, 'territory or other property,' as used, do imply from the use of the pronoun 'other,' that territory was used as descriptive of land; but does it follow that it was not used also as descriptive of a district of country? In both of these senses it belonged to the United States—as land, for the purpose of sale; as territory for the purpose of government."

Again, on page 543:

"The sovereignty of the federal government extends to the entire limits of our territory. Should any foreign power invade our jurisdiction, it would be repelled. There is a law of congress to punish our citizens for crimes committed in districts of country where there is no organized government. Criminals are brought to certain territories or states designated in the law for punishment. Death has been inflicted in Arkansas and in Missouri, on individuals, for murders committed beyond the limits of any organized territory or state; and no one doubts that such a jurisdiction was rightfully exercised."

Justice Curtis says in the same case, at page 598:

"Dr. Emerson was an officer in the army of the United States. He went into the territory to discharge his duty to the United States. The place was out of the jurisdiction of any particular state, and within the exclusive jurisdiction of the United States."

The ordinance of 1787 declared the northwestern territory to be "one district:" 1 St., 51, note.

Several statutes passed before the Crimes Act provide for revenue districts (1 St., 29), and judicial districts (1 St., 73), or otherwise refer to "districts" (1 St., 94, 98, 99, 101, 106), and many later statutes refer to United States territory as "districts:" 1 St., 123, 130, 139. In describing territory, and

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especially unorganized territory of the United States, we very naturally refer to it as "a district of country."

The statute is a general statute enacted for the protection of the citizen, not only within the military and naval establishments, and districts of country, then possessed by the United States, but also within such as it might possess at any future time, and, although nearly a century has passed since the passage of the statute, it has proved adequate during all that period, for the prevention and punishment of murder within all places which have come under the sole and exclusive jurisdiction of the United States.

It is in no sense a local act, but it operates as an adequate and abiding provision in the national criminal code, defining and punishing the crime of homicide throughout the national jurisdiction; of equal dignity with the principles of the common law, under which murder was for centuries recognized and punished as a crime. Indeed the statute effected a transfer of the common law of murder to the national jurisdiction.

It is to be observed that only such murders were provided for as should occur within "the sole and exclusive jurisdiction of the United States."

It is doubtful whether, in view of the ordinance of 1787, and the contractual and fiduciary nature of its provisions, the legislators of that day would have been disposed to regard the northwestern territory as a district of country under the "sole" and exclusive jurisdiction of the United States. But the question has never judicially arisen.

The ordinance, adopted in 1787, and continued in force under the constitution by the act of 1789 (1 St., 50), contained special provisions respecting crimes, under which the territorial council, composed of the governor and judges, was required to select for the northwestern territory and there put in force such criminal laws of the original states as it might deem necessary: 1 St., 51.

It is well known that at that time murder was punished

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capitally in every state, and it might well be that, knowing the state laws on the subject to be either the common law, or statutes substantially declaratory thereof, thus conforming to the intent and spirit of the act of 1790, congress did not intend by that act to supplant the territorial legislative power previously conferred. Besides, there is a well settled rule of law, under which the special provisions of the ordinance would be held not repealed by a subsequent general act not necessarily involving repugnancy to those provisions: Sedgwick on Construction, 98, note (2d ed.), and cases cited. Again, in the application of the statute to territory occupied by Indian tribes, under claim of sovereignty, it might well be doubted whether such Indian country could be properly considered as under the "sole and exclusive jurisdiction of the United States." The status of such tribes has been considered by high authority. "The political relation of the Indian nations on this continent towards the United States is that of semi-sovereign states, under the exclusive protectorate of another power:" Wheaton's Int. Law, 68. "The United States Supreme Court held that the Cherokees constituted a distinct political society capable of managing its own affairs and governing itself, and that they had uniformly been treated as such since the first settlement of the country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war and responsible in their political capacity. \* \* They were a domestic dependent nation:" Wheaton's Int. Law, 69; *The Cherokee Nation v. The State of Georgia*, 5 Pet., 1. "The British crown considered them as nations competent to maintain the relations of peace and war and of governing themselves under its protection. The United States, who succeeded to the rights of the British crown, in respect to the Indians, did the same, and no more; and the protection stipulated to be afforded to the Indians, and claimed by them, was understood by all parties as only

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binding the Indians to the United States as dependent allies. A weak power does not surrender its independence and right to self government by associating with a stronger and taking its protection. This was the settled doctrine of the law of nations, and the Supreme Court, therefore, concluded and adjudged that the Cherokee nation was a distinct community, occupying its own territory in the boundaries accurately described, within which the laws of Georgia could not rightfully have any force, and into which the citizens of that state had no right to enter but with the assent of the Cherokees themselves, or in conformity with treaties and with the acts of congress :” Wheaton’s Int. Law, 69, 70; 3 Kent Com., 382, 383, etc.; *Worcester v. State of Georgia*, 6 Pet., 515. Although later decisions of the Supreme Court indicate a tendency to abridge the claims of the Indian tribes to legal recognition as *quasi* sovereign (*United States v. Rogers*, 4 How., 572); yet the prevailing opinion at the time of the passage of the Crimes Act of 1790, and for a long time subsequently, must have been that the country occupied by Indian tribes under claim of sovereignty, was not under the “sole and exclusive jurisdiction of the United States.” Of course, at that time the relation of vagabond tribes to the national government had not been considered.

It may well be that, in view of this question regarding the *quasi* sovereignty of Indian tribes, even the express extension of the Crimes Act to the Louisiana purchase (2 St., 283, § 7; *Id.* 331; *Id.* 322) did not make it judicially clear that the vast tracts claimed and occupied by Indian tribes were intended to be affected by the extension. Whatever the motive, whether that here suggested, or whether the precaution which induced so much other cumulative and supererogatory legislation, congress deemed it prudent, in the statutes defining and regulating the “Indian country” (3 St., 383; 4 St., 733, § 25), to extend the general criminal acts over the districts of country comprehended within the term ;



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and it is possible that this express extension was deemed the more necessary, because certain parts of the "Indian country" were within state boundaries, and presented complicated questions of jurisdiction: 6 Pet., 515, *supra*.

On this subject of the Indian country, I refer to the opinion of Judge Wells, formerly district judge of Missouri, reported 1 Western Law Journal, p. 246; also Hempstead O. C., p. 413, note, who, criticising the opinion of Judge Catron, cited by him, says: Judge Catron, in his opinion, says, "In the case supposed of the commission of murder or robbery on the water in the Indian country, it would be a capital felony committed in a place and district of country under the sole and exclusive jurisdiction of the United States, and be punishable by the eighth section of the act of 1790." Now, I deny that the Indian country, even technically, either land or water, is under the sole and exclusive jurisdiction of the United States. The United States have not, in any instance within my knowledge, exercised such sole and exclusive jurisdiction. By the acts of 1817 and 1834, above referred to, nothing of the kind is attempted. They both expressly except crimes committed by Indian on Indian, and confine their operations to regulating trade and commerce, and preserving peace. A sole and exclusive jurisdiction would exclude all Indian laws and regulations, punish crimes committed by Indian on Indian, and regulate and govern property and contracts, and the civil and political relations of the inhabitants, Indians and others, in that country. It would be wholly opposed to a self-government by any Indian tribe or nation. This self-government is expressly recognized and secured by several treaties between the United States and Indian tribes in the Indian country attached by the act of 1834 to Arkansas and Missouri districts for certain purposes. This may be seen from the treaty with the Choctaws in 1830, and the treaty with the Creeks in 1832, and other Indian treaties.

"The United States could not, therefore, assume a sole and

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exclusive jurisdiction over the Indian country without violating their treaties, which treaties are the supreme law of the land.

"I conclude, therefore, that the Indian country is, neither in fact nor in law, under the sole and exclusive jurisdiction of the United States.

"Indeed if congress considered the Indian country as being under the sole and exclusive jurisdiction of the United States, it was wholly unnecessary to extend to that country the laws for the punishment of crimes committed in places under the sole and exclusive jurisdiction of the United States."

In this proposition last above cited, Judge Wells admits that the Crimes Act extends *ex proprio vigore* to all new territory which comes under the sole and exclusive jurisdiction of the United States.

Nevertheless, there is some obscurity among juridical writers of the highest repute respecting this self-extending force of general laws over newly-acquired territory.

While it is generally admitted that new territory acquired by right of discovery is to be governed by the existing laws of the sovereignty to which it becomes thus attached, so far as the same are reasonably applicable, and, on this principle, it is generally held that the American colonists brought with them such laws of their ancestors as were adapted to colonial life: 1 Bl. Com., 107; 1 Kent Com., 343, 473; 1 Story Const., §§ 147, 148; *Town of Pawlet v. Clark*, 9 Cranch, 333; *Bogardus v. Trinity Church*, 4 Paige, 178, 198; *Canal Appraisers v. The People*, 17 Wend., 584, 622; *Van Rensselaer v. Hays*, 19 N. Y., 73; also 1 Kent. Com., 473, note.

Yet even this proposition is "full of vagueness and perplexity," owing to the difficulty of determining the question of applicability: 1 Story Const., § 149.

Even greater difficulty is encountered in the case of coun-

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tries acquired by arms or ceded by treaty, wherein a body of laws more or less enlightened is found in actual operation.

There is authority for the proposition that during belligerent occupation, and before definitive conquest, the ordinary municipal laws of the occupied country remain in force: Per Field, J., in *Coleman v. Tennessee*, 97 U. S., 517. And after acknowledged conquest, or peaceable cession, it is generally held that the old municipal laws of the acquired territory continue in force until changed by the expressed will of the new sovereign: Authorities *supra*; *American Ins. Co. v. Canter*, 1 Pet., 542, 543; *United States v. Percheman*, 7 Pet., 87; *Mitchel v. United States*, 9 Pet., 734; *Leitensdorfer v. Webb*, 20 How., 177, 178; 17 Wend., *ubi supra*, also pp. 535, 586, 587, 588.

Nevertheless, this proposition, respecting the continuing force of the old laws of acquired territory, is subject to the qualification that the old laws can continue only so far as is consistent with the constitution, policy and moral code of the new sovereign: 1 Bl. Com., 108; *Scott v. Sandford*, 19 How., 393; also the second clause of Article VI of the Constitution.

It is also subject to the qualification that they may be abolished and supplanted, not merely by the action of the legislative department of the new sovereignty, but in default of such legislative interference, by the mere will of the executive department. Such exercise of executive authority was usual in the government of the dependencies of the English crown: *Canal Appraisers v. The People*, 17 Wend., 585, 586.

And even in our own history, California and New Mexico afford examples of Mexican laws changed and supplanted under American executive authority by military and provisional governors; and certain provisional laws thus promulgated have received the sanction of the Supreme Court of the United States and have by that tribunal been held not only

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to operate as effectual repeals of the old laws but also to continue in force after the cessation of military or provisional government: *Cross v. Harrison*, 16 How., 78; *Leitensdorfer v. Webb*, 20 How., 177, 178.

Such decisions, however, refer only to the laws concerning the relations between individuals, and other subjects of the ordinary municipal code; but they do not extend to cases provided for by the constitution or general statutes, which in their nature operate throughout the nation.

I submit that in a country like our own, existing under a written constitution, which recognizes no common law crimes, except such as congress provides for by statute (7 Cranch, 32, *supra*), the general doctrine, above alluded to, ought to be subjected to the further qualification that, except during belligerent occupation and prior to a consummated acquisition of territory, not only the constitution, with the bill of rights, but also all general statutes intended to assert the sovereignty of the nation over its entire domain, should be deemed in full force over all acquired districts, and be held to supplant all repugnant prior laws whether ancient or provisional.

In the sixth article of the constitution, it is expressly provided that "This constitution and the laws of the United States, which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

This provision covers not only the law of murder, in question here, but the laws for the prevention of mail robberies and other crimes enumerated in the Crimes Acts of 1790 (1 St., 112) and 1825 (4 St., 115).

Within the spirit of this constitutional provision, it ought to be held that the moment that new territory is acquired and accepted by both the executive and legislative departments

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of the government as part of the national domain and jurisdiction, all foreign and provisional laws and regulations that previously operated on subjects upon which the constitution and general laws of the Union are intended to operate, should be deemed merged in the latter, in order that the latter should carry equal dignity and force into every part of the national jurisdiction. Such is the principle declared in *Scott v. Sandford*, 19 How., 393. Such is the intent of the treaties with Mexico ceding California and New Mexico (9 St., 930, art. 9), and with Russia ceding Alaska (15 St., 542, art. 3).

It is necessary to beware of false analogies sometimes suggested between our institutions and those of England.

"In the distribution of political power between the great departments of government, there is such a wide difference between the power conferred on the president of the United States and the authority and sovereignty which belong to the British crown that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquest in war, or any other subject where the rights and powers of the executive arm of the government are brought into question. Our own constitution and form of government must be our only guide:" *Fleming v. Page*, 9 How., 618.

In the opinion of the Supreme Court of the United States in the case of *Cross v. Harrison*, 16 How., 198, it is said that "the ratifications of the treaty made California a part of the United States, and that as soon as it became so, the territory became subject to the acts which were in force to regulate foreign commerce with the United States, after those had ceased which had been instituted for its regulation as a belligerent right." \* \* \* \*

"In this case foreign trade had been changed in virtue of a belligerent right before the territory was ceded as a conquest, and after that had been done by a treaty of peace, the

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inhabitants were not remitted to those regulations of trade under which it was carried on whilst they were under Mexican rule ; because they had passed from that sovereignty to another whose privilege it was to permit the existing regulations of trade to continue, and by which only they could be changed.

“ We have said in a previous part of this opinion that the sovereignty of a nation regulated trade with foreign nations, and that none could be carried on except as the sovereignty permits it to be done.”

The court quotes, with apparent approval, from a despatch of Secretary Buchanan (*Ib.*, p. 184), who says with reference to the political condition of California after the treaty of peace : “ The termination of the war left an existing government, a government *de facto*, in full operation, and this will continue with the presumed consent of the people, until congress shall provide for them a territorial government. The great law of necessity justifies this conclusion. The consent of the people is irresistibly inferred from the fact that no civilized community could possibly desire to abrogate an existing government, when the alternative presented would be to place themselves in a state of anarchy beyond the protection of all laws, and reduce them to the unhappy necessity of submitting to the dominion of the strongest.

“ This government *de facto* will, of course, exercise no power inconsistent with the provisions of the constitution of the United States, which is the supreme law of the land.

“ For this reason no import duty can be levied in California on articles the growth, produce, or manufacture of the United States, as no such duties can be imposed in any other part of our Union on the productions of California ; nor can new duties be charged in California upon such foreign productions as have already paid duties in any of our ports of entry, for the obvious reason that California is within the territory of the United States.”

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Equality under the constitution and general laws is suggested not only by the genius of the American government, but by political philosophy: *Vide* Bowyer on Universal Public Law, pp. 160, 327, 365.

Theoretically, even colonies participate in the legal privileges enjoyed in the mother country.

"When a nation takes possession of a distant country and settles a colony there, that country, though separated from the principal establishment or mother country, naturally becomes a part of the state, equally with its ancient possessions. Whenever, therefore, the political laws or treaties make no distinction between them, everything said of the territory of a nation must also extend to its colonies." Bowyer *supra*, p. 365, citing *Vattel*, book 1, ch. 18.

The "Kearney Code," under which New Mexico was provisionally governed, was promulgated by General Kearney, September 22, 1846.

Under the head of "Crimes and Punishments," it provides as follows:

"SECTION I. The crimes mentioned in the first article of this law being defined with sufficient accuracy by the laws heretofore in force in this territory, it is deemed unnecessary to do more than to annex the punishments to the respective offenses.

**"ARTICLE I.**

"SECTION I. If any person shall be convicted of the crime of willful murder, such person shall suffer death. If any person or persons shall be convicted of manslaughter, such person or persons shall be imprisoned not exceeding five years, and fined not exceeding one thousand dollars."

The provisional organic law promulgated by General Kearney on the same day (September 22, 1846), provided (Art. 3), for a territorial legislative assembly; the treaty of peace was signed February 2, 1848: 9 St., 942. The present organic law was approved September 9, 1850: 9, St., 446.

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Yet no interference with the above cited provisions of the Kearney Code respecting homicide was attempted by the territorial legislature, either provisional or permanent, except the act of July 14, 1851, adopting the Kearney Code (Prince's Laws, 373) until February 15, 1854, when the legislative assembly assumed to reform the law of homicide: Prince's Laws, 256.

Thus it will be observed that the prosecution in this case is forced to the absurdity of claiming that, after the cessation of military occupation, and during the whole period from September 9, 1850, to February 15, 1854, in face of the definite and adequate provisions of the Crimes Act of 1790, the courts of this territory were obliged to consult the Mexican law for the definition of the crime of murder committed on American territory.

The law of homicide adopted and declared by the Kearney Code was in fact a merely provisional regulation established for a present emergency by a temporary military commander. Why, then, should not such provisional regulation or expedient yield, upon the cessation of military rule, to the superior dignity and efficacy of a national law of general nature upon the same subject, expressive of the will of congress and intended to apply to every part of the national jurisdiction?

A similar question may some day arise respecting the immense territory of Alaska. No civil government has yet been provided for that district of country. No express statute has extended over it the Crimes Act of 1790.

It is not a part of the "Indian country" defined by the act of 1834: 4 St., 729; *United States v. Seveloff*, 2 Sawyer, (U. S. C. C.), 311.

Yet, is it therefore a land of immunity and refuge for murderers? If not, is the United States compelled to search the statutes of Russia for the law under which to punish such a crime?



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I suggest that the only egress from the dilemma is found in the adoption of the wholesome rule that laws of a general nature, like the Crimes Act, extend *ex proprio vigore* to newly acquired territory.

This suggestion is confirmed by the consideration that our territorial acquisitions are immediately annexed to the national domain as part of our common country, entitled equally with the rest of the country to all the privileges guaranteed by the constitution and to an equal standing under the laws, and are not mere dependencies, like British provinces, nor of the nature of mere colonies: *Scott v. Sandford*, 19 How., 393.

There is a marked distinction between the condition of new territory acquired by the kingdom of Great Britain and that of new territory acquired by the United States: *Fleming v. Page*, 9 How., 618.

In the former case, the new territory is a mere dependency, largely under the king's control, and not entitled to all the privileges of the British constitution or of the general acts of parliament: 1 Bl. Com., 108, and context.

In the latter case, the new territory is incorporated into the Union as a constituent part thereof, under the same constitutional privileges and under the protection of the same general laws as those enjoyed by the nation at large: *Scott v. Sandford*, 19 How., 393.

This is illustrated by the fact that, although, according to the common law, acts of parliament did not extend to Ireland, the Isle of Man, the American colonies, and other dependencies, unless the latter were expressly named therein (1 Bl. Com., 101, *et seq.*), yet in the United States general acts of congress operate throughout the Union, inclusive of all outlying territory.

But whether or not the Crimes Act extended *ex proprio vigore* to the territory of New Mexico upon its consummated acquisition under the treaty of peace, it is plain that

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the 17th section of the present organic act declares such extension: 9 St., 446.

That section provides: "That the constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within the said territory of New Mexico as elsewhere within the United States.

It has for many years been the policy of congress, in providing for the government of newly organized districts of country, to make express declaration of its intent to extend over such territory the criminal and other general laws of the Union; abundant caution inducing such legislative declaration even in cases where there can be no possibility of doubt that the laws would extend themselves without legislative aid.

On this subject Judge Deady remarks (*U. S. v. Seveloff*, 2 Sawyer C. C., 318): "It has been so common a habit of congress upon the acquisition of territory to specially extend the laws of the United States over it, that an impression seems to prevail that, without such action, these laws would not affect territory acquired after their passage. For my own part, I can see no good reason why any general law of the United States does not become in force at once in any country acquired by it without reference to the time of its passage."

In pursuance of this cautious congressional policy—the very adoption of which discloses the jealousy of the government respecting its constitutional authority—the general laws of the United States, including the Crimes Act of 1790, were expressly extended to the territories of Orleans (2 St., 283, § 7), Louisiana (2 St., 283, § 7), Missouri (2 St., 743, §§ 4, 16), and Florida (3 St., 654, § 9), and to the Indian country (3 St., 383; 4 St., 729), and provisions similar to the 17th section of our organic act were incorporated in the organic acts of other territories, carved out of the French and Mexican cessions: (a. g.), Utah, 9 St., 453, § 17; Kansas, 10 St.,

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277, § 32; Nebraska, 10 St., 277, § 14; Colorado, 12 St., 172, § 16; Nevada, 12 St., 209, § 16; Dakota, 12 St., 239, § 16; Idaho, 12 St., 808, § 13; Montana, 13 St., 85, § 13; Wyoming, 16 St., 183, § 16; also see U. S. R. S., § 1891, as well as in the acts under which many of the states have been admitted into the Union (*vide infra*).

Pursuant to the same policy, many of the territorial organic acts contain wholly unnecessary precautionary provisions forbidding encroachments by territorial legislatures on the congressional prerogative and reserving certain powers of supervision and repeal to congress, and these provisions are retained in codified form in the United States Revised Statutes: §§ 1839, 1840, 1851.

In view of the sovereignty of the Union over the territories, the supererogatory nature of such legislation respecting the territories is obvious: *National Bank v. County of Yankton*, 101 U. S., 129.

And it seems equally clear that, in view of the equality of the several states under the constitution, the statutory extension of general laws to new states is also supererogatory: Const., art. 6, second clause; *Id.*, art. 4., § 2; *U. S. v. McBratney*, 104 U. S., 621.

The plain intent of the 17th section of the organic act is to declare the constitution and general statutes of the United States to be of like dignity, force and effect in the territory of New Mexico as elsewhere in the United States—in other words, to insure the full operation in this territory of the constitution and general laws in every case in which they can be applied. In face of this intent, any merely grammatical quibbling tending to restrict the scope and effect of the provision is petty and puerile.

The various statutes purporting to extend the general laws of the United States to newly organized territories or states are all *in pari materia*, inspired by the same intent, and effective of the same object, although clothed in variant

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phraseology—many being in form identical with the 17th section in question: 10 St., 277, §§ 14, 32; 12 St., 172, § 16, and other citations *supra*; others declaring that the general laws shall “extend,” and shall have “full force and effect:” 3 St., 554, § 9; 3 St., 750, § 11; 2 St., 283, § 7; others declaring that they shall be “in force:” 4 St., 729, § 25; 9 St., 453, § 17; but all regarding the general laws as already of full force and effect elsewhere in the United States, and intending to declare them to have equal force and effect in the newly organized districts of country.

The Crimes Act of 1790 should be construed in the light of the various statutes, *in pari materia*, expressly extending it over newly organized districts of country: Orleans and Louisiana, 2 St., 283, § 7; Florida, 3 St., 654, § 9; Indian Country, 3 St., 383; 4 St., 729, § 25; District of Columbia, 16 St., 419, § 34; and of the judicial decisions respecting its effect in such districts; and so construed it is plain that it is potent to reach the crime of murder whenever committed upon territory “under the sole and exclusive jurisdiction of the United States.” *United States v. Rogers*, 4 How., 567; *United States v. Osage Indians*, Hempstead C. O., 27; *United States v. Terrel, Id.*, 411, and note at page 419; *United States v. Scroggins, Id.*, 478; *United States v. Sanders, Id.*, 483; see also *United States v. Guiteau, infra*.

These applications of the Crimes Act amount to a legislative declaration of the signification of the terms “place” and “district of country,” as used in the act; and this construction has in the cases above cited received authoritative judicial sanction.

The section of the organic act (9 St., 446, sec. 17), declaring the laws of the United States in force in the territory, when not locally inapplicable, must be deemed to operate upon those laws as already interpreted by congress and the courts; and, so operating, it must put the murder statute in full force as the only law of homicide in the territory.

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The 25th section of the Indian country act of 1835 (4 St., 729, sec. 25), reads as follows :

"That so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States shall be in force in the Indian country: *Provided*, That the same shall not extend to crimes committed by one Indian against the person or property of another Indian."

It is evident that this section of the Indian country act is less emphatic and explicit in its phraseology than the 17th section of our organic act; yet in the case of *United States v. Rogers*, 4 How., 567, in which the Supreme Court of the United States considered the question whether the proviso above cited, included the case of a white man charged with murder, who had become a member of an Indian tribe, the court expressly held that "by the twenty-fifth section of the act, the prisoner is undoubtedly liable to punishment, unless he comes within the exception contained in the proviso," etc.; thus holding that the meagre language of the section then under consideration was sufficient to extend the murder statute to the Indian country as a "place" or "district of country."

In the case of *Hornbuckle v. Toombs*, 18 Wallace, 648, a section of the Montana organic act, whose phraseology is precisely similar to that of the section of our organic act in question (13 St., 85, sec. 13), is construed as follows :

"That clause has the effect undoubtedly of importing into the territory the laws passed by congress to prevent and punish offenses against the revenue, the mail service, and other laws of a general character and universal application, but not those of a specific application" (like, for instance, the case cited by the court, of the statute authorizing the supreme court to employ a reporter).

Even more direct authority, regarding the proper construction of the phraseology in question, is found in the decision

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of the appellate court of the District of Columbia in the recent case of *United States v. Guiteau*. Guiteau, the assassin of the late President Garfield, was indicted for murder under the Crimes Act of 1790 as incorporated in the United States Revised Statutes, sec. 5339.

The language of the Crimes Oct, "any other place or district of country," is certainly broad enough to include the district of Columbia as a district of country: *Vide United States v. Bevans*, 3 Wheaton, 390, 391; *Cohens v. Virginia*, 6 Wheaton, 426.

But in 1801 the laws of Maryland were extended by act of congress over the District of Columbia: 2 St., 103, sec. 1. And the counsel for Guiteau claimed before the court *in banco*, that the Maryland laws thus introduced furnished the only murder law in force in the district, and that therefore the indictment, being founded upon the provisions of the Crimes Act of 1790, was unauthorized and void.

The court in considering the question of repugnancy thus raised between the law of 1801 and the Crimes Act of 1790, alludes to the 34th section of the District of Columbia act of February 21, 1871 (16 St., 419, sec. 34), which is similar in form to the 17th section of our organic act, and proceeds:

"If any questions were raised about the incongruity of these two statutes, none certainly can be raised since the act of February 21, 1871 (16 St., 419), the thirty-fourth section of which act providing that all the laws of the United States not locally inapplicable shall have the same force and effect within the district as elsewhere in the United States. If the law of 1790 was put aside by the law of 1801, its operation was restored in 1871. The usual rule of construction as to repeals is that a special provision relating to a particular case or locality is not superseded by a general provision for all places and cases; but no such problem is presented here. Both the act of 1801 and the act of 1871 made a comprehensive provision for a whole body of laws which should be in

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force here, and to the extent of its purview the later provision necessarily supersedes the earlier. We are of opinion then that section 5339 of the Revised Statutes of the United States applies to murder committed in the District of Columbia :” *Vide* Washington Post, May 23, 1882.

Judge Hallett, of Colorado, has, in the case of *Franklin v. United States*, 1 Col., 3, expressed views, respecting the territorial application of the Crimes Act, opposed to those here presented. Judge Hallett is a jurist of great ability and high reputation. Nevertheless, he sometimes fails in the construction of statutes to display that logical energy and masterly comprehension which characterize his judicial efforts in other branches of law ; and consequently we find that on several occasions his decisions regarding the force and effect of important acts of congress have, because of their restrictive tendency, been condemned by the Supreme Court of the United States and overruled.

Judge Hallett's first proposition is couched in the following language (p. 37) : “ We must first inquire whether this territory is a place or district of country under the sole and exclusive jurisdiction of the United States within the meaning of the law mentioned. We may find an answer to this inquiry in the sixteenth section of the act establishing this territory (*i. e.*, Colorado Act, 12 St., 172), which declares ‘ that the constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within the said territory of Colorado as elsewhere within the United States. Within the several states, section 3 of the act of 1790, provides for punishing murder, where committed in a fort, arsenal, dock-yard or the like place, owned by the general government, and the above mentioned section of the organic act declares it shall have the same force and effect in this territory. It may be suggested that the words ‘ force and effect ’ used in the organic act, refer to the penal power of the law, and were not designed to limit

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its operation to places owned by the general government as in the several states. But a law is presumed to be effectual to accomplish its purposes, and therefore it was not necessary to declare what force and effect the act of 1790 should have in this territory, except for the purpose of limiting the places within which it should obtain. If, by the terms of the act, it is in force in the territory, its power is declared in the language of the act itself, and the limitation in the organic act that it shall have the same force and effect as elsewhere in the United States can refer only to the places in the territory within which it shall operate. If, then, in obedience to the sixteenth section of the organic act, we give section 3 of the act of 1790 the same force and effect in this territory which it has elsewhere in the United States, we shall apply it to murder committed in forts, arsenals and the like places belonging to the United States and in the Indian territory."

This extraordinary reasoning, respecting the office of the words "force and effect" in the application of general statutes of the United States, savors of the fantastic subtlety of a class of antiquated cases which have long since been buried by the common sense of the profession.

It implies that the provision in question was not intended to give full force and effect in the newly organized territory to the constitution and general laws, but rather to curtail and limit their operation. The provision relates equally to the constitution and to the laws, and, according to Judge Hallett, so far from evincing an intent to provide for the full application of the constitution and laws, it operates as a declaration that the "supreme law of the land" shall not be applied in the territory in conformity with its terms, but in a cramped and mitigated sense.

The "United States" is used in the section as the title of the nation and not simply to indicate the individual states, and the only purport of the provision in question is to declare the constitution and laws to be forceful and effective in the



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territory, even as they are forceful and effective throughout the rest of the national domain; not to limit or cramp their operation, but, declaring them to be in operation, to leave their force and effect to be determined by their own terms and by relation to the subject matter affected.

The genesis of the provision furnishes a convincing argument in favor of the construction here claimed. Vermont was by the act of 18th February, 1791 (1 St., 191), declared to be admitted from and after 4th March, 1791, "as a new and entire member of the United States." No lawyer of that day would have denied that the mere fact of admission into the Union would extend over Vermont the constitution and general laws passed thereunder. Yet this extension of the constitution and laws over a new state, would be largely theoretical and not effectual, unless by further legislation proper local provision respecting judicial and revenue districts, courts, judges, attorneys, marshals and other officers should be made. This political need led congress, in the case of Vermont, to pass the supplemental act of 2d March, 1791 (1 St., 197), which enacts "that from and after the third day of March next all the laws of the United States which are not locally inapplicable ought to have and shall have the same force and effect within the state of Vermont as elsewhere in the United States;" "and to the end that" the judiciary act of 1789 should have due effect, provision is then made for a judicial district, etc. And in like manner provision is made for the collection of revenue, the taking of the census, etc. This is the first occasion on which a provision like that in question appears in the statutes of the United States, although in one or two previous statutes laws were applied to new districts by a declaration that they should have "force" in the latter: 1 St., 99, § 6; *Id.*, 108, cl. 8.

It is obvious that no such intent can be imputed to this original use of the provision as that imputed by Judge Hallett to the use of like provisions in the territorial organic acts.

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In providing for the admission of Tennessee, congress declared (1 St., 491), "That until the next general census the said state of Tennessee shall be entitled to one representative in the house of representatives of the United States, and in all other respects as far as they may be applicable the laws of the United States shall extend to and have force in the state of Tennessee in the same manner as if that state had originally been one of the United States."

Of course this provision was constitutionally unnecessary ; but I cite it to show that the central idea of the provision in question can be conveyed by the use of words not in any view susceptible of Judge Hallett's restrictive interpretation.

But this act of admission not providing Tennessee with courts, judicial or collection districts, or officers, further provisions were needed to secure the due execution of the theoretically extended laws, and hence another act was passed (1 St., 496), to supply this need, and, in pursuance of the super-erogatory policy before alluded to, a cumulative provision was introduced similar to that above cited from the Vermont act (1 St., 197).

Still no legislative intent can be perceived to accomplish by the language used any other purpose than to declare the laws in full force, and to leave to their own terms the expression of the nature and extent of their operation. So, in the case of Ohio, which being admitted on an equal footing with the other states (2 St., 173), and thus made by implication subject to all applicable laws, still needed legislative provision for judicial and other official machinery, this need was supplied 19th February, 1803 (2 St., 201), by an act which, passed according to the recital "in order therefore to provide for the due execution of the laws of the United States within the said state of Ohio" first unnecessarily declares, "That all laws of the United States which are not locally inapplicable, shall have the same force and effect within the said state of Ohio as elsewhere within the United States,"

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and then enacts the needed provisions establishing courts, etc. So in the admission of Louisiana and Alabama the same provision was adopted, with the addition of a clause declaring that the laws "shall be extended to the said state:" 2 St., 701, sec. 2; 3 St., 664; sec. 1. And, so on, as a rule, the same provision generally identical in form with that in our organic act, and in that of the late territory of Colorado, appears in connection with other provisions providing the official means for carrying the laws into execution: Mississippi, 3 St., 472; Illinois, 3 St., 502; Missouri, 3 St., 653; Arkansas, 5 St., 50; Michigan, 5 St., 61; Florida, 5 St., 788; Iowa, 5 St., 789; Wisconsin, 9 St., 57; California, 9 St., 521; Minnesota, Oregon, 11 St., 383; Kansas, 12 St., 126; Nevada, 13 St., 30; Nebraska, 13 St., 47; Colorado, 19 St., 61.

But in the cases of Kentucky (1 St., 180), and Maine (3 St., 544, *Id.* 554), there appears to have been no express statutory extension of the laws. And in the case of Texas, which was admitted by resolution on an "equal footing" (9 St., 108), it was provided (9 St., 1), by "An act to extend the laws of the United States over the state of Texas and for other purposes," that "all laws of the United States are hereby declared to extend to and over, and to have full force and effect within the state of Texas, admitted at the present session of congress into the confederacy and union of the United States."

I submit that the phraseology in the Texas act is only the fair equivalent of the more usual provisions: *Vide Smith v. Cockrill*, 6 Wallace, 758.

So, with reference to the territories, there is the same tendency to employ the usual phraseology in the provisions extending the laws, but with occasional variations, which, discarding the words "same force and effect," which have misled Judge Hallett, are still effectual to declare the extension intended.

In the case of the territories of Orleans and Louisiana

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(2 St., 283, sec. 7), and Florida (3 St., 654, sec. 9), the general acts intended to be extended, are expressly named by their titles, including the Crimes Act of 1790 ; but in the case of Florida (3 St., 654, sec. 9), the specific enumeration of extended statutes is supplemented by the addition of "all other public laws of the United States which are not repugnant," etc, and in each case, the general acts referred to are declared to "extend to and have full force and effect" in the respective territories.

In the later Florida organic act (3 St., 750, sec. 11), the specific enumeration of extended statutes is discarded as unnecessary and cumbersome, and a general provision is substituted in the following form :

"That the laws of the United States relating to the revenue and its collection, subject to the modification stipulated by the fifteenth article of the treaty of the twenty-second of February, one thousand eight hundred and nineteen, in favor of Spanish vessels and their cargoes, and all other public acts of the United States, not inconsistent or repugnant to the provisions of this act, now in force, or which may hereafter be in force, shall extend to and have full force and effect in the territory aforesaid."

But, generally, the language employed is that in question here: New Mexico, 9 St., 446, sec. 17; Nebraska, 10 St., 277, sec. 14; Kansas, 10 St., 277, sec. 32; Colorado, 12 St., 172, sec. 16; Nevada, 12 St., 209, sec. 16; Dakota, 12 St., 239, sec. 16; Idaho, 12 St., 808, sec. 13; Montana, 13 St., 85, sec. 13; Wyoming, 16 St., 183.

Nevertheless, at the very session of congress, at which the organic act of New Mexico was passed (9 St., 446), and on the same day, congress, in the Utah organic act, which is substantially like our own, uses the following language, in applying the constitution and general laws (9 St., 453, sec. 17): "That the constitution and laws of the United States are hereby extended over and declared to be in force in said ter-

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ritory of Utah, so far as the same, or any provision thereof, may be applicable."

It is manifest that Judge Hallett's special reasoning could not find even the semblance of an excuse in the language of the Utah act, and yet it is equally manifest that congress had no other or different intent in the one case than in the other respecting the application of the constitution and general laws.

The true construction, then, of the provision in question is to hold that it put the constitution and general laws of the United States in full force in New Mexico wherever applicable.

The language previously cited from the Indian country act (4 St., 729, sec. 25), declaring the Crimes Act to be "in force" could only be interpreted as putting the act in force according to its terms, and in this application of the Crimes Act to the Indian country its operation in respect to murder, maiming, etc., was not limited to forts, arsenals, or other like establishments, but it extended over each and every part of the Indian country as a "district of country." 4 How. 567; *Hempstead C. O.*, 27; *Id.*, 478; *Id.*, 483; also *United States v. Guiteau*, *supra*.

In 1850, at the time of the passage of the New Mexico organic act (9 St., 446), the term "district of country" as used in the Crimes Act had received a most extensive practical interpretation by a series of acts in *pari materia*, declaring the act in force over the vast districts of country purchased from France and Spain (*vide* citations *supra*), and, that at that time, it still furnished the only law of murder for a very extensive territory west of the Mississippi.

New Mexico, so recently the possession of a hostile power, was at that time in no position to claim greater immunity from the sovereignty of the Union than that enjoyed by the Louisiana and Florida territories at the time of their peaceable acquisition, and there was no reason or policy for waiv-

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ing in respect to New Mexico that national jurisdiction on the subject of the crime of murder which had theretofore been exercised over all new territory that had come "under the sole and exclusive jurisdiction of the United States."

If any places "elsewhere" were to be referred to in order to determine the "force and effect" of the Crimes Act, they were precisely those districts of country over which the government had thoroughly and effectually applied it, including the vast Indian country in which the act was still in force, as well as the district of Columbia.

With reference to the provision, it is said in a recent case in the Supreme Court of the United States (*United States v. McBratney*, 104 U. S., 621):

"Such a provision has a less extensive effect within the limits of one of the states of the Union than in one of the territories of which the United States have sole and exclusive jurisdiction."

The historical relation of the organization of the territory of New Mexico, to the organization of other territories, is significant as a factor in determining the degree in which congress intended to delegate to the legislative assembly the national sovereignty.

I have already shown that, by reason of its contractual and fiduciary relation to the Union, the northwestern territory was a district *sui generis*—it was land held on an express trust for the formation of new states, and governed upon a system established before the enactment of the Crimes Act, and not intended to be disturbed by the latter. When new territories were formed out of this peculiar domain, it was natural to preserve to them the laws, rights and privileges under which their inhabitants had been educated; and consequently we find these laws, rights and privileges expressly saved to such new territories: Indiana, 2 St., 58; Illinois, 3 St., 514; Michigan, 2 St., 309; 3 St., 769, sec. 2, also sec. 6, repealing inconsistent U. S. laws; Wisconsin, 5 St., 10.

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The same policy was naturally followed respecting the territories of Mississippi and Alabama, which were formed out of lands ceded to the Union by some of the states: 1 St., 549; 3 St., 371.

Again, some parts of the vast Louisiana purchase were settled by emigrants from the northwestern territory, who carried with them the traditions, laws, and customs under which they had been reared, and who proved to be a very trustworthy class of citizens. Hence it was desirable in providing new territorial governments for these districts of country to permit the inhabitants to retain their old laws and customs and to assimilate their government to that of the government under which their citizenship had developed. With the exception of Orleans, which was quite advanced in civilization (2 St., 322), the only territorial governments affecting the Louisiana purchase, established under these special conditions prior to the organization of New Mexico (A. D. 1850) were, first, that country west of the Mississippi and north of the Missouri, attached to the Michigan territory in 1834 (4 St., 701), and afterwards that of Wisconsin (5 St., 10), Iowa (5 St., 235), and Minnesota (9 St., 403), formed, except a part of Wisconsin, out of the same district. Oregon was equally privileged (9 St., 323).

As to Oregon, that was for a long time a district more or less in dispute between the United States and Great Britain *vide* Treaty 1848, 9 St., 869; and it had been settled and considerably developed early in the century through the efforts of men who brought with them the traditions and customs of the east: *Vide* Irving's *Astoria*.

It was therefore advisable to assimilate its territorial government to that of the northwestern territory.

But, in dealing generally with the vast territory acquired from France and Spain—a territory inhabited principally by savages and by unstable whites—congress held a tighter rein. It expressly put the Crimes Act and general laws in force: 2

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St., 1804, and amendments ; 3 St., 654, and amendments ; 4 St., 729, sec. 25.

This was the situation when congress passed the organic act of New Mexico : 9 St., 446.

I have shown the exceptional nature of the organization of Wisconsin, Iowa, Minnesota and Oregon, the only territories organized in the interval between the organization of Arkansas (carved out of Missouri, 3 St., 494), and that of New Mexico, and I have referred to the express provisions of the organic acts of the four territories first named, which grant to those territories exceptional privileges and larger governmental powers.

But New Mexico—an acquisition by means of hostilities only lately ended—clearly called for the same cautious political treatment as that employed for Louisiana, Florida and Missouri.

That the Crimes Act was the only law of murder in force over the greater part of the national domain is a well known historical fact. On this subject, Judge Wells remarked, in 1843 (Hempstead C. C., p. 419), "In the territories of Florida and Louisiana, and perhaps others, certain laws, including the act of 1790, were declared to be in force. They are of course yet in force in Florida, and what remains of Louisiana, as purchased from France ; and I presume in other territories." He adds that the Crimes Act was "in full force" in the territory of Missouri.

Judge Hallett thus proceeds in his second proposition, p. 38 : "We may reach the same conclusion without referring to the sixteenth section of the organic act. In all its legislation congress pursues the authority given in the constitution, and we may refer the section under consideration to the sixteenth clause of section 8, article 1, of that instrument. In that clause of the constitution, congress is invested with exclusive legislative authority over such district (not exceeding ten miles square), as may, by cession of particular



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states, and the acceptance of congress, become the seat of government of the United States, and like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and their needful buildings. The description of places in the act is nearly the same as in this clause. The words 'fort, arsenal, dock-yard and magazine,' are found in the act and in the constitution, and the words 'other place or district of country,' occurring in the act but not in the constitution, were probably inserted out of abundant caution, or probably they refer to the District of Columbia, which at the time of this enactment had no existence, but was in contemplation." \* \* \* "Beyond doubt this law was enacted in execution of the power conferred in this clause of the constitution. Now there is nothing concerning the territories of the United States in this clause; it refers only to the federal seat of government, and to forts, arsenals, etc." \* \* \* \* "The law we are discussing is not more comprehensive than the clause of the constitution upon which it rests, and therefore this territory, as a territory, is not within its descriptive terms."

In this proposition, Judge Hallett fails to consider that, when a statute is enacted to supply a want or to remedy a mischief, the legislating body rarely limits itself to the single subject which moved it to action, but, in acting upon that subject, usually employs language broad enough to cover all cases coming within the same legislative principle.

For instance, in the very act in question, congress, while moved to action by the constitutional clause cited by Judge Hallett, and intending to cover all the cases embraced in that clause, naturally conceived the larger purpose of legislating, not simply for the limited jurisdiction described in the clause, but rather for the entire national jurisdiction; thus making the enactment commensurate with the political need. Therefore, while the constitutional clause refers only to forts

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and other establishments on sites within state limits, and ceded by states to the Union, the Crimes Act is not limited in its terms to forts and other establishments of the class mentioned in the constitution, but it expressly extends to all forts and other national places, even including those which then might be (and which in fact have since been) built on territory acquired under the war power and the treaty power; of which latter class of establishments (not within the purview of the constitutional clause cited), we have many instances in the vast French, Spanish and Mexican cessions.

So, while the same constitutional clause made mention of only one district of country, *i. e.*, such as might be acquired for the seat of government, the Crimes Act, while using terms broad enough to include such a district, evinces no intent to limit its operation to any one special district, but expressly extends to "any district of country" whatsoever: Sedgwick on Construction, p. 198, *et seq.*

Arguing in support of this proposition, Judge Hallett, p. 39, refers to congressional legislation purporting to extend the operation of the Crimes Act, and, having cited the 25th section (*vide supra*) of the Indian Country Act of 1834, he continues: "The Indian country at that time comprised the greater part of the national territory, and congress found it necessary to extend the section we are considering to that country. If the territory of the United States had been within the terms of the law, it would have been in force in the Indian country before the act of 1834, and that enactment would have been unnecessary."

From this language the inference is reasonable that Judge Hallett had not made a thorough historical search on the subject of which he wrote; else he would have become aware that, independently of the self-extending force of the Crimes Act over newly acquired districts of country, that act had been expressly extended to the Louisiana purchase as early

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as 1804 (2 St., 283, § 7, cited *supra*); that, as I have shown, congress had been in the habit of repetitious legislation on this subject (Statutes *supra*; also 2 Sawyer, C. C., p. 318), and that the only doubt ever judicially suggested respecting the self-extending force of the Crimes Act over the "Indian country" was based, not on any interpretation of the term "district of country," but on the fact that the "Indian country," being occupied by *quasi* sovereign Indian tribes, who there administered their own laws—"dependent nations" with whom the United States had entered into treaties, binding as "the supreme law of the land,"—was not, so far as so occupied, "under the sole and exclusive jurisdiction of the United States." Per Wells, J., Hempstead C. C., p. 422; *ubi supra*.

Judge Hallett then considers (pp. 39, 40, 41) the ordinances of 1787, and declares, as I agree, that "ample power was conferred upon the northwest territory to enact a full code of civil and criminal laws, subject only to the limitations contained in the ordinance itself."

He adds: "This ordinance subsequently became the organic law of Illinois, Indiana, Michigan, Mississippi and Alabama territories, which were established after the act of 1790 was passed. The language of the ordinance above set forth undoubtedly conferred authority to enact the law of homicide, and from this it sufficiently appears that congress did not propose to exercise that authority directly and by its own act. Congress certainly did not intend to confer upon these territories authority to do that which it purposed to do or had done itself, and which, being done by congress, could not be modified or in any manner affected by the territories. If the law under consideration was the law of homicide in Illinois and the other territories last named, why should congress confer upon those territories authority to legislate upon that subject?"

I have already referred to the singular *status* of the north-

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western territory. It is familiar history that it was a domain conceded to the Union under a special compact which was viewed with peculiar jealousy, not only by the individual states, but also by the large and intelligent population which settled in that territory in expectation of its speedy division into states of the Union, and on the faith of the continuance meanwhile of its pledged form of temporary government. I have shown why, on familiar principles, the Crimes Act might be held not to repeal by implication any provision of the ordinance.

As to the territories of Illinois, Indiana and Michigan, they having been originally a part of the northwestern territory and subject to the ordinance, good faith and sound policy required that, on their organization as separate territories, their old laws should be continued in force. And as to the territories of Mississippi and Alabama, they having been originally part of the territory of some of the states and ceded by them to the Union, on certain conditions, were wisely placed on a footing with the northwestern territory and the various territories carved out of the same: *Statutes supra*.

This assimilation of the government of certain later territories to that of the northwestern territory, I have already alluded to as exceptional, although politically justifiable for special reasons which I have stated.

In Illinois, Indiana, Michigan, Mississippi and Alabama, specified by Judge Hallett, the Crimes Act law of murder was probably never in full force, because the first three were part of the northwestern territory and the last two were assimilated to that territory, in point of government, immediately on their acquisition: 1 St., 549; 3 St., 371.

But there were six territories in which, although the Crimes Act was originally in full force (2 St., 283; 4 St., 729, § 25), yet, on the formation of distinct territorial governments, some of the provisions of the Crimes Act were

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probably repealed in order that they might enjoy all the privileges of the northwestern territory and its successors—I refer to Iowa, Orleans, Minnesota, a part of Wisconsin, Oregon and Washington.

Thus we find that certain territories were never subject to the full operation of the Crimes Act law of murder; that others, although so subject as parts of the Louisiana purchase, were released from its operation by force of the peculiar phraseology of their organic acts; and that others have always been under its full operation.

The superficial nature of Judge Hallett's research on this subject is seen in his remarks on page 41: "Again, in an act respecting Florida territory (4 St., 164), in defining the jurisdiction of the superior courts of that territory, it is declared that they 'shall have and exercise original and exclusive jurisdiction of all crimes and offenses committed against the laws of said territory, where the punishment shall be death.' In this country, murder is commonly punished with death, and we do no violence to language when we say that that crime was referred to in the clause we have cited. If so, the law of homicide in that territory was provided, not by the act of 1790, but by the act of the territory. It appears to us that congress has already acted in the belief that the territory of the United States is not a place or district of country under the sole and exclusive jurisdiction of the United States, within the meaning of the law under consideration."

The Florida statute (4 St., 164) cited by Judge Hallett, was passed in 1826, and it does not contain any provisions defining crimes. Congress had already—in the organic act of 1822—most emphatically extended the Crimes Act over Florida (3 St., 654), the ninth section of that act providing "that the following acts, that is to say 'An act for the punishment of certain crimes against the United States,' approved April thirteenth, one thousand seven hundred and ninety.

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and all acts in addition or supplementary thereto which are now in force, \* \* \* shall extend to and have full force and effect in the territory aforesaid." See also opinion of Judge Wells, cited *supra*.

Consequently, having an express statute to inform us as to the law of Florida, in respect to homicide, we are not forced to draw an illogical inference from a statute enacted with no reference to the subject.

Other acts of congress, above cited, show, moreover, that congress has most impressively manifested its belief that the territory of the United States acquired from foreign powers is a "district of country" subject to the United States law of murder: 2 St., 283, and amendments; 2 St., 743; 3 St., 654, and amendments; 4 St., 729, sec. 25.

Judge Hallett proceeds, on page 42: "Since the ordinance of 1787 was disused, the language in which legislative power has been conferred upon territories is similar to that found in our own act, which is:

"The legislative power of the territory shall extend to all rightful subjects of legislation consistent with the constitution of the United States and the provisions of this act."

"More comprehensive language than this could not have been used, and we cannot doubt that it was designed to confer as full authority as that used in the ordinance. Unquestionably the powers conferred upon territories recently established are as full and complete as were those of the territories established under the ordinance. As the power to legislate upon the subject of homicide was conferred by the ordinance, so also it is conferred by our own act, and this, as we have seen, excludes the notion that the law of homicide in this territory is to be found in the act of 1790."

This suggestion still proves the error, above pointed out, of considering all the later territories on an equal footing with the northwestern territory. Even the late Chief Justice Chase fell into a similar error in treating the Wisconsin

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organic act (5 St., 10), as the model on which all later territorial organic acts have been drawn : *Clinton v. Englebrecht*, 13 Wallace, 444.

The Chief Justice failed to notice that the territory of Wisconsin was assimilated to the northwestern territory by a provision in its organic act (5 St., 10, sec. 12), which is wanting in the organic acts of most of the territories, formed out of the French and Mexican cessions; the provision being as follows :

"SECTION 12. That the inhabitants of the said territory shall be entitled to and enjoy all and singular the rights, privileges and advantages granted and secured to the people of the territory of the United States northwest of the river Ohio, by the articles of the compact contained in the ordinance for the government of the said territory, passed on the thirteenth day of July, one thousand seven hundred and eighty-seven, and shall be subject to all the conditions and restrictions and prohibitions in said articles of compact imposed upon the people of the said territory. The said inhabitants shall also be entitled to all the rights, privileges and immunities heretofore granted and secured to the territory of Michigan, and to its inhabitants, and the existing laws of the territory of Michigan shall be extended over said territory so far as the same shall not be incompatible with the provisions of this act, subject nevertheless to be altered, modified or repealed by the governor and legislative assembly of the said territory of Wisconsin; and further the laws of the United States are hereby extended over and shall be in force in said territory so far as the same or any provision thereof may be applicable."

Besides, very few of the provisions of the Wisconsin act first appear in that act. Even the language quoted by Judge Hallett as that usually employed in conferring territorial legislative power did not first appear in the Wisconsin act.

Indeed, a historical review of the evolution of the present

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usual form of territorial organic acts, confutes absolutely Judge Hallett's argument.

The organic acts of Wisconsin and all subsequently organized territories, including Colorado (12 St., 172), and New Mexico (9 St., 446), may, in respect to their provisions, be summarized as follows:

1st. Declaration of a temporary government, in a defined district of country, under a specified name.

2d. The deposit of executive power with a governor, declared to be *ex officio* commander in chief of the militia and superintendent of Indian affairs, and empowered to approve all legislative acts, to pardon territorial offenses and to reprieve United States offenses; to commission all officers appointed under territorial laws, and to take care that the laws be faithfully executed.

3d. Provision for a secretary to record and preserve legislative and executive acts, to transmit copies of the laws to the president, and to act as vice-governor.

4th. Deposit of legislative power with the governor and a legislative assembly composed of a council and house of representatives to be elected in a manner specified.

5th. Qualifications of voters.

6th. Limitation of legislative power as follows: "The legislative power of the territory shall extend to all rightful subjects of legislation, consistent with the constitution of the United States and the provisions of this act; but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents. All the laws passed by the legislative assembly and governor shall be submitted to the congress of the United States, and, if disapproved, shall be null and of no effect."

7th. Mode of appointment of local officers.



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8th. Specification of disqualifications of legislators and United States officers respecting holding certain offices.

9th. Deposit of judicial power with a supreme court, district courts, probate courts, and justices of the peace, and a limitation of jurisdiction, provision for a clerk of each district court, and limitation of right of appeal to Supreme Court of the United States.

10th. Provisions for a United States attorney and marshal.

11th. Provisions for appointment of governor, secretary, chief justice, associate justices, attorney and marshal, by the president with the advice and consent of the senate, oaths of office, salaries, appropriations, etc.

12th. Provisions respecting the first assembly, and other sessions of the legislative assembly.

13th. Provisions for election of a delegate to congress.

14th. Provisions for grant of school lands.

15th. Provisions for judicial districts.

16th. Provisions declaring the constitution and applicable laws of the United States in force.

17th. Bill of rights.

The germ of many of these provisions is found not only in the ordinance of 1787, but in several of the colonial charters and organic laws (1 Story Cons. Book I, *passim*.) But the first assume a form substantially analogous to the present in the organic act of March 26, 1804 (2 St., 283), which may be compared with the later acts above analyzed by reference to the following summary :

1st. There is a similar declaration of temporary government over a defined district.

2d. There are similar provisions respecting a governor and a secretary.

3d. The legislative power is vested in a governor and council, who are declared to "have power to alter, modify or repeal the laws which may be in force at the commencement of this act. Their legislative power shall also extend

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to all the rightful subjects of legislation, but no law shall be valid which is inconsistent with the constitution and laws of the United States." There are analogous provisions for reporting laws to congress, and for their nullification by disapproval. "The governor or legislative council shall have no power over the primary disposition of the soil, nor to tax the lands of the United States, nor to interfere with the claims to land within the said territory."

4th. There is an equally broad grant of judicial power, accompanied with provisions respecting judicial sessions, appointment of a clerk, juries, habeas corpus, bail, etc.

5th. There are analogous provisions respecting the appointment of governor, secretary and judges, and respecting official oaths and salaries.

6th. In the seventh section, twenty acts of congress, including the Crimes Act, are enumerated specifically, and declared "to extend to and have full force and effect in the said territories (*i. e.* Orleans and Louisiana).

7th. There are provisions as to a United States district court, and as to an attorney and marshal, and respecting the qualifications of jurors, as well as others not material to this illustration.

In this Orleans act we find a grant of legislative power in language substantially like that employed in all later organic acts, including those of Wisconsin (5 St., 10), New Mexico (9 St., 446), and Colorado (12 St., 172.)

Nevertheless, the provisions of the seventh section (2 St., 283, sec. 7), extending the Crimes Act expressly and putting it in "full force and effect," show beyond doubt that the grant of legislative power by the language in question, was not intended to oust the United States of its jurisdiction over the crime of murder, nor to leave the territory destitute of a law of homicide, should its legislature see fit to decline action on that subject: *Vide* 4 How., 567.

In harmony with all that is here contended for, congress

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passed, in 1871, "An act to provide a government for the District of Columbia (16 St., 419), which is strictly modeled on the usual form of territorial organic acts, embracing all the usual provisions, with the addition of many special provisions appropriate to the peculiar situation of the district.

The first section declares that "all that part of the territory of the United States included within the limits of the District of Columbia be and the same is hereby created into a government by the name of the District of Columbia."

The eighteenth section is as follows: "That the legislative power of the district shall extend to all rightful subjects of legislation within said District of Columbia consistent with the constitution of the United States and the provisions of this act; subject nevertheless to all the restrictions imposed upon states by the tenth section of the first article of the constitution of the United States; but all acts of the legislative assembly shall at all times be subject to repeal or modification by the congress of the United States, and nothing herein shall be construed to deprive congress of the power of legislation over said district in as ample a manner as if this law had not been enacted."

Of course this exception to the grant of legislative power was unnecessary, since it would have been implied by law: (101 U. S., 129.)

The thirty-fourth section contains the words construed with reference to the Crimes Act in *U. S. v. Guiteau, supra*, viz.:

"The constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within the said District of Columbia as elsewhere within the United States."

From the time of the enactment of the first Orleans organic act, we observe a disposition on the part of congress to conform all new territorial organic acts to the same standard; the first idea in each case being to preserve in full force and effect over the new territory the constitution and general

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laws of the United States, and the next idea being to confer upon the newly created territorial legislature the power to enact laws consistent with the constitution and not repugnant to the existing laws of congress, which being general in their nature and evincing a uniform policy over all the territories not already provided with laws on the same subjects ought to prevail. In this connection, it is to be observed that wherever congress has favored new territories, by putting them on a footing with the northwestern territory, it has invariably by the organic acts immediately applied a full code of laws, criminal and civil, to such new territory, by adoption, either directly from the northwestern territory, or mediately from some territory formed on the model of the latter and already having a sufficient code; and it would be vain to search the national statutes for any instance in which congress has left a territory in a state of anarchy, in respect to any of the high crimes mentioned in the Crimes Act.

It is also worthy of remark that, in the early days of territorial governments, the sovereignty of the Union was more cheerfully acknowledged than it was after the slavery agitation gave birth to the doctrine of "squatter sovereignty" so called; and, accordingly, all prosecutions were conducted in the name of the United States, whether for crimes in violation of acts of congress or for crimes in violation of territorial acts. See cases in Hempstead, pp. 30, 61; Morris (Iowa), pp. 164, 341, 412; also, 1 Wisconsin, pp. 73, 93, 124, 276, 841. And indictments for such offenses properly conclude "against the peace and dignity of the United States:" *United States v. Lemmons*, Hemp., 62.

And, at the present day, notwithstanding the practice of prosecuting territorial crimes in the name of the territory, the highest governmental officers, executive and judicial, are, as I am advised, of opinion that, within the meaning of the pardon clause of the constitution, all territorial offenses are offenses against the United States: *In re Edward M. Kelley*.

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Wherever there is a general statute of the United States that can reasonably be applied to the territories, every intention is in favor of the intention of congress under that statute to assert the sovereignty of the Union, rather than to commit the exercise of that sovereignty to any delegated authority: *Vide National Bank v. County of Yankton*, 101 U. S., 129.

Especially ought this principle to be applied in the case of statutes declaring high crimes like treason and murder.

It seems absurd to hold that congress, while deeming it important in 1862 to pass the Bigamy Act (U. S. R. S., § 5352), and in 1873 to pass the Obscene Literature Act (U. S. R. S., § 5389), both expressly extending to the territories, and referring to them as places under the exclusive jurisdiction of the United States, and while having expressly extended the Crimes Act to the Louisiana and Florida purchases (2 St., 283, § 7; 3 St., 654, § 9), should have been willing to waive the jurisdiction of the Union over the crime of murder in the territories acquired from Mexico and Russia.

These provisions in the Revised Statutes clearly imply that a territory is a "place" within the meaning of the provisions, just as the Indian country act (4 St., 729, § 25) implies that the word "place" in the Crimes Act is applicable even to so extensive a district as the Indian country.

There are some old records in the office of the clerk of the district court of the first district which tend strongly to confirm the views which I have expressed regarding the force of the constitution and general statutes of the Union in newly acquired territory, and even to suggest a greater efficacy than I have imputed to them.

Among these records are the indictment, verdict, death sentence, and other proceedings in the case of *The United States v. Antonio Maria Trujillo*, from which it appears that as early as March 9th, A. D. 1847, under the provisional government and even before the treaty of peace, a grand

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jury of New Mexico, in the name of the United States, indicted the defendant for the crime of treason, charging, among other things, that he did in New Mexico "levy and make war against the said government of the United States and did then and there maliciously and traitorously attempt and endeavor by force and arms to subvert and destroy the constitution and laws of the government aforesaid in contempt of the constitution and laws of the government aforesaid," etc.

It was under this indictment that the defendant was convicted and sentenced to be hanged, which sentence was probably carried into effect on the 16th day of April, A. D. 1847.

The proceeding was evidently under the Crimes Act of 1790, for the violation of that act and of the United States constitution. As a writer in the *New American Cyclopædia* (15 Appleton, p. 583) well observes, with reference to the crime of treason—"the foundation of the law itself and of our knowledge of it must be the clause in the constitution \*

\* and, as there is no common law of the United States, this clause would have remained inoperative but for the act of 1790, chap. 36, sec. 1."

Another of these old records is entitled *United States v. John Armstrong*, and is an indictment and proceedings thereunder, against the defendant for committing murder in a "cantonment" of United States troops at Taos. The prosecution was evidently founded on the provisions of the Crimes Act of 1790.

Judge Hallett says at page 43: "As the laws of congress can be better enforced than those of the territory, we would be glad to adopt a different view, if it were possible to do so, but we cannot indulge our wishes or preferences in opposition to the law."

There can be no doubt of the wisdom and policy of applying the Crimes Act to cases of territorial homicide, if the law will justify the application. I have sought to show that

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the law, properly interpreted, not only justifies this application, but denounces as a gross heresy the prevailing territorial opinion; and, I add, in conclusion of this subject, that the same suggestions of wisdom and policy, which, according to Judge Hallett, lead to the judicial wish to hold the Orines Act in force, must have been controlling with congress to prevent its repeal or degradation.

The territorial law of homicide is unconstitutional. The organic law is the territorial constitution. Any legislation in conflict therewith is void *ab initio*. No disaffirming act of congress is necessary to establish this invalidity; and the failure of congress to expressly disaffirm is immaterial. A disaffirmance by congress is in such case supererogatory; and it is absurd to attempt to uphold such legislation on the bare negative that congress has taken no action on the subject.

In *Goodbe v. Salt Lake City*, 1 Utah, 79, it is said by McKean, Ch. J., respecting a statutory provision then under judicial consideration, "If, in any particular, this provision conflicts with the organic act, in such particular it is null and void, unless it has been affirmatively approved by congress."

So, in *Smith v. Odell*, 1 Wisconsin, 449, it is said in the opinion (pp. 454, 455): "The act of congress organizing this territory is in the nature of a constitution of a state. It is supreme and the legislative assembly cannot pass an act in opposition to or in violation of it. The courts cannot be required to enforce such an act. It should be treated as a nullity."

To the same effect is *Cass v. Davis*, 1 Col., 43, and, quite recently, Associate Justice Bell, while holding the Socorro district court, disregarded, as violative of the organic act, a statute which had been enacted by the territorial legislature nearly thirty years ago.

It requires no argument to show that a law of congress, applicable to this territory, is supreme and cannot be invaded, avoided or nullified by a territorial act. It is evident that

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when the will of congress is once declared, the legislative assembly can set up against it no other will on the same subject of legislation. As Judge Hallett well observes (1 Col., p. 40), any territorial law, "so far as it should correspond with the federal law would have been unavailing, and so far as in conflict with the federal law, it would have been void because of its repugnance thereto."

The judgment of this court, not being forestalled by any authoritative adjudication on the point here presented, the court is in duty bound to examine the question fully and as freely as if this case had arisen for discussion immediately after the enactment of the organic act.

As the highest appellate court in the territory it is called upon to decide the question upon principle, according to its judicial conscience, untrammelled by the ignorance and prejudice of the past.

The question never having been raised before in this court or in the Supreme Court of the United States, the rule of *stare decisis* is not applicable as an artificial obstacle to truth and justice.

With reference to the authority of precedents, there exists "an obvious distinction between the cases where the point decided was not the leading or chief point in the cause; where it did not receive full discussion at the bar, or was incidentally decided, without full examination, and those cases where the point in question was singly presented, fully discussed by counsel, and distinctly passed upon by the court:" *Olcott v. Tioga R. R. Co.*, 26 Barb., 153. See also opinion Denio, J., in same case, 20 N. Y., 226; *Justice v. Lang*, 52 N. Y., 325.

A learned judge has said (Johnson, J., 4 Cranch., pp. 103, 104): "I am far, very far, from denying the general authority of adjudications. Uniformity in decisions is often as important as their abstract justice. But I deny that a court is precluded from the right, or exempted from the necessity, of



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examining into the correctness or consistency of its own decisions, or those of any other tribunal. If I need precedent to support me in this doctrine, I will cite the example of this court, which, in the case of *The United States v. Moore*, February, 1805, acknowledged that in the case of *The United States v. Sims*, February, 1803, it had exercised a jurisdiction it did not possess. Strange, indeed, would be the doctrine that an inadvertency once committed by a court shall ever after impose on it the necessity of persisting in its error. A case that cannot be tested by principle is not law, and in a thousand instances have such cases been declared so by courts of justice."

*William Breeden*, Attorney-General, for the appellee :

1st. There was no error in excluding the question asked the witness Greenleaf. It referred to a remark made by deceased, not to or in the presence of the defendant, and it was not disclosed in any way that the remark in any way affected or referred to the defendant, or that, if so, it was ever communicated to the defendant. The evidence of Greenleaf clearly shows that the remark which the question sought to bring out, could not be of the *res gestæ* of the case or in any way proper or material to the defense.

It was not a part of or made in connection with the meeting with the defendant by the deceased, and deceased and defendant had no feud or quarrel: Wharton's Crim. Evidence, 262.

2d. The question asked Ronan was with reference to a remark by defendant, upon hearing a shot fired some moments before the shooting of the deceased, when it was not known who fired the shot, and the record does not show that it could in any way be material or proper evidence in the case. It was not of the *res gestæ*: Wharton's Crim. Evidence, 262.

3d. The question asked the witness Armijo, as to what the defendant said about the shooting four or five minutes after it occurred, was properly excluded. The statements of do

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fendant at that time were not admissible for defense, and he could not be permitted to make evidence for himself of statements made by him after the commission of the act, and after he had had time for consideration and to prepare a story, it was not of the *res gestae*: Wharton's Crim. Evidence, 262, 690.

4th. The ruling of the court on the motion for a new trial is not reviewable, as has been repeatedly decided in this court.

The newly discovered evidence referred to in the motion for a new trial was merely cumulative and tending to show, if anything, only an alleged fact of which direct evidence had been given to and considered by the jury.

5th. The minutes of evidence in the record show that there was evidence that the defendant and Boyd were acting together, and besides it is not pretended that all the evidence in this case was preserved or is before this court.

Therefore, it must be held that the fifth instruction asked by defendant was properly refused.

6th. The charge of the court was unexceptionable and no objection was made or exception taken to any specific portion thereof, but only a sweeping general exception to the whole charge, which this court cannot consider.

It was the province of the court to give the jury the law applicable to the facts of the case, which was done. There was no error in the failure of the court to instruct as to second, third and fourth degrees, and there was no exception taken on that account. The instructions given as to justifiable and excusable homicide, comprehended all that the defendant was entitled to: 6 Cal., 214; 29 Cal., 507; 32 Cal., 280; 31 Mo., 147; 18 Texas, 343; *Territory v. Romine*, ante, p. 114; *Territory v. Young*, ante, p. 93.

7th. The Crimes Act of the United States does not apply to cases like this. This indictment was properly brought and prosecuted in the name of the territory. New Mexico is

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not a district of country under the exclusive jurisdiction of the United States in the sense of the Crimes Act of 1790: *Franklin v. The United States*, 1 Col., 35.

It is too late to object to the constitution of the grand jury or the qualifications of jurors for the first time in this court. Any objection to the jury or jurors which may have existed, was waived by defendant when he assented to go to trial without objection: 1 Bish. Crim. Law, 995, *et seq.*, particularly 997 and authorities there cited; *Territory v. Romina*, New Mexico Supreme Court, Opinion, Book; 1 Bish. Crim. Proceed, 895, *et seq.*, and particularly 887, authorities cited; Wharton's Crim. Pleadings and Practice, 350, *et seq.*

The only question properly brought into this court by defendant's exceptions is the exclusion of one question to witness Greenleaf, one to Armijo and one to Ronan. The general question of jurisdiction is proper to be considered. But the court can properly consider none of the other questions suggested in the assignment of errors and brief for the reason that they are not brought into this court so as to be reviewed.

The instructions were liberal to the defendant, and fairly stated the law of the case, and the case was fairly submitted to the jury upon the evidence before them.

The judgment should be affirmed.

**ATTELL**, Chief Justice: The defendant, Yarberry, was indicted for murder in the second district court of the county of Bernalillo, May term, A. D. 1882.

He was tried at the same term, convicted of murder in the first degree and sentenced to be hung; he appeals to this court, and urges particularly the following reasons why he ought to be granted a new trial:

The first reason given is "that the court had no jurisdiction of the person or subject-matter, and the indictment is void on its face for lack of jurisdiction, the said indictment

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part of the said record is not in the name of the United States of America, for the violation of section 5339 of the United States Revised Statutes, and the indictment is fatally defective because it is drawn in the name of the territory, for violation of the territorial law, instead of in the name of the United States for violation of the act of congress relative to the crime of murder."

The organic act establishing a territorial government for New Mexico was approved September 9th, 1850.

It has now been in force over thirty-two years, and has been acquiesced in during all that period by every department of the general government. As early as the December term, 1857, in the case of *Leitensdorfer v. Webb*, the Supreme Court of the United States recognized the validity and binding force upon them of this organic act.

The court says: "It was undoubtedly within the competency of congress to define directly by their own act the jurisdiction of the courts created by them, or to delegate the authority requisite for that purpose to the territorial government. This power," they continue, "we consider, was in fact delegated by congress to the territorial government by the seventh section of the act of 1850, which declares that the legislative power of the territory shall extend to all rightful subjects of legislation, consistent with the constitution of the United States and with the provisions of this act:" 20 Howard, p. 177. Congress in the exercise of its undoubted right to govern the territories, has deemed it inconvenient or inexpedient to provide a body of municipal laws for them, but has erected territorial governments and delegated to them authority to enact such laws: *Franklin v. United States*, 1 Col., 35.

A year prior to the decision in *Leitensdorfer v. Webb*, which went up from this territory, the celebrated Dred Scott case had been decided, the venerable Chief Justice Taney delivering the opinion of the court. This great judge does

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not limit congress in their power to govern territories to the clause of the constitution which enables them to make all needful rules and regulations respecting the territory or other property belonging to the United States, but puts it on the broad ground of sovereignty. "The right to govern is the inevitable consequence of the right to acquire territory." As to form of territorial government he says: "In some cases a government consisting of persons appointed by the federal government would best subserve the interests of the territory." In other instances it would "be more advisable to commit the power of self-government to the people who had settled in the territory, as being most competent to determine what was best for their own interests:" 19 How., pp. 443-449. The expression in this opinion "to commit the power of self-government to the people" is the equivalent of "delegate the authority requisite," used in *Leitensdorfer v. Webb*.

Strictly within the limits of this grant of power, the legislature of New Mexico has declared that the unlawful killing of a human being with premeditated design to effect death is murder in the first degree, and that any person convicted of the same shall suffer death. This statute is consistent with the constitution and laws of the United States. It would be inconsistent with the foregoing reasoning to hold that New Mexico is either a fort, arsenal, dock-yard, magazine or district of country under the sole and exclusive jurisdiction of the United States. We therefore conclude that this indictment was properly found in the name of the territory of New Mexico for violation of territorial law.

The second class of objections are to the grand and petit jurors. These were not taken till after trial and conviction, and cannot now be considered: *Territory v. Abeita*, 1 N. M., p. 546; 1 Bishop, pp. 875-887; Wharton's Criminal Pleadings and Practice, p. 350, and authorities there cited.

The third class of objections is to conduct of trial, par-

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ticularly as to ruling out certain evidence offered by defendant. Before proceeding to consider these objections it will be proper to state some of the facts of the case; for it is only by reference to the facts that the rulings of the court below can be clearly understood.

The evidence shows that the defendant, Milton Yarberry, was at the time of the homicide acting as a peace officer in the city of Albuquerque, where the killing occurred. That it was within the scope of his duties to prevent the carrying and using of deadly weapons by persons other than peace officers; that by the statutes of New Mexico it is a misdemeanor to carry such weapons, and all peace officers are required to arrest and disarm persons unlawfully carrying or unlawfully using the same in towns or cities; that, on the night when the homicide was committed, Yarberry and a person by name of Ronan, and another by name of Boyd, were together, when they heard a shot fired down the street some doors below them. They did not start immediately in the direction whence the shot came, and Yarberry said something to one of these men just before he went in the direction where the shot was heard. The defense asked this question :

"Mr. Ronan, please state what was said by Yarberry, the defendant, when his attention was attracted to where this first shot was fired immediately preceding this occurrence?"

On objection, this question was ruled out. Yarberry and Boyd went down the street to where the shot was heard. It was between 8 and 9 o'clock at night, a number of men were in the vicinity, the deceased, Charles Campbell, was walking slowly along from where the shot was fired. Yarberry called out to him to stop, and to hold up his hands, and at the same instant Yarberry and Boyd commenced firing at Campbell, he fell forward on his face and instantly expired, pierced by six balls, all from behind—all entering his back. Yarberry did not go to the body of the dead man.

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but turned and went into a saloon. At this point the second question asked was excepted to as follows: "The court below erred in ruling that it was not competent or relevant for the appellant to show what statement he had made to the sheriff, Perfecto Armijo, on the occasion of the appellant's arrest by the latter four or five minutes after the occurrence in question, in answer to the question of the latter, 'What is the trouble, Milt?'" The third question asked was as to what deceased said a short time prior to the shooting. It is in evidence that the prisoner and deceased were strangers to each other. This is the statement of the prisoner himself. The question is as follows: On the direct examination of J. H. Greenleaf, a witness on behalf of the defense, witness testified that a short time before the occurrence of the shooting which resulted in the death of Campbell, the deceased was in his (witness') father's saloon, and witness was then asked to state what occurred there at that time; to which question he answered: "Well, he was in there, and he shook the dice with my father for drinks, and my father beat him. My father asked him to pay for the drinks, and he said:—" Objected to on the ground of irrelevancy; objection sustained. The first two questions relate to what the prisoner said a short time before and a short time after the shooting. It is claimed by defendant's counsel that they ought to have been admitted as part of the *res gestæ*. "The general rule as to *res gestæ* is that all declarations made at the same time the main fact under consideration takes place, and which are so connected with it as to illustrate its character, are admissible as original evidence, being what is termed a part of the *res gestæ*, in other words, a part of the thing done." The cries of the bystanders while the thing is being done are original, and not hearsay evidence, because they are part of the *res gestæ*, but a defendant may not manufacture evidence for himself, either before or after or in the moment of the assault, and claim its admission under this head, and in no

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did not even turn his body, but only looked back over his shoulder. Yarberry did not go to the body, but turned into a saloon. A citizen asked him: "Milt, why did you do this?" He replied: "I did it, and there he lies." To another he said: "He shot at me, but I was too quick for him, and I downed the son of a bitch." As this case presents a state of society which is now nearly impossible, and will soon become incredible, it may be well to say that where all persons are presumed to be armed, the order, "Hold up your hands," is to prevent an assaulted person from seizing his pistol, usually carried at his hip. The command is not only given by officers making an arrest, but also and more generally by highwaymen—and in the eloquent language of the attorney-general, "The cry was the cry of a robber, and the shot the shot of an assassin." Yarberry, in his own testimony, says that he first called "stop! I want you, that Campbell;" then "went for his pistol," and said, "go back;" I then, continued Yarberry, "fired at him, and he fired at me; I do not know who fired first." There is no dispute but what Yarberry shot him several times. Boyd, who was with Yarberry, also shot him. There were six bullets entering his body, all from behind, all coming out in front. He was instantly shot to death, shot through and through by these two men, one of them a peace officer! both of them assisting each the other, to make an arrest of a man for a supposed misdemeanor! The evidence is conclusive that Yarberry and Boyd acted in concert. They were in pursuit of a common purpose and were each responsible as principals.

As the instruction, if given, would have put the jury upon an unnecessary inquiry and tended to confuse their minds, we think it was properly refused. The point raised as to the original verdict as given in the Spanish language we cannot consider, for it is not a part of the record. The newly discovered evidence, the finding of some pistol cartridges upon the person of deceased, has a tendency to strengthen some



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testimony that the deceased was armed at the time of his death, but is merely cumulative and would not justify the granting of a new trial. Yarberry's statement was that he attempted to arrest this man, that the man turned and fired upon him; that he returned the shot and killed him. Had the jury believed this statement they would have acquitted him. They disbelieved it and found him guilty. The evidence discloses a case either of justifiable homicide or willful and deliberate murder.

The jury have passed upon it and we are not disposed to disturb their verdict. As to the objection that the verdict does not assess the penalty as required by statute, we are disposed to take the view that it does assess it.

The verdict is in the following language: "We, the jurors, unanimously find the defendant guilty, as charged in the indictment." The statute provides as follows: "All questions of fact in a criminal case shall be tried by a jury, who shall assess the punishment in their verdict, and the court shall render judgment accordingly." In finding the prisoner guilty, as charged in the indictment, the jury instructs the court exactly what judgment to render. The indictment charges murder in the first degree. The law which binds the jury as well as the court, assesses the penalty to be death. To assess this penalty in words would be surplusage, to assess any other on this finding, would be illegal. This question has, however, been settled by previous descriptions of this court, which are here affirmed: *Territory v. Romine, ante*, p. 114; *Territory v. Young, ante*, p. 93.

The only remaining question relates to the presence of the prisoner in court during his trial. It is a well established practice that in cases of felony the defendant must be personally present during all the proceedings, and must so appear on record. But a formal averment of defendant's presence during trial is not necessary when it can be inferred from the record. We think the record in this

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case shows the presence of the prisoner, although not every day by formal averment. At the arraignment the record says: "Now comes the said defendant in his own proper person." At the trial defendant is sworn and gives evidence. This is just as convincing of his presence as a formal statement. On motion for new trial and in arrest of judgment "the defendant in his own proper person moves the court." At the sentence the record says: "Now comes the said plaintiff by her district attorney and the said defendant in his own proper person and by his attorneys." The eleventh specification in the motion for a new trial is in the following words: "The jury was not polled as the defendant had a right to have done, owing to the absence of his counsel, when the verdict was rendered late at night." This is as much a part of the record as if made by the clerk of the court, and we think the averment that his counsel was absent plainly implies that the prisoner was present. The absence of any statement in the assignments of error that the prisoner was not at all times present, raises a very strong presumption that he was so present. But without resorting to presumptions, we think the record shows enough to convince any reasonable mind that the prisoner was personally present in court during all his trial. We are asked to presume that he was not. The contrary doctrine is the true one: That in a court of general jurisdiction all the details of a trial are presumed to be regular and sufficient to sustain judgment until the contrary be shown: *Territory v. Webb*, ante, p. 147.

The judgment of the court below is affirmed.

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United States v. Lewis.

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THE UNITED STATES OF AMERICA, Appellee, v. CHARLES LEWIS, *alias* CHARLES FOSTER, Appellant.

*January, 1883.*

CRIMINAL LAW. (1) *Feloniously obtaining registered letter : Principal and agent, authority of latter to take letter from the office ; Demurrer to evidence.*

NEW TRIAL. (2) *Refusal of court to grant new trial an abuse of discretion when, under the evidence, the defendant should have been discharged.*

APPEAL. (3) *Discharge of prisoner upon appeal to Supreme Court.*

1. Where it had been the custom of several persons living some distance from the post-office to delegate one of their number to bring their mail from the post-office whenever he called there, this amounts to a general authority to such one to get such mail matter, and if, pursuant to such authority, he takes a registered letter from the office belonging to one of such persons, he is not guilty of fraudulently and feloniously obtaining such letter from the postmaster, although after thus obtaining it from the postmaster he converts it to his own use; and if indicted for feloniously obtaining the letter and the evidence shows the foregoing state of facts, a demurrer to such evidence will lie upon which the defendant should be discharged.
2. Where, in such case, the evidence is not demurred to, but instead a motion for a new trial is made, a new trial should be granted, and if refused, the refusal is an abuse of the discretion of the court below as to granting new trials, and its judgment will be reversed.
3. There being no evidence in the court below to sustain the conviction of one charged with a felony, on appeal to the Supreme Court, that tribunal will not remand the case for a new trial, but will direct that judgment below be reversed, and that the defendant be discharged.

Appeal from the District Court of the First Judicial District.

*Cayless & Breedon*, for appellant.

*Sidney M. Barnes*, United States District Attorney, for the United States.

There is no error in the finding of the jury or the judgment of the court. The judgment of conviction should be sustained; the indictment in this case is under section 5469 of the Revised Statutes of the United States, page 1060.

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The case of *Webb v. Territory of New Mexico*, decided at January term, 1881, *ante*, p. 147, is conclusive of this case and an affirmance is asked.

BELL, Associate Justice: The appellant was convicted under an indictment which charged that he did unlawfully and feloniously, and by fraud and deception, obtain from Edward H. Bergman, postmaster, at Springer, N. M., one registered letter addressed to William H. Breen, at that place, and which letter contained money.

This is the substance of the charge, which is stated formally. It is not disputed that the appellant received the letter in question from Mr. Bergman, the postmaster at Springer, and that it contained money, and the only issue presented to the jury was whether the appellant unlawfully and by fraud and deception obtained it as charged in the indictment.

The evidence on the trial showed that the appellant and Breen were both employed on the ranch of one Myers, some 45 miles from Springer. That the appellant had frequently theretofore gone to Springer from the ranch and brought out the mail of the complaining witness, of Mr. Myers and other persons in that vicinity. The testimony of the postmaster, Mr. Bergman, in that regard is as follows:

"Lewis had been in the habit of coming to the post-office at Springer; he had been there time and again to receive mail matter for Mr. Myers and the vicinity."

The complaining witness, Wm. H. Breen, testified as follows:

Q. Did you at any time before the 10th day of May, 1880, (the day the letter was received by the appellant) give him (the appellant) any directions or authority to receive your mail from the postmaster at Springer?

A. I did, sir.

Q. When?

A. I couldn't exactly tell what time; he would go to

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Springer and I would tell him to get my mail; it was the custom of that part of the country.

Q. When did you last authorize him to get letters for you?

A. I think it was on the 4th of May.

Q. Now, on the 4th day of May, when you saw Lewis last, what were you and Lewis doing?

A. We were in the house talking; he was going to Springer and I told him to get my mail, if there was any there.

Q. Was that the last time you saw him before he got the letter?

A. That was the last time.

\* \* \* \* \*

Q. Had you authorized Mr. Lewis before to get your mail?

A. Yes, sir.

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Q. Mr. Breen, was it not customary for yourself and others who were working for Mr. Myers at that ranch to send after mail by Mr. Lewis to Springer?

A. It was.

Q. And Mr. Lewis brought the mail frequently, did he not?

A. Yes, sir.

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This witness further testified that he had not authorized the appellant to get that particular letter, but that was immaterial, as the evidence does not show that he either expected the letter in question or knew that it was in the post-office at the time of its delivery. The authority given to him was to get his, the complainant's, mail generally, and of course that included all letters of any kind that might be at the office.

The postmaster testified, in addition to his testimony already quoted, that the appellant came to his office on the 9th of May, and that he then refused to give him the letter, but on the 10th he delivered it to him on his representation

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that Breen was twelve or fifteen miles away from the ranch and could not come for it. There was no evidence to disprove this statement of the appellant.

This is substantially all the evidence showing how the accused became possessed of the letter. The jury convicted him of the offense charged in the indictment.

A motion for a new trial was then made, for the following reasons :

*First.* "That the verdict was contrary to the law and the evidence in said cause.

*Second.* "That the jury was not authorized to find a verdict of guilty upon the evidence produced upon the trial of said cause, and that said verdict was unwarranted by the facts."

The motion was denied, and error is assigned on this denial.

We are of opinion that had a demurrer been interposed to the evidence, it would have been the duty of the court below to have directed an acquittal of the defendant.

That course was not taken, but we are asked to review the action of the judge who presided in denying a new trial.

The rule of law is, we think, well settled, that a motion for a new trial is addressed to the discretion of the court and is not ordinarily reviewable. But when the discretion of court has been abused and has resulted in injustice, then the appellate court will interfere. A difference of opinion as to the proper course of proceeding would not be sufficient. An appellate court must be able to say that the course pursued was not only improper, but that it operated unjustly and injuriously to the party: ——— *v. State*, 11 Ohio St., 114. We think the case at bar comes fairly within the class of cases referred to in the case cited.

It is quite certain, from the evidence, that the appellant was fully authorized to receive the letter in question, and though the authority under which he acted on the particular

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occasion was given to him some four days before he acted on it, yet when the distance of post-office from the ranch is considered, and the fact that he had been acting on similar authority for some months at least, it is not to be presumed that the mere lapse of a few days had operated to revoke the general authority with which it seems that he was vested. The authority was not revoked expressly, according to the evidence of the complainant, and we think he was entirely justified in acting on it.

What he did with the letter and its contents after receiving it is wholly immaterial, though it is probable that the belief in the minds of the jury that he improperly converted them to his own use was what led them to convict him.

On all the evidence, it was, in our judgment, clearly the duty of the presiding justice to set the verdict aside and order a new trial; it was an abuse of the discretion with which he was vested to do otherwise.

The case being now in this court, we are also of opinion that, on the evidence, no conviction could properly be had and, therefore, we do not send it to the court below for a new trial, but direct that the judgment be reversed and the defendant discharged from further custody under this indictment.

AXTELL, C. J: I concur.

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Martinez v. Martinez.

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BENITO MARTINEZ, Appellant, v. EDUARDO MARTINEZ,  
Appellee.

January, 1883.

PRACTICE. (1) *Affidavit in replevin amendable on appeal to district court.*

REPLEVIN. (2) *Nature of the action.*

1. In replevin before a justice of the peace, the affidavit filed was insufficient in that it did not state that the person who made the affidavit was the agent or attorney of the plaintiff, and it did not state that plaintiff had a right to the possession of the property sought to be replevied. Trial was had and a verdict and judgment rendered for the plaintiff. The defendant appealed to the district court. Then the plaintiff moved in that court to amend the affidavit, but the district court overruled the motion, quashed the writ, and restored the property replevied to the defendant. *Held*, that the district court should have allowed the amendment, and that its refusal to do so was error.
2. The action of replevin is not an extraordinary remedy in derogation of the common law like the proceeding by attachment. On principle the owner of personal property ought to have the same right to recover the possession of it in specie when wrongfully detained, as he has to recover a debt, and in either proceeding the law should be equally liberal in allowing amendments in furtherance of justice.

Appealed from the District Court of San Miguel county.

This was an action of replevin commenced in the justice court and on judgment being rendered for the plaintiff, an appeal was taken to the district court.

In the district court the plaintiff asked leave to amend the affidavit for replevin so as to conform to the exact language of the statute with reference to the necessary affidavits on the subject of replevin. The original affidavit had left out the words alleging the plaintiff had good right to the possession of the horse in question. Plaintiff also presented with his motion his proposed amended affidavit in full. The court refused to allow the amendment to be filed. The de-



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fendant then moved the court to quash the writ on account of the defect of the affidavit, which was allowed, and judgment rendered against the plaintiff for a return of the horse and one dollar damages.

*Catron & Thornton*, for appellant :

The court should have allowed the amendment to be filed : Prince's Stat., sec. 120, p. 109 ; Prince's Stat., secs. 25 and 26, p. 119 ; *Sanchez v. Luna*, 1 N. M., 239 ; *Helling v. Wright*, 14 Pa. St., 375 ; *Applewhite v. Allen*, 27 Tenn., 698.

Our statutes are mandatory in terms as to amendments.

*Breeden & Waldo*, for appellee.

BRISTOL, Associate Justice : This is a case of replevin originally brought before a justice of the peace in San Miguel county, in the first judicial district, for the recovery of a horse of the alleged value of thirty dollars.

The affidavit on behalf of plaintiff Benito Martinez, on which the writ of replevin was issued by the justice is as follows :

" TERRITORY OF NEW MEXICO, }  
COUNTY OF SAN MIGUEL. }

" *Honorable Justice of the Peace, Florenolo Aragon, Precinct No. 3 of said county :*

" SIR—I, the undersigned, under the most solemn oath, declare and say that in possession of Eduardo Martinez is found a wolf-colored colt of the age of two years past, going on three, of the property of Benito Martinez, of the value of thirty dollars. Said colt has been detained unjustly by the said Eduardo Martinez, and therefore I ask, in virtue of the law, that the said colt be replevied, in conformity with the law, and that the said Eduardo Martinez be summoned before your court to answer to the plaintiff for twenty-five dollars damages, for the unjust taking and detention of said

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colt, etc., and I promise to prove all that is put in this declaration, and I swear that I do not proceed with malice, etc.

"JULIAN BACA,  
"Deponent.

"Witnesses :

BENITO MARTINEZ,  
JOSÉ ARCHIBEQUE,  
AGAPITO GARCIA,  
MANUEL MARTIN,  
FERNANDO BACA.

"Sworn and subscribed before me, this }  
29th day of November, A. D., 1881. }

"FLORENCIO ARAGON,  
"Justice of the Peace."

On this affidavit the justice issued a writ of replevin. The colt in question was taken thereon; a trial was had, both parties appearing. The jury rendered a verdict that the colt was the property of the plaintiff, and that the plaintiff recover twenty-five dollars damages.

No formal judgment was rendered on the verdict by the justice, unless the words of the justice immediately following the verdict in the transcript may be considered a judgment, which words are as follows :

"Approved by me this above day of the said date."

From this disposition of the case by the justice an appeal was taken to the district court of San Miguel county.

In the latter court, the plaintiff and appellee made a motion for leave to amend the affidavit on which the writ of replevin was issued, so as to show that at the time the action commenced the plaintiff had, and still has, good right to the possession of the colt in question, and accompanied the motion with the proposed amended affidavit to that effect, in words as follows :

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"BENITO MARTINEZ  
 vs.  
 EDUARDO MARTINEZ. } ss.

"In replevin appealed from before Florencio Aragon, justice of the peace for precinct No. 8, in the county of San Miguel.

"By leave of the court first had.

"Julian Baca, being duly sworn, says he is the agent of Benito Martinez, the plaintiff in the above entitled suit; that said plaintiff has, and at the time of suing out the writ in above entitled cause had, good right to the possession of the following described chattel, and that the same was at the time of suing out, and the service of said writ in the above entitled cause wrongfully detained by the said defendant, Eduardo Martinez, to wit: one dun or clay-bank horse, of the age of two years, going on three, of the value of thirty dollars, at, to wit, the precinct aforesaid.

"Plaintiff therefore brings suit, and asks the judgment of this court for the possession of said horse, together with twenty-five dollars damages for the wrongful detention thereof, together with his costs."

"JULIAN BACA,  
*"Agent of Benito Martinez, Plaintiff"*

"Subscribed and sworn to before }  
 me, this March 9th, 1883. }

"F. W. CLANCY,  
*"Clerk."*

This motion was overruled by the court below, and the plaintiff excepted.

The defendant thereupon moved the court to quash the writ on the ground, among others, that the affidavit or verified complaint filed with justice for the purpose of obtaining the writ, did not allege that the plaintiff had a right to the possession of the colt in question. This motion was sustained by the court and the plaintiff excepted.

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Final judgment was then rendered by the court below for the return of the colt by the plaintiff to the defendant; that he pay the defendant one dollar as damages and his costs.

From this judgment the plaintiff appeals to this court.

The record presents a single question for our consideration, and that is, whether the court below erred in refusing leave to the plaintiff to amend his affidavit in replevin.

To justify the issuing of a writ of replevin by a justice of the peace, the statute requires that "the plaintiff, his agent or attorney, shall file an affidavit with the justice, stating that the goods and chattels are wrongfully detained by the defendant, and stating the value thereof, and that he has a right to the possession thereof, and that every writ of replevin issued without such affidavit, shall be quashed at the cost of the plaintiff."

The affidavit that was filed with the justice, and on which the writ was issued, and the colt replevied was clearly insufficient in two particulars: one was, that it did not appear that Julian Baca, who made the affidavit, was either the agent or attorney of Benito Martinez, the plaintiff; and the other was, that it did not state that the plaintiff had a right to the possession of the colt.

Unless the affidavit was amendable, and the plaintiff offered to amend, it follows that it was incumbent on the court below to quash the writ, and render the proper judgment.

Was the affidavit amendable? In 1876 the legislature passed an act, entitled an act to define the qualifications, powers and jurisdiction of justices of the peace, and regulating the practice in their courts.

This act contains 125 sections. Sections 48 to 55, both inclusive, relate to actions of replevin. Section 120 provides as follows: "All causes removed into the district court in pursuance of the foregoing sections, shall be tried *de novo*, and the court shall allow all amendments which may be

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necessary in furtherance of justice in all cases appealed by petition, *certiorari*, or in the ordinary mode."

That this section covers the action of replevin, as well as every other action that may be brought before a justice of the peace, there can be no doubt.

The action of replevin is not an extraordinary remedy in derogation of the common law, like the proceeding by attachment. On principle, the owner of personal property ought to have the same right to recover the possession of it in specie when wrongfully detained, as he has to recover a debt, and in either proceeding the law should be equally liberal in allowing amendments in furtherance of justice.

The fact that the statute expressly provides that if the writ be issued without the required affidavit, it shall be quashed, adds nothing to the mandatory character of the statute, for that result would uniformly follow, without any such possession.

The provisions of the statute in regard to actions of replevin before justices of the peace, and in regard to amendments on appeals from their courts, in all cases being parts of the same act, must be construed together, and harmonized, if possible.

This is not difficult. If the plaintiff inadvertently has made an insufficient affidavit for a writ of replevin, and takes no steps to rectify it, but rests his case thereon, the writ will be quashed, as a matter of course. But after discovering its insufficiency, if he applies at the proper time for leave to amend, there can be no objection to its allowance, if justice will be promoted thereby.

It is quite evident from the record that the court below refused the amendment on the ground that it had no discretion to allow it under the statute. This was error. The refusal of the court to allow the affidavit to be amended was virtually a final disposition of the case in favor of the defendant, without a trial on the merits.

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Territory of New Mexico v. Weller.

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There can be no doubt from the facts appearing on the record, that granting leave to the plaintiff to amend his affidavit, would have been in furtherance of justice, and that refusing it was an abuse of discretion of the court below.

Judgment reversed, and cause remanded with instructions to grant leave to the plaintiff to amend his affidavit, and thereupon to further proceed according to law.

All the justices concur.

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THE TERRITORY OF NEW MEXICO, Appellant, v. G. E.  
WELLER, Appellee.

January, 1883.

JUSTICE OF THE PEACE. (1) *Powers of.*

PERJURY. (2) *Surety on appeal bond, swearing falsely as to his property is guilty of: Examination of surety by justice of the peace as to former's ownership of property is a judicial proceeding.*

1. The powers of a justice of the peace or magistrate in New Mexico are not less or narrower than the powers of the same officer elsewhere.
2. It is the duty of a justice of the peace to see that sureties offered on appeal bonds are worth the sum for which they intend to become sureties, in such property as can be reached by legal process. In order to ascertain this, the justice may examine, upon oath, the persons offering to go upon the bond, and he may also call and examine witnesses upon the subject. This examination and the approval of the bond by the justice constitute a judicial proceeding, in which the justice has legal power to administer oaths, and if the sureties proposed swear falsely to a material matter in such proceeding, they may be indicted and punished for perjury.

Appeal from the District Court of Santa Fe county.

*William Breeden*, attorney-general, for the territory.

*Fiske & Warren*, for the appellee.

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Territory of New Mexico v. Weller.

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AXTELL, Chief Justice: The defendant was indicted by the grand jury of Santa Fe county, February term, 1882, for perjury.

The indictment was found upon the following facts: In January, 1882, an action of forcible entry and unlawful detainer, had been tried before a justice of the peace in Santa Fe county, and a judgment rendered in favor of plaintiffs. The defendant appealed and offered G. H. Weller, defendant in this action as one of his sureties on his appeal bond.

Weller was thereupon duly sworn, and took his corporal oath in due form of law, before the said justice of the peace, to true answers make, touching his sufficiency as such surety and the value and character of the property of which he was then possessed. The indictment then alleges in due form then and there, that he swore falsely in regard to his property.

The defendant appeared to the indictment and filed his motion to quash the same for the following reasons: That the same is insufficient in law to constitute any crime or offense, and the same does not allege any crime or offense indictable under the laws of this territory.

The statute relating to perjury is as follows, Chap. LIV, sec. 2, Laws of New Mexico:

If any person of whom an oath shall be required by law, shall willfully swear falsely in regard to any matter or thing respecting which such oath is required, such person shall be deemed guilty of perjury.

There is no statute of the territory requiring the sureties on an appeal bond, to make affidavit that they are worth the amount for which they bind themselves, nor is there any statute except the general statute hereafter referred to, authorizing or requiring a justice of the peace to examine under oath, a person offering himself as bondsman, touching his ability pecuniarily to go on such bond. The contention is upon this point, the defendant claiming that there was

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no oath required by law, and consequently no perjury for swearing falsely.

The court below took this view of the case and quashed the indictment. The territory took an appeal to this court.

It was contended by defendant in argument before us, that justices of the peace in New Mexico, had less authority and were confined within narrower limits, than the same officers in the old colonial states; because it was argued that the colonists brought with them from the mother country, some of the common law, while we have only such as govern us by express statute. We find by reference to the organic act, sec. 10, that the judicial power of the territory shall be vested in a supreme court, district courts, probate courts and in justices of the peace; and we find in our general statutes, secs. 122 and 123 of the act, in regard to justices of the peace, that all justices of the peace of this territory are hereby declared to be magistrates, and are empowered to administer oaths and affidavits and to take depositions. This power is general and the definition of justice of the peace is enlarged by the term magistrate. It is difficult to see how these terms can have any larger significance in the old colonial states than is given to them by the organic act and statutes of New Mexico; the powers of a magistrate or justice of the peace over subjects within their proper jurisdiction, are the same in New Mexico as elsewhere.

In the case before us, it was the duty of the justice to see that the sureties to the appeal bond were worth the amount for which they went upon the bond and in such property as could be reached by legal process, for he must approve the bond, and this approval is a judicial act. Before he could intelligently approve this bond he must, by some process, be able to judge and determine the sufficiency of the security. This is a judicial proceeding and the general power conferred upon the justice to administer oaths, is sufficient to enable him to proceed and determine the question to his own satis-



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faction by examining the person offering to go upon the bond upon oath, and if he is not satisfied, by calling and examining other witnesses.

His powers as a magistrate and justice of the peace at common law—the duty imposed upon him by statute to take and approve the bond—the whole tenor and course of judicial proceedings justified him in requiring this defendant to be sworn, and when the justice required him to be sworn he was required by law, within the meaning of our statute. Possibly the justice could not have compelled him to swear, but had he refused to do so, it would have answered the same purpose, and the justice would have rejected him, but if, when required by the justice, he voluntarily comes and swears falsely, he commits perjury. The statute of New Mexico provides (chapter XXVII., sec. 18), that in criminal cases the common law, as recognized by the United States and the several states of the Union, shall be the rule of practice and decision. At common law it was perjury to take a false oath in justifying bail in any of the courts or before any person acting as a court, justice or tribunal, having power to hold such judicial proceeding. Again, one of the best common-law definitions of the crime is, that perjury is committed when a lawful oath is administered in some judicial proceeding to a person who swears willfully, absolutely and falsely in a matter material to the issue. This was a judicial proceeding, the justice had a legal right to administer the oath, the matter inquired of was material in the case and the false swearing was perjury. It follows that the district court erred in quashing the indictment.

The judgment is reversed and the cause remanded.

**All concur.**

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Territory of New Mexico v. Romero.

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**THE TERRITORY OF NEW MEXICO, Appellee, v. DAMIAN  
ROMERO, Appellant.**

*January 16, 1882.*

**NEW TRIAL.** (1) *Granting of, discretionary: Decision not reviewable except where discretion abused.*

**GRAND JUROR.** (2) *Objection to, must be made, when.*

**PRACTICE.** (3) *Review of matters extraneous to record.*

**MURDER.** (4) *Instruction as to degrees.*

**SAME.** (5) *Instruction limiting jury to consider evidence only with reference to first degree.*

1. The granting of a new trial is discretionary with the court below, whose decision will not be reviewed or reversed except for a manifestly gross abuse of its discretion, causing great injustice.
2. An objection to a grand juror, that he was not a citizen of the United States, comes too late after a plea to the merits. It is not ground for a motion in arrest of judgment.
3. Matters outside of the record are not reviewable by the Supreme Court.
4. A trial court is only required to charge as to such degrees of the crime of murder as there is evidence in the case tending to sustain. It is, however, its duty to charge as to *all* such degrees, and a failure so to do is error, if objected to in time.
5. It appeared from the evidence that the defendant, charged with murder, was arrested more than a hundred miles from the scene of the crime, having in his possession the watch, coat and cap of the deceased, and that, when arrested, he confessed to having taken also a race horse which had belonged to the deceased, and which he had sold in the vicinity where he was arrested; and there was, besides, other evidence which led the jury to believe that the defendant killed the deceased for the purpose of robbery: *Held*, that an instruction to the jury that there was "no evidence whatever to show that the killing of the deceased was justifiable or excusable, or that there were any circumstances to bring it within the definition of any degree of murder less than the first," is not erroneous.

Appeal from the District Court for Colfax county.

*William Breeden*, attorney-general, for the territory,  
appellee.

*Frank Springer* and *W. D. Lee*, for appellant.

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Territory of New Mexico v. Romero.

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BELL, Associate Justice. The appellant in this cause was indicted for the offense of murder in the first degree, at the regular term of the district court of the first judicial district of the territory of New Mexico, held in and for the county of Colfax at the March term of said court for 1882.

Thereafter, and at the same term of the said court, he was tried by a petit jury and convicted of the offense charged in the indictment, to wit, the crime of murder in the first degree. Following the conviction a motion was made for a new trial, for various reasons set forth in the notice of said motion filed in the cause, and appearing upon the record.

The court below denied the motion for a new trial.

That motion is not reviewable in this court, excepting only in a case where the discretion with which the court is vested, in that regard, has been grossly abused and great injustice has followed.

The question was recently considered in this court in the case of the *United States v. Lewis*, and the law held to be as herein stated.

In the case of the *Territory v. Webb*, ante, p. 147, the rule is laid down to be: "When the evidence is contradictory and the verdict is against the weight of evidence, though a new trial may be granted by the court trying the cause, in their discretion, their decision denying the same is not examinable by an appellate court." *Territory v. Webb*, Opinions of Supreme Court, p. 70, ante, p. 147, citing, *State v. Cruise*, 16 Mo., 391; *Herbon v. The State*, 7 Texas, 69.

In the same case, this court further holds that, "if there had been no part of the evidence, which if true, would sustain the verdict, then an error of law would have been apparent from the record upon which we could reverse the judgment.

"Under the rules governing the judicial administration of the criminal laws of this territory, this court can only review and determine errors of law appearing on the face of the

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Territory of New Mexico v. Romero.

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record :” *Territory v. Webb, supra*, and citing *Cathcart v. The Commonwealth*, 37 Pa., 108. This view of the law we reaffirm in this case.

We are clearly of the opinion, upon examination of the evidence, that it was not an abuse of the discretion of the court below to deny the motion, and therefore we cannot consider it here.

After the denial of the motion for a new trial, counsel for the appellant filed a motion in arrest of judgment, based upon affidavits charging that one of the grand jurors who presented the indictment against him to the court, was not a citizen of the United States.

That motion was also denied and we think properly so.

From the record it appears that this question was not raised until after the verdict.

It is perfectly well settled, that objection to the character of the grand jury, or the qualification of an individual member of it, comes too late after plea to the merits.

Bishop, as the result of an examination of the decisions on this subject, states the rule to be : “ The courts will refuse to hear objections to the persons composing the grand jury or the manner in which it is impanelled, after the case has been tried by the petit jury :” 1 Bish. Crim. Law, 997, and the numerous cases there cited.

The same author in his work on procedure : “ It is too late, after the verdict, to raise an objection of this class ; as, that the grand jury was not lawfully constituted or a particular member disqualified :” 1 Bish. Crim. Prac., 887, and cases there cited.

It follows from the authorities cited, that there was no error in the court denying the motion in arrest of judgment for the reason assigned.

We now come to the consideration of the only question, which, we think is properly presented by the record for the determination of this court.

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Territory of New Mexico v. Romero.

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Error is assigned upon the following instructions given by the court to the jury: "In this case there is no evidence whatever to show that the killing of the deceased was justifiable or excusable, or that there were any circumstances to bring it within the definition of any degree of murder less than the first."

It is contended by the counsel for the appellant, that the court should have instructed the jury as to all the degrees of murder declared by the statute of the territory.

This is the only exception taken to the charge of the court below, and is therefore the only question which is reviewable here.

We think the law upon this subject is well settled, not only in this territory, but throughout the states of the Union, and we think the rule to be, that the court is only required to charge as to such degrees of the crime of murder as there is evidence in the case tending to sustain.

We deem it to be the duty of the court to charge as to all such degrees, and that a failure to do so is error, if objected to at the proper time.

In the *People v. Williams*, the Supreme Court of California held: "It is not error for the court to refuse an instruction in a criminal case which is not pertinent to the facts: 32 Cal., 280.

The same court in another case similar to the one at bar, used the following language: "If on the trial for murder there is no evidence of facts and circumstances, such as would under the law reduce the crime charged to manslaughter, the judge may so inform the jury, and charge them that they cannot consider the question of manslaughter:" *People v. King*, 27 Cal., 507.

In the case of *State v. Grant*, 7 Oregon R., cited by counsel for the defendant, the court holds that the degree of guilt, as well as the question of guilt, should be left to the jury,

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but that was only in cases where there was evidence of more than one degree of crime.

The court in that case nowhere holds that it is the duty of the presiding judge to charge as to every degree of murder, whether there is evidence tending to sustain all the degrees or not.

In the case of *The State v. Glyden*, 51 Iowa, also cited by defendants' counsel, the court there expressly holds that it was not error for the court below to limit the consideration of the jury to the question of murder in the first degree, for they say that, from an examination of the record, they are of opinion that the facts showed the case to be one of murder in the first degree.

The counsel for the defendant also cited the case of *The People v. Dun*, 1 Idaho, p. 74.

That case decides the law to be precisely as we have here declared it.

It says: "A court is not bound to give instructions based on a supposed state of proof which does not exist. A defendant may insist on instructions that are sound law in the abstract, but, unless they have some application to the proof in the case, the court should refuse them, as having a tendency to confuse and mislead the jury. In the trial of a prisoner on a charge of murder, involving the penalty of death, while it is safe to give him the benefit of all presumptions, yet if the court sees no evidence to reduce the grade of the offense, it has the right to withhold an instruction which presupposes such testimony."

In this territory the same view of the law has been uniformly taken by the Supreme Court.

In the case of *The Territory v. Young*, *ante*, p. 93, where exactly the same question was raised, the court says: "The reading of the entire law as to homicide to a jury in each case would not only be useless, and as to some of the sections absurd, but would tend to confuse their minds, and make it

## Territory of New Mexico v. Romero.

almost impossible for them to distinguish what the real crime, as proved is, and to agree on a proper verdict." \*

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"It is within the power, and we think it is the duty of the judge presiding to simplify and make clear the duties of the jury as far as possible, by eliminating from these degrees, which are in effect made by our law distinct crimes, any which the case certainly is not:" *Territory v. Young*, Opinions of Supreme Court, p. 36, *ante*, p. 93.

A careful examination of the evidence, as shown by the record, satisfies us that the appellant was either guilty of murder in the first degree, or he was innocent of the crime charged.

All the evidence shows that the deceased, William A. Brocksmidt, was assassinated for the purpose of robbery.

The testimony of the appellant himself is, in substance, that Rael, the Indian, killed the deceased, robbed him of his money, which he divided with him (the appellant), and that they then departed together, leaving the murdered man lying in the house.

The jury evidently did not believe this story, but were satisfied that the appellant himself killed Brocksmidt, in order to rob him.

They were entirely justified in taking this view.

The appellant was arrested, as the evidence shows, more than a hundred miles away from the scene of the crime, having in his possession the watch, coat and cap of the deceased, and when arrested, confessed to having taken also a race horse, which had belonged to the deceased, and which he had sold in the vicinity of where he was arrested.

We cannot see now, under the circumstances disclosed by this evidence, and all the other evidence in the case, the court could have been required, or even justified, in leaving the case to the jury on any other degree of crime than that of murder in the first degree.

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Keeney et al. v. Carillo et al.

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We are of the opinion that there was no error in the instructions excepted to, and that the judgment should be affirmed.

All concur.

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THOMAS KEENEY ET AL., Appellees, v. JOSE ANTONIO  
CARILLO ET AL., Appellants.

January, 1883.

**WATER.** (1) *Appropriation, rights conferred by:* (2) *Forfeiture of such rights by abandonment:* (3) *Enforcement, by injunction of such rights.*

**CHANCERY PLEADINGS.** (4) *Bill need not state evidence.*

**SAME.** (5) *Sufficient allegation of diversion of water.*

**WATER.** (6) *Right to subterranean stream.*

**EVIDENCE.** (7) *Answer under oath, how overcome.*

**PLEADINGS.** (8) *Misnomer of complainant.*

1. Complainants built a house near two springs, at the mouth of a cañon, took possession of them, and by an acequia, conducted water from them to a farm. Subsequently complainants dug ditches through a cienega, or marsh, several miles up the cañon, to drain the same, and collect and turn the water into the natural channel of the cañon below, wherein it continued to run upon the surface of the ground, about twenty cubic inches in volume, two or three miles to a place in the cañon, where it sank. To prevent the sinking and wasting of the water at this place, complainants constructed a dam, and made a ditch, conducting the water by and beyond the place of sinking, and turning it again into the natural channel of the cañon, wherein it continued to run to within about two miles of the springs at the mouth of the cañon, where it again sank, and entirely disappeared from the surface. Complainants' intention was to conduct the water by channels on the surface, natural and artificial, from the cienega to their lands in the plain below; but aside from having made the small acequia from the springs to such lands, they only prosecuted the work so far as to conduct the water to the place where it sank the second time, and then abandoned it for want of means and time. This was in 1876.



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The respondents in September, 1877, commenced work, and succeeded thereby in conducting water from the cienega to the mouth of the cañon upon the surface, and thence to their lands on the plain below. The effect of this work was to dry up the lower springs at the mouth of the cañon where complainants had received their water, and conducted it to their lands, and complainants applied for an injunction to restrain the diversion of their water.

*Held*, That the land of the cañon being public unoccupied land, of no value whatever, save as a natural water course, complainants had a right in good faith to commence the necessary work to conduct to and upon their lands all or any part of the water of the springs, stream or cienega, and that if they had continued their work with due diligence to final completion within a reasonable time, their right to the water actually appropriated, would be valid, and would relate back to the time of commencing work, but that complainants had failed to prosecute the necessary work with due diligence, and that in consequence they had failed in appropriating *all* the water of the cienega.

- 2 That not having time and means requisite to a completion of the work within a reasonable time, would be no excuse; and a discontinuance on that ground for an unreasonable time would work the forfeiture of any right that might have been acquired and retained by due diligence in completing the work.
3. But that complainants had acquired a right by prior appropriation and use of the water flowing from the lower springs; that this amount was cut off by respondents' works, which took all the water from the cienega, and diverted the supply that otherwise would have reached complainants' springs; hence they were decreed one-fourth of the entire quantity of water.
- 4 Evidence need not be set forth in a bill of complaint.
- 5 Allegations in bill held sufficient to charge diversion of water by cutting off percolating water.
- 6 A well-defined and constant subterranean stream is protected to the owner as much as though it ran in a natural channel on the surface.
7. An answer under oath may be overcome by the testimony of one witness, corroborated by other facts and circumstances in the case.
- 8 One of the complainants was described in the bill as James Aguallo, but in the other papers and proceedings, was called José María Aguallo. This variance appeared to be the result of a clerical error. It was not objected in the court below, and was not prejudicial to defendants. *Held*, Immaterial.

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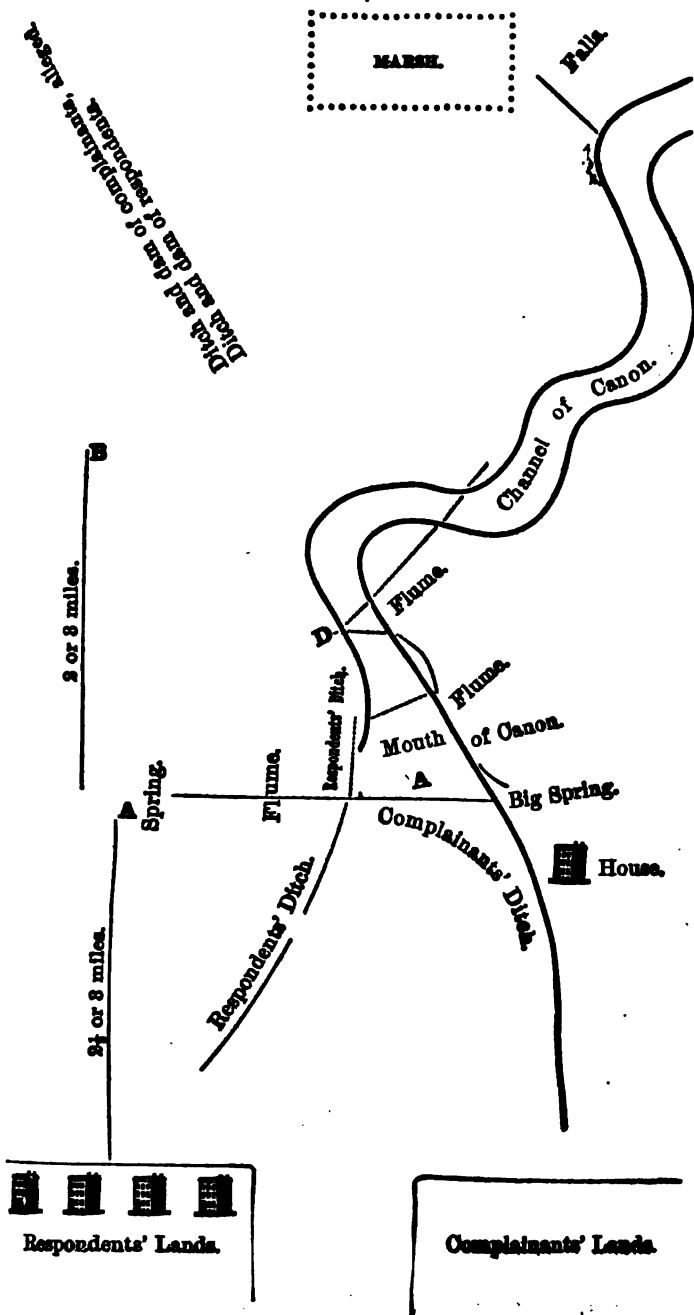
Appeal from the District Court for Doña Ana county.

This suit is brought by Thomas Keeney, James Hill, Humphrey Hill and James Aguillo, complainants and appellees, against José Antonio Carillo, Juan Lopez, Sebero Bargas and Francisco Maes, respondents and appellants, to enjoin the respondents from directing and using any of the water from cienegas and springs in the Alamo cañon in Doña Ana county, and from in anywise interfering with ditch of complainants there situate. Complainants' bill is sworn to, and requires answer under oath. Respondents answer under oath, and deny having interfered with complainants' ditches or water. Both parties claim the water flowing in said cañon above certain springs at the mouth of the cañon. Respondents make no claim to water of the springs last named, nor to ditches leading down from them. The proofs show that said cañon is from seven to fifteen miles long, and at head of cañon is a marsh, or cienega.

At the mouth of said cañon are two springs. A map, showing approximately the matters referred to in evidence, is herewith attached.

In October, 1876, complainants, with one Eugene A. Dow, went up into the said cañon, and did some work at cienega C, and in the cañon down to point D; also at elbow at flume, and at the springs at mouth A A, in all six days' work of five men, including a day occupied in going up and coming back from cienega, that is in all, thirty days' work. Work had been previously done at points named. Complainants built a house at mouth of cañon A, and dug ditch from springs A A to their lands below at E. But little water flowed from these lower springs, not enough to irrigate lands with. It is not shown that the work above increased the flow of water from springs at A A. Complainants failed to get water to flow further down cañon than to point at D, when it sank.

Complainants did no more work in cañon, abandoned the



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enterprise and left the canon. Complainants show that it would have required only an expenditure of fifty or a hundred dollars to have conducted the water out of the canon. None of the water in the canon above springs at A A was ever appropriated by complainants to any useful purpose, and but slight evidence of an appropriation of water of springs at A A, and if it was appropriated, it seems to have been abandoned about a year afterwards, in 1877. Respondents and associates went to canon, took up lands out from mouth of canon, and went to work to appropriate water. They opened ditch in March, built dam and made a ditch at D, and thence conducted water by means of ditch and flumes out of canon and into their lands at F. The dotted line represents the ditch. Respondents made no claim to nor interfered with springs and ditches at mouth of canon, claimed by complainants. These ditches and springs are below respondents' ditches, and water from them cannot flow into respondents' ditch. Respondents, from eight to eighteen in number, worked constantly from one to two months at construction of their ditch, about forty days. They appropriated the water irrigating their lands below. When respondents were about getting their ditch in canon completed, complainants appeared and claimed water in the canon as their property. Afterwards, when respondents had completed work and appropriated water of canon, complainants came back to the mouth of the canon and claimed the water. This suit was not instituted until December, 1878, but in the summer previous, by an agreement between parties, complainants had use of respondents' ditch to get water to lands for a time, which was not to prejudice either party's rights to premises. During the time they (complainants) were thus getting water from respondents' ditch, complainants built a cabin or two on their lands, and did one planting. The complainants, up to time of commencement

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of this suit, did not attempt to build a ditch in cañon from D to mouth of cañon.

*W. L. Rynerson and T. B. Catron*, for appellants:

The judge who heard the cause found that the complainants only are entitled to the water of the springs at mouth of cañon, and that the respondents, by constructing their ditch and diverting the water of the cienega, decrease the water of the springs at mouth of cañon. This question was not presented by complainants' bill, and the witness Dow, who gave the only testimony on this point, shows by his own testimony that the assumption that the springs last named are supplied by the water of the cienega at head of cañon is not sustained.

In referring to complainants, it is to be understood that complainant, James Aguallo, has established no right whatever, and that one José Maria Aguallo, not named in complainants' bill, was an equal partner in all that the other complainants acquired, or attempted to acquire. It is apparent that there is a misjoinder of parties plaintiff, which is fatal to complainants' bill.

As to the effect of constructing respondents' ditch upon springs at mouth of cañon, there being only one witness testifying on that point, and answer of respondents having been made on oath, his oath cannot prevail against averment in answer: See *Grisley's Equity Evidence*, p. 227.

Evidence only opinion, and therefore will not warrant injunction: See *Hilliard on Injunction*, par. 23, p. 19, etc.

To warrant injunction, clear and certain rights and full disclosure of facts must appear. Complainants should have set up in their bill facts touching diverting water by cutting off percolating water: See *Hilliard on Injunction*, par. 18, p. 16, and authorities there cited.

Complainants cannot enjoin use of percolating waters: *Angell on Water Courses*, pp. 152, 173 and 176.

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Allegations and proofs must correspond to: U. S. Digest, 890, § 6155; 21 Ill., 17.

Allegations denied by answer must be proven by two witnesses, or one and corroborating circumstances: *Id.*, 6163; 7 Blackford, 162; 10 Foster, 500-509.

*S. B. Newcomb*, for appellees:

The appellants assume, in the statement of their case, both as to the facts and the law applicable thereto, that they had a clear legal right to appropriate the water in the Alamo cañon, and that their going into said cañon and doing the work they did in no way trespassed upon or interfered with the prior rights of complainants. Upon no other hypothesis could they claim to have any legal or equitable standing in a court of equity. If their going there was a trespass upon, or an interference in any way with, the prior rights of complainants, then they do not come into this court with clean hands; they cannot invoke the aid of this court to perpetuate that wrong. He who seeks equity must do equity.

Now, we say that the defendants had no business in that cañon in the first place. They were trespassers from the beginning; they knew before they went there that the complainants had been in possession of this cañon, including the cienegas and springs at its head for a long time previous. They knew that complainants had taken up, or were occupying, land below the mouth of said cañon; that they (complainants) had had their stock there; had built a house at the mouth of the cañon, had lived there, were striving to make a home for themselves and their families; they knew that the complainants had done work in and at the head of the cañon. They also knew perfectly well, as every one in the country knew, that the lower springs derived their supply of water from the marshes and springs above; they were well aware that if they succeeded in carrying the water out of the cañon above the lower springs, that those springs would dry up (as they did), and the complainants would be

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literally "starved out;" would be compelled to leave their lands and homes; be obliged to take away their stock and abandon all the property they had acquired and the work they had done. This is what defendants intended to do when they went there, and that is what they will succeed in doing should this court sustain their view of this case. They did not want these complainants there; they intended to force them to leave.

We contend that complainants had possession of not only the mouth of the cañon and the grounds below, but of the cañon itself, up to its very head, long before the defendants went there at all. The bill alleges, and the answer admits, that said cañon is a narrow, rugged gorge in the mountains; the evidence shows that it is even impossible to pass all the way up through this cañon to its head. It was absolutely impossible for complainants to fence in this cañon. They could under no circumstances take exclusive possession of it any further than they did, that was by building a house at its mouth, and they also built a small house up at the cienega; they dug ditches through the cienega, and also at different places in the cañon. They, or some of them, lived at the mouth of the cañon, not all the time, it is true, they were absent occasionally, but they kept their cattle there, and farmed lands in the vicinity. This, we contend, was taking actual continual possession of the cañon; they could do no more under the peculiar formation of the country, and it was sufficient actual possession as against mere trespassers, such as these defendants. These defendants knew, when they first went there, that complainants claimed possession of this cañon. Their own witness, Sylvanio Gabaldovia, who was one of the party who worked for and with the defendants, says, "We had heard, before we went there, that plaintiffs were in possession of mouth of cañon; we had heard that the Hills were living in the house at the mouth of the cañon." Again, their own witness admits that Hum-

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phrey Hill served a notice on them not to work, or in any way interfere with this cañon, and that the complainants claimed the possession and ownership of the same. One witness testifies that he stopped work as soon as this notice was served, he having some sense of right and justice, acknowledged complainants' claim, and abandoned the enterprise. The complainants' possession was good as against all the world, save the United States Government.

It is abundantly evident from the evidence, that the lower springs are fed from the cienega and upper springs; all the facts and circumstances indicate this beyond a doubt. This fact can only be shown by the circumstances and the opinion of men who are acquainted with the cañon and springs; why it was that every party who undertook to settle there, and utilize the water at this place, went up to the cienega to make ditches and clean out the springs up there, the first thing they did. The party who went there some eleven years before this suit was commenced, went up there to work to increase the flow of water. Alexander Hill, some years later, did the same thing. These plaintiffs did the same, and so did the defendants; all parties had to do this, and why? simply because the lower springs furnished no water save what came from above. How did it happen that as soon as defendants cut off the water above one of the lower springs dried up entirely, and the other nearly so? Can there be a doubt about this? None in the least; and this is why complainants took possession of the whole cañon and claimed it as theirs. There was no land in the cañon that could be utilized or used; the water was all there was on it, and the springs at the mouth and the land below were of no use to any one without the springs and water above.

We further contend, that the complainants had not lost their right of prior possession and appropriation of this upper water, that under the circumstances of the place and country, one year, or two years, would not be too long for



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them to be engaged in bringing down this water. It is a barren, desolate country, at times very dangerous, on account of Indians. The complainants were poor men, struggling hard for a living; they were doing all they could to complete this work; they had to go slow, stop occasionally for want of time and means, but they did not give up their possession; they still held on to their lands and houses and water, and they should be protected in their rights. These defendants had no business there; they were trespassers, and cannot claim any right to the water in question, in equity.

Defendants claim that because their answer is sworn to, therefore we must contradict in every instance by more than one witness; when we examine this answer, and see what they have sworn to, we think the court will have little difficulty in disposing of this matter. Defendants swear that complainants never did any work up the cañon, nor built any house at the cienega, and now they admit, in the statement of facts, that complainants did do thirty days' work up in the cañon; and the evidence shows conclusively that they did a large amount of work up there, and that they did build a house at the cienega. So much for this very truthful answer. The point that James Aguillo is made plaintiff, instead of José M. Aguillo, is taken a little too late in the day to be available; at most it is a mere clerical error, and can be amended.

The defendants admit plaintiffs' right to the lower springs, and in this admission they give away their case.

It is a well-settled law, that the owner of a spring has a perfect right to it against all the world, except those through whose land it comes. Strangers cannot take it away or destroy it, even though it be derived from lands which do not belong to the owner of the spring. See Angell on Water Courses, p. 182, also 153, *Id.*, 99, 150.

The question of fact whether the lower springs are supplied with water from this upper, has been decided by the

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chancellor in the case in the affirmative, and being a question of fact its decision by the judge has the same force as if decided by a jury, and this court will not disturb the finding.

BELL, Associate Justice: The judgment entered in the court below decreed that the appellants herein (respondents in the court below), are entitled to the exclusive use of three-fourths of the water running in their acequia at the mouth of Alamo canon, mentioned in the bill. It further decrees that the appellants "are entitled to one-fourth of the water running in said acequia."

The decree then provides the manner of dividing the water in these proportions between the respective parties, and maintaining the ditches in good order.

It closes with a restraining order enjoining "either party from in any manner interfering with, or preventing or obstructing the free and exclusive use by the other party, or either of them, of that proportion of said water which such party is hereby decreed to be entitled to."

Each party is required to pay his own costs.

From an examination of the evidence taken before the master we think the facts are fairly set forth in the opinion of the court below, which is as follows:

THOMAS KEENEY ET AL.

v.

JOSÉ ALBINO CARILLO ET AL.

} *District Court, County of Doña  
Ana—In Chancery.*

This suit was brought to enjoin the respondents from using or obstructing the use by the complainants of the water flowing from the mouth of the Alamo canon, situated in Doña Ana county.

Both complainants and respondents claim the water on the ground of prior possession and appropriation, for the purpose of irrigating lands.

From the testimony taken and reported by the master it

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Keeney et al. v. Carillo et al.

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seems that the complainants first attempted to appropriate the water in question, and to some extent succeeded, in the year 1876.

It is evident, however, that all the water actually appropriated by the complainants was taken from certain two springs at or near the mouth of the cañon.

Several miles up the cañon is situated a cienega, or marsh. In 1876 the complainants dug ditches in and through this cienega to drain the same and collect and turn the water into the natural channel of the cañon below, wherein it continued to run upon the surface of the ground, about twenty cubic inches in volume, two or three miles to a place in the cañon where it sank.

To prevent the sinking and wasting the water at the latter place, the complainants constructed a dam and made a ditch, conducting the water by and beyond the place of sinking and turning it again into the natural channel of the cañon, wherein it continued to run to within about two miles of the said springs at the mouth of the cañon, where it again sank and entirely disappeared from the surface.

The complainants commenced the work above mentioned, and prosecuted it to the extent specified, with the intention of conducting the water from the cienega at the head of the cañon by channels on the surface, partly natural and in part artificial, to their lands on the plain below.

But, aside from having made a small acequia from the springs to their lands to be irrigated, they only prosecuted the work so far as to conduct the water to the place where it sank the second time. This was in 1876.

There is nothing in the testimony showing, or tending to show, any intention since that time on the part of the complainants to resume and complete the work. In the language of one of their witnesses, the work was then discontinued for want of means and time.

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The complainants commenced the work above mentioned, and prosecuted it to the extent specified, with the intention of conducting the water from the cienega at the head of the cañon by channels on the surface, partly natural and in part artificial, to their lands on the plain below.

But, aside from having made a small acequia from the springs to their lands to be irrigated, they only prosecuted the work so far as to conduct the water to the place where it sank the second time. This was in 1876.

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The question now is, how much water had the complainants, up to this time, appropriated to some useful purpose?

The respondents the year following, 1877, in September, commenced work, and succeeded thereby in conducting water from the cienega to the mouth of the cañon upon the surface, and thence to their lands on the plain below.

The effect of this work was to dry up the lower springs at the mouth of the cañon, where the complainants had received their water, and conducted it by an acequia to their lands. That these lower springs were fed by the water coming from the cienega above is quite evident.

But if the water from the cienega flowed under ground for any considerable distance before reaching the lower springs, it is evident that a large amount, which, percolating through the ground beneath the surface, would be absorbed, and never make its appearance at the springs.

It is also very probable that the work of the complainants in conducting the water on the surface to the place where it sank the second time would to some extent increase the flow of water from the lower springs, but what this increase was does not satisfactorily appear from the evidence.

In fact, the testimony on both sides as to the amount of water appropriated by either complainants or respondents is so very loose and indefinite, that it is quite impossible to come to any very satisfactory conclusion as to the equity of the case on that point. My impression from the testimony, however, is that the complainants had acquired a right by prior appropriation and use of the water flowing from the lower springs; that this amount, whatever it was, was cut off by the respondents' acequia, which took all the water from the cienega and diverted the supply that otherwise would have reached their springs.

That the labor performed by the respondents in conducting the water to the mouth of the cañon was, perhaps, more than four times as much as that performed by complainants,

and was more than four times as effective for the purpose ; and that the water flowing from the mouth of the cañon, in the respondents' acequia, was at least four times as much as that previously flowing from the springs, and appropriated by the complainants.

The respondents, of course, in any event had the right by their labor to increase the flow of water from the mouth of the canon, over and above that actually appropriated by complainants from the springs and acequia, the right and title to such increase.

The complainants seem to place great reliance upon the fact that they were before the respondents in *commencing* work for the appropriation of this water; that they had built a house in the cañon and taken possession of the *land* at its mouth, etc.

It is true that a party may in good faith commence the necessary work to conduct to and upon his lands all, or any part of the water of a spring, stream or cienega, and continue the work with due diligence to final completion within a reasonable time, and in that case his right to the water actually appropriated by him will relate back to the time of his commencing work, and, in the meantime, and before the expiration of what would be a reasonable time, under the circumstances, he would be protected in what he could show that he intended to appropriate by his works as against any trespasser : *Weaver v. Eureka Lake Co.*, 15 Cal., 271 ; *Kimbal v. Gearhart*, 12 Cal., 28.

Not having the time and means requisite to a completion of the work within a reasonable time, would be no excuse, and a discontinuance on that ground for an unreasonable time would work the forfeiture of any right that might have been acquired and retained by due diligence in completing the work : *Kimbal v. Gearhart*, 12 Cal., 28.

In the case under consideration, the complainants, though they may have commenced work in 1876, with the intention

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conclusive evidence that the water of the springs was furnished from the complainants' said ditch.

It is also to be noted that this is not the case of an adjoining owner diverting percolating water in his own soil from flowing into his neighbor's land. Here the land of the cañon was public unoccupied land, of no value whatever, except as a natural water-course; the complainants went on it, did work by which their supply of water was increased to them; they were in the actual use and enjoyment of that water; that the defendants then came, and without any right whatever, went into the cañon and dug ditches, which entirely cut off the supply of water which the complainants had theretofore enjoyed.

Surely these facts warrant the interference of a court of equity.

The court below held that under the circumstances the complainants were entitled to the continued use and enjoyment of at least so much of the water flowing through the said canon, as they had previously enjoyed.

In that view we concur.

We think the law is clear on the subject: "A subterranean stream which supplies a spring with water, cannot be diverted by the proprietor above, for the mere purpose of appropriating the water to his own use:" *Smith v. Adams*, 6 Paige, 435; Angell on Water Courses, sec. 112A. In this case there is no pretence of ownership by the defendants of the lands above the complainants. The law in regard to percolations is different, *ex necessitate rei*, for they "spread themselves in every direction through the earth, and it is impossible to avoid disturbing them without relinquishing the necessary enjoyment of the land:" Angell on Water Courses, *supra*. It is alleged by the appellants that the answer being under oath, it must be overcome by the evidence of more than one witness, and that as to the effect of constructing appellants' ditch upon the springs at the mouth of the cañon, but



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one witness was examined. Entertaining the views already expressed, we think that the evidence of the witness on that point was sufficiently corroborated by the other facts and circumstances in the case.

It is objected that the court erred in finding a decree in favor of James Aguallo.

From an examination of the record, it would appear that though one of the complainants in the bill is described as James Aguallo, in the other papers and proceedings he is called José Maria Aguallo.

It would appear to have been a clerical error in thus describing him by different Christian names, but as the defendants are not in any way prejudiced by it, we deem it of little importance. The question was not raised in the court below, and we will not further consider it here.

We find no error in the record presented.

The judgment should be affirmed.

All concur.



**EXTRA ANNOTATION**  
**TO**  
**PRECEDING VOLUME**



**EXTRA ANNOTATIONS**  
—TO—  
**NEW MEXICO REPORTS**  
—  
**VOLUME II**

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# NOTES

## ON THE

### NEW MEXICO REPORTS.

#### CASES IN 2 NEW MEXICO.

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**2 N. M. 1, GARLAND v. BARTELS BROS.**

**2 N. M. 7, BENNETT v. ZABRISKI.**

**Right to amend affidavit for attachment.**

Cited in note in 31 L.R.A. 426, on right to amend affidavit for attachment.

**2 N. M. 11, ABREN v. BROWN.**

**2 N. M. 21, MAGRUDER v. WEISL.**

**2 N. M. 29, ZANZ v. STOVER.**

**Conclusiveness of findings of fact by court.**

Cited in *Romero v. Desmarais*, 5 N. M. 142, 20 Pac. 787; *De Baca v. Pueblo*, 10 N. M. 38, 60 Pac. 73; *Rush v. Fletcher*, 11 N. M. 555, 70 Pac. 559; *Candelaria v. Miera*, 13 N. M. 360, 84 Pac. 1020,—holding that findings of court will not be disturbed if supported by substantial evidence. **Garnishment of unliquidated claims.**

Cited in note in 59 L.R.A. 374, on garnishment of unliquidated claims.

**2 N. M. 37, KIDDER v. BENNETT.**

**Power of supreme court to issue writ of error.**

Cited in *Farish v. New Mexico Min. Co.* 5 N. M. 234, 21 Pac. 82, holding under statute writ of error lies from supreme court to review decree in equity.

**2 N. M. 40, BRANNIN v. BREMEN.**

**Necessity that verdict in replevin conform to statute.**

Cited in *Ulrich v. McConaughy*, 63 Neb. 10, 38 N. W. 150, holding

that verdict in replevin not conforming to statute is void only when it affects some one prejudicially.

**2 N. M. 49, RE ATTY. GEN.**

**Construction of territorial laws.**

Cited in *Torrez v. Socorro County*, 10 N. M. 670, 65 Pac. 181, holding that courts have power to pass upon constitutionality of territorial legislature; *Territory v. Baca*, 6 N. M. 420, 30 Pac. 864; *Jung v. Myer*, 11 N. M. 378, 68 Pac. 933,—to the point that in territory constitution and laws of United States and organic act of territory stand in same relation as state constitution does in state.

**Right to maintain action for fees of office.**

Cited in *Fiske v. Breeden*, 2 N. M. 70, holding that action cannot be maintained by one who claims to be attorney general, but is not, against one who is alleged to have wrongfully received fees of such office.

**Power to fill vacancies occurring in vacation.**

Cited in *Territory ex rel. Curran v. Gutierrez*, 12 N. M. 254, 78 Pac. 139, to the point that there was no power to fill vacancies occurring in vacation otherwise than by death or resignation.

**2 N. M. 63, TERRITORY v. STOKES.**

**Right of governor to fill vacancy in office of attorney general.**

Cited in *Re Atty. Gen.* 3 N. M. 524, 9 Pac. 249, holding that governor may fill vacancy in office of attorney general during recess of legislature, when it occurs by death or resignation.

**2 N. M. 70, FISKE v. BREEDEN.**

**2 N. M. 73, TERRITORY v. DWENGER.**

**2 N. M. 86, HERRERA v. CHAVES.**

**Effect of decisions of federal courts upon territorial courts.**

Cited in *Bryan v. Pinney*, 3 Ariz. 34, 21 Pac. 332; *Alexander v. Tennessee & L. C. Gold & S. Min. Co.* 3 N. M. 255, 3 Pac. 735,—holding that decisions of United States courts are conclusive upon territorial courts.

**Compulsory nonsuits.**

Cited in *Abbott's Civ. Tr.* 2d ed. 372, on inability to grant compulsory nonsuit.

**2 N. M. 93, TERRITORY v. YOUNG.**

**Effect of mistake in ruling as to peremptory challenges.**

Cited in *Territory v. Padilla*, 12 N. M. 1, 71 Pac. 1084, holding that if defendant had peremptory challenges left which he did not use mistake of court in ruling upon order of exercising peremptory challenges is not reversible error.



**Instructions as to degrees of crime.**

Cited in *Territory v. Fewel*, 5 N. M. 34, 17 Pac. 569, holding that it is error to instruct jury, in trial for murder in first degree, as to murder in third degree where there was no evidence to sustain it; *Territory v. Romine*, 2 N. M. 114; *Territory v. Romero*, 2 N. M. 474; *Territory v. Nichols*, 3 N. M. 103, 2 Pac. 78; *Faulkner v. Territory*, 6 N. M. 464, 30 Pac. 905; *Territory v. Friday*, 8 N. M. 204, 42 Pac. 62,—holding that in trial of indictment for murder in first degree court should charge as to murder in second degree if there is any evidence indicating that degree.

**Sufficiency of charge as to essential elements of crime.**

Cited in *Territory v. Baca*, 11 N. M. 559, 71 Pac. 460, holding that court must tell jury in clear and concise language what essential elements of crime charged are.

**Sufficiency of verdict not assessing punishment.**

Cited in *Territory v. Yarberry*, 2 N. M. 391, holding that verdict that jury "find defendant guilty as charged in indictment" is not objectionable for not assessing punishment where law fixes punishment for crime charged.

**2 N. M. 108, TERRITORY v. VALENCIA.****2 N. M. 114, TERRITORY v. ROMINE.****Necessity for written instructions.**

Cited in note in 99 A. D. 123, on sufficiency of oral translation of written instructions.

**Instructions as to degrees of crime.**

Cited in *Faulkner v. Territory*, 6 N. M. 464, 30 Pac. 905, holding that court should not instruct as to degrees of murder other than first degree, in murder trial, where evidence shows only crime in first degree; *Territory v. Nichols*, 3 N. M. 103, 2 Pac. 78; *Territory v. Friday*, 8 N. M. 204, 42 Pac. 62,—holding that court is bound to charge jury to degrees of murder in murder trial if any evidence is given tending to show crime within any certain degree.

**Sufficiency of verdict finding defendant guilty as charged.**

Cited in *Territory v. Yarberry*, 2 N. M. 391, holding that verdict finding defendant guilty as charged in indictment is sufficient.

Cited in *Bowlby's Homicide*, 3d ed. 1045, on necessity for verdict assessing punishment for homicide when fixed by law; *Bowlby's Homicide*, 3d ed. 1040, on necessity for specifying degree of homicide in verdict when finding is of same degree as that charged.

**Necessity for instructions as to law of case.**

Cited in *Territory v. Baca*, 11 N. M. 559, 71 Pac. 460, holding that it is duty of court, in criminal case, to instruct jury as to law of case whether requested to do so or not.

**Correctness of instruction as to credibility of testimony of accused.**

Cited in *State v. Bartlett*, 50 Or. 440, 19 L.R.A.(N.S.) 802, 128 Am. St. Rep. 751, 93 Pac. 243, holding that instruction leaving implication that it was incumbent on jury to consider accused's testimony as false is erroneous; *Territory v. Gonzales*, 11 N. M. 301, 68 Pac. 925, holding that it is not error, for court to refer to defendant, in instructions as to credibility of witnesses.

Cited in notes in 72 A. D. 547, on commenting upon evidence; 19 L.R.A.(N.S.) 809, 818, on right of court to caution jury as to believing testimony of accused in own behalf.

**Right to infer malice from fact of killing.**

Cited in *Aguilar v. Territory*, 8 N. M. 496, 46 Pac. 342, to the point that killing may be sufficient to justify jury in finding malice.

**2 N. M. 131, BACA v. BARRIER.****Recovery on quantum meruit.**

Cited in note in 13 L.R.A.(N.S.) 450, on right of contractor to sue on quantum meruit upon breach of construction contract by other party.

**2 N. M. 138, FRICK v. JOSEPH.****Necessity for execution of agreement for accord.**

Cited in *Sutherland Dam*. 3d ed. 649, on necessity that agreement of accord be executed.

**2 N. M. 147, TERRITORY v. WEBB.****Assessment of punishment in verdict.**

Cited in *Bowlby's Homicide*, 3d ed. 1045, on verdict not being required to assess punishment for homicide when fixed by law.

**Conclusiveness of verdict founded on conflicting evidence.**

Cited in *Territory v. Romero*, 2 N. M. 474, holding that decision of court below granting new trial will not be reversed except for plain abuse of discretion; *Mares v. Territory*, 10 N. M. 770, 65 Pac. 165, to the point that there might be evidence to sustain material allegation of indictment, yet evidence might be so very slight as to justify appellate court in reversing judgment; *Esquibel v. Chaves*, 12 N. M. 482, 78 Pac. 505 (dissenting opinion), on conclusiveness of verdict founded upon conflicting evidence; *Badeau v. Baca*, 2 N. M. 194; *Cunningham v. Springer*, 13 N. M. 259, 82 Pac. 232,—holding that verdict upon conflicting evidence will not be set aside on appeal because against weight of evidence; *Trujillo v. Territory*, 7 N. M. 43, 32 Pac. 154; *Territory v. De Gutman*, 8 N. M. 92, 42 Pac. 68; *Territory v. Guillen*, 11 N. M. 194, 66 Pac. 527; *Territory v. Gonzales*, 11 N. M. 301, 68 Pac. 925; *Cornish v. Territory*, 3 Wyo. 95, 3 Pac. 793,—holding that court on appeal will not set aside verdict of jury on trial for murder where there is material evidence tending to support it.

**Conclusiveness of findings of fact by court.**

Cited in *State v. Hamey*, 168 Mo. 167, 57 L.R.A. 846, 67 S. W. 620 (dissenting opinion), on right of court on appeal, to reverse though there is slight evidence in support of judgment; *Gale v. Salas*, 11 N. M. 211, 66 Pac. 521; *Romero v. Coleman*, 11 N. M. 533, 70 Pac. 557; *Rush v. Fletcher*, 11 N. M. 555, 70 Pac. 559; *Carpenter v. Lindauer*, 12 N. M. 338, 78 Pac. 57; *Marques v. Maxwell Land Grant Co.* 12 N. M. 445, 78 Pac. 40,—holding that findings of facts by court upon conflicting evidence will not be disturbed on appeal.

**Asking why sentence should not be pronounced.**

Cited in *Abbott's Crim. Tr.* 2d ed. 743, on necessity for asking defendant convicted in capital case why sentence should not be pronounced against him.

**Presumption of regularity of court proceedings.**

Cited in *Territory v. Herrera*, 11 N. M. 129, 66 Pac. 523, to the point that in court of general jurisdiction all details of trial are presumed to be regular and sufficient; *United States v. De Amador*, 6 N. M. 173, 27 Pac. 438, holding that on appeal from final judgment of court of general jurisdiction all details of trial are presumed to be legal; *Territory v. Yarberry*, 2 N. M. 391, holding that presence of prisoner during trial for felony is presumed.

**3 N. M. 161, TERRITORY v. STOKES.**

**Meaning of term "privilege."**

Cited in *Hammer v. State*, 24 L.R.A.(N.S.) 795, 89 N. E. 850, holding that no constitutional privileges or immunities are denied citizen by forbidding him to wear badge of secret society of which he is not member.

**2 N. M. 176, BENNETT v. ZABRISKI.**

**Sufficiency of description of parties in writ of attachment.**

Distinguished in *Robinson v. Hesser*, 4 N. M. 282, 13 Pac. 204, holding that court has right to examine petition in attachment for description of parties.

**1 N. M. 183, TERRITORY v. BACA.**

**Nature of action for penalties.**

Cited in *Waters-Pierce Oil Co. v. State*, 48 Tex. Civ. App. 162, 106 S. W. 918, holding that ante-trust laws vest in state civil right of action for pecuniary penalties prescribed for violations.

Cited in *Farnham, Waters*, 1983, on criminal nature of statute imposing fine for interference with irrigating ditch.

**2 N. M. 191, TERRITORY v. TAFOYA.**

**Nature of statute imposing fine.**

Cited in *Farnham, Waters*, 1983, on criminal nature of statute providing for fine for interfering with irrigating ditch.

**2 N. M. 194, BADEAU v. BACA.****Conclusiveness of findings of fact by court.**

Cited in *Lynch v. Grayson*, 7 N. M. 26, 32 Pac. 149; *Gale v. Salas*, 11 N. M. 211, 66 Pac. 521; *Romero v. Coleman*, 11 N. M. 533, 70 Pac. 557; *Rush v. Fletcher*, 11 N. M. 555, 70 Pac. 559; *Carpenter v. Lindauer*, 12 N. M. 388, 78 Pac. 57; *Marques v. Maxwell Land Grant Co.* 12 N. M. 445, 78 Pac. 40,—holding that findings of trial court will not be disturbed on appeal where there is sufficient evidence to support them; *Esquibel v. Chaves*, 12 N. M. 482, 78 Pac. 505 (dissenting opinion), on conclusiveness of findings of trial court where there is sufficient evidence to sustain them.

**Conclusiveness of verdict founded upon conflicting evidence.**

Cited in *Cunningham v. Springer*, 13 N. M. 259, 82 Pac. 232, holding that verdict of jury rendered upon conflicting evidence will not be disturbed on appeal.

**2 N. M. 198, CROLOT v. MALOY.****Conclusiveness of findings of fact by court.**

Cited in *Torlina v. Trorlicht*, 5 N. M. 148, 21 Pac. 68; *Candelaria v. Miera*, 13 N. M. 360, 84 Pac. 1020,—holding that findings of trial court will not be disturbed upon appeal when supported by any substantial evidence.

**Necessity that certificate show that bill of exceptions contains all the evidence.**

Cited in *Territory v. Hall*, 11 N. M. 273, 67 Pac. 732, to the point that bill of exceptions was imperfect in that it did not have certificate that it contained all the evidence.

**2 N. M. 211, WAGNER v. EATON.****2 N. M. 214, MONTOYA v. DONOHUE.****Compulsory nonsuit.**

Cited in *Abbott's Civ. Tr.* 2d ed. 372, on inability to grant compulsory nonsuit.

**2 N. M. 222, TERRITORY v. RUDABAUGH.****2 N. M. 223, BARRUEL v. IRWIN.****Right to amend affidavit in replevin.**

Distinguished in *Romero v. Luna*, 6 N. M. 440, 30 Pac. 855, holding that affidavit in replevin which fails to state value of property may be amended while cause is pending before justice of the peace.

**2 N. M. 239, SAMPLES v. SAMPLES.****2 N. M. 245, LAMY v. REMUSON.****New trial for newly discovered evidence.**

Cited in *United States v. Biena*, 8 N. M. 99, 42 Pac. 70, to the point

that new trial should not be granted because of newly-discovered evidence, unless such evidence would probably produce different result.  
**Ground for new trial.**

Cited in note in 15 L.R.A. 614, on constitutional right to jury for assessment of damages on default.

**2 N. M. 250, TERRITORY v. MAXWELL.**

**Conclusiveness of verdict founded upon conflicting evidence.**

Cited in *Trujillo v. Territory*, 7 N. M. 43, 32 Pac. 154; *Territory v. Guillen*, 11 N. M. 194, 66 Pac. 527; *Territory v. Gonzales*, 11 N. M. 301, 68 Pac. 925,—holding that where there is evidence for prosecution, which if true sustains verdict of guilty, verdict will not be disturbed on appeal; *Cunningham v. Springer*, 13 N. M. 259, 82 Pac. 232, holding that verdict of jury rendered upon conflicting evidence will not be disturbed on appeal.

**Conclusiveness of findings of fact by court.**

Cited in *Gae v. Salas*, 11 N. M. 211, 66 Pac. 521; *Rush v. Fletcher*, 11 N. M. 555, 70 Pac. 559; *Candelaria v. Miera*, 13 N. M. 360, 84 Pac. 1020,—holding that findings of fact of trial court will not be disturbed on appeal when they are supported by substantial evidence.

**Embezzlement.**

Cited in notes in 98 A. D. 130, 131, 141, 154, 156; 87 A. S. R. 43,—on embezzlement.

—**Law governing prosecutions for.**

Cited in *Re Grin*, 112 Fed. 790; *Browning v. Browning*, 3 N. M. 659, 9 Pac. 677; *Borrego v. Territory*, 8 N. M. 446, 46 Pac. 349,—to the point that courts should not follow common law in prosecutions for embezzlement.

—**Sufficiency of description of money embezzled, in indictment.**

Cited in *Territory v. Hale*, 13 N. M. 181, 81 Pac. 583, 13 A. & E. Ann. Cas. 551, holding that in indictments for embezzlement money need not be specifically described.

**2 N. M. 271, HOLZMAN v. MARTINEZ.**

**Validity of act authorizing probate clerks to issue writs of attachment.**

Cited in *Robinson v. Hesser*, 4 N. M. 282, 13 Pac. 204, on constitutionality of act authorizing probate clerks to issue writs of attachment.

**2 N. M. 292, TERRITORY v. KELLY.**

**Conclusiveness of affidavits for change of venue.**

Cited in *Territory v. Leary*, 8 N. M. 180, 43 Pac. 688, holding that court may require defendant to produce in court persons making supporting affidavit for change of venue; *Cox v. United States*, 5 Okla. 701, 50 Pac. 175, to the point that if proper affidavit is made by party moving for change of venue, and supported by affidavits of two or more disinterested persons, such affidavits are conclusive.

**Discretion of court in granting or refusing continuance.**

Cited in *Territory v. McFarlane*, 7 N. M. 421, 37 Pac. 1111, holding that granting or refusing motion for continuance is in discretion of court.

**Right to appear unmanacled at trial.**

Cited in note in 39 L.R.A. 822, 823, 825, on right of prisoner to appear unmanacled at trial.

**Presumption as to legality of proceedings at trial.**

Cited in *State v. Allen*, 45 W. Va. 65, 30 S. E. 209, holding that on appeal court will presume that trial court exercised sound discretion in not causing irons to be removed from prisoner, when record is silent as to whether there was or was not excuse for leaving them on prisoner.

**2 N. M. 307, TERRITORY v. FRANKLIN.****Effect of drunkenness.**

Cited in *Wharton & Stille's Med. Jur.* 316, on effect of drunkenness upon competency of witness.

**— As excuse for crime.**

Cited in *Wharton & Stille's Med. Jur.* 236, 237, 245; *Bowlby's Homicide*, 3d ed. 805, 806, 814,—on voluntary intoxication as excuse for crime.

Cited in note in 36 L.R.A. 465, on what intoxication will excuse crime.

**Instruction as to credibility of accused.**

Cited in note in 19 L.R.A.(N.S.) 805, on right of court to caution jury as to believing testimony of accused in own behalf.

**2 N. M. 318, KING v. WARRINGTON.****What constitutes a mortgage.**

Cited in note in 4 A. S. R. 707, on what constitutes an equitable mortgage.

**Nature of mortgagor's estate.**

Cited in note in 7 A. S. R. 32, on nature of mortgagor's estate at common law and remedies available to him.

**2 N. M. 321, BULL v. SOUTHWICK.****Right to amend pleadings in election contests.**

Cited in *Kindel v. Le Bert*, 23 Colo. 385, 58 Am. St. Rep. 234, 48 Pac. 641, holding that statute regulating election contests makes no provision for amendment of pleadings, and right to amend in such case does not exist; *Harmon v. Tyler*, 112 Tenn. 8, 83 S. W. 1041, holding that contestant cannot more than 20 days after election file further pleading stating new grounds upon which to contest election.

**Power of court to extend time for pleading in election contests.**

Cited in *English v. Dickey*, 128 Ind. 174, 13 L.R.A. 40, 27 N. E. 495; *Gonzales v. Gallegos*, 10 N. M. 372, 62 Pac. 1103,—to the point that

statutory provisions as to time of filing and serving notice of contest in election cases are in effect statutes of limitations; *Vigil v. Pradt*, 5 N. M. 161, 20 Pac. 795, holding that court has no power to extend time for filing answer to notice of contest in election cases.

**2 N. M. 391, TERRITORY v. YARBERRY.**

When objections to juror must be taken.

Cited in *Territory v. Baker*, 4 N. M. 236, 13 Pac. 30, holding that objection to juror on ground of alienage not made until after verdict, is too late, where party had opportunity to know facts before jury was accepted.

Necessity for taking specific exceptions to instructions to jury.

Cited in *Probst v. Domestic Missions*, 3 N. M. 373, 5 Pac. 702, holding that assignments of error in charge will not be considered on appeal unless exceptions are specific; *Padilla v. Territory*, 8 N. M. 562, 45 Pac. 1120, holding that instructions, in criminal case not excepted to below, are not reviewable; *Territory v. Guillen*, 11 N. M. 194, 66 Pac. 527; *Territory v. Clark*, 13 N. M. 59, 79 Pac. 708,—holding that assignments that court erred in certain specified paragraphs of instructions, not specifying error, will not be considered on appeal.

Cumulative evidence as ground for new trial.

Cited in *United States v. Biena*, 8 N. M. 99, 42 Pac. 70, holding that new trial on ground of newly discovered evidence will not be granted where such evidence is cumulative merely.

Requisites of verdict for homicide.

Cited in *Bowlby's Homicide*, 3d ed. 1040, on degree of homicide not being required to be specified in verdict, when finding is of same degree as that charged.

Presumption as to regularity of details of trial.

Cited in *United States v. De Amador*, 6 N. M. 173, 27 Pac. 488; *Territory v. Herrera*, 11 N. M. 129, 66 Pac. 523,—holding that all details of trial in court of general jurisdiction are presumed to be regular on appeal.

Presumption as to presence of accused during trial.

Cited in *Lewis v. United States*, 146 U. S. 370, 36 L. ed. 1011; 13 Sup. Ct. Rep. 136 (dissenting opinion), on presumption that prisoner who was present at commencement of trial continued to be present until verdict; *Peters v. United States*, 36 C. C. A. 105, 94 Fed. 127; *State ex rel. Kotilinic v. Swenson*, 18 S. D. 196, 99 N. W. 1114,—holding that if record shows that accused was present at commencement of trial it will be presumed that he continued to be present until verdict.

**2 N. M. 459, UNITED STATES v. LEWIS.**

**2 N. M. 464, MARTINEZ v. MARTINEZ.**

Right to amend affidavit in replevin.

Cited in *Romero v. Luna*, 6 N. M. 440, 30 Pac. 855, holding that

plaintiff on appeal to district court for new trial is entitled to have affidavit in replevin amended so as to show value of property.

**2 N. M. 470, TERRITORY v. WELLER.**

**2 N. M. 474, TERRITORY v. ROMERO.**

**Discretion of court as to granting or refusing new trial.**

Cited in *United States v. Biena*, 8 N. M. 99, 42 Pac. 70, holding that granting or refusing new trial rests in sound discretion of court.

**Qualification of grand jurors.**

Cited in note in 28 L.R.A. 195, on qualification of grand jurors.

**Waiver of defects in organization of grand jury.**

Cited in *Abbott's Crim. Tr.* 2d ed. 98, on waiver of defects in organization of grand jury by pleading to merits.

**Sufficiency of instructions as to degrees of crime.**

Cited in *Territory v. Nichols*, 3 N. M. 103, 2 Pac. 78, holding that it is duty of court in trial for murder in first degree to instruct as to degrees of murder to which evidence is applicable; *Faulkner v. Territory*, 6 N. M. 464, 30 Pac. 905, holding that in trial for murder in first degree court need not instruct as to other degrees where evidence does not warrant it; *Territory v. Baca*, 11 N. M. 559, 71 Pac. 460, holding that it is duty of court to tell jury in clear and concise language, what elements of crime charged are.

**Right of court to refuse instruction where point is covered.**

Cited in *Territory v. Taylor*, 11 N. M. 588, 71 Pac. 489, holding that court need give no instructions asked for, if those given by court cover case.

**2 N. M. 480, KEENEY v. CARILLO.**

**Appropriation of water.**

Cited in *Farnham, Waters*, 2100, as to what right to appropriate water of stream depends on.

Cited in notes in 30 L.R.A. 187, on appropriation of percolating waters on public lands; 30 L.R.A. 676, on right of prior appropriation of water.

**What are percolating waters.**

Cited in note in 67 A. S. R. 667, on what are percolating waters.

**Rights in subterranean waters.**

Cited in note in 19 L.R.A. 97, on rights in subterranean waters.











**EXTRA ANNOTATED EDITION.**

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**REPORTS OF CASES**

**DECIDED IN**

**THE SUPREME COURT**

**OF**

**THE TERRITORY OF OREGON,**

**AND OF**

**THE STATE OF OREGON.**

**FROM 1853 TO 1862.**

---

**BY JOSEPH G. WILSON,**

**ATTORNEY AT LAW, AND CLERK OF THE SUPREME COURT OF OREGON.**

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**VOLUME 1.**

**SAN FRANCISCO:**

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THOMAS NELSON, *Chief Justice*, APPOINTED 1850. (vice BRYANT.)  
TERM EXPIRED 1853.  
WILLIAM STRONG, *Associate Justice*, APP'D 1850. (vice BURNETT.)  
TERM EXPIRED 1853.  
GEORGE H. WILLIAMS, *Chief Justice*, APPOINTED 1853.  
RE-APPOINTED—RESIGNED 1858.  
CYRUS OLNEY, *Associate Justice*, APPOINTED 1853.  
RE-APPOINTED—RESIGNED 1858.  
MATTHEW P. DEADY, *Associate Justice*, APPOINTED 1853.  
OBADIAH B. McFADDEN, *Associate Justice*, APP'D 1853.  
(Removed 1854, and commission vacated as informal.)  
MATTHEW P. DEADY, RE-APPOINTED—TERM EXPIRED.  
BY ADMISSION OF OREGON, 1859.  
REUBEN P. BOISE, *Associate Justice*, APPOINTED 1858. (vice OLNEY.)  
TERM EXPIRED BY ADMISSION OF OREGON, 1859.

**Sec. 9. That the judicial power of said territory shall be vested in a Supreme Court, &c. The Supreme Court shall consist of a chief-justice and two associate justices, any two of whom shall constitute a quorum, and who shall hold a term at the seat of government of said territory annually, and shall hold their offices during the period of four years, and until their successors shall be appointed and qualified.**

*An Act to Provide for a Special Term of the Supreme Court, passed August 28, 1849.*

*"Be it enacted by the Council and House of Representatives of Oregon Territory, That a term of the Supreme Court shall be holden at Oregon City on the 30th inst."*

*An Act to Amend the Act to Provide for Holding the Supreme and District Courts, passed January 26, 1855.*

SEC. 1. *"Be it enacted by the Legislative Assembly of the Territory of Oregon, That the Supreme Court shall be held at the seat of government on the first Monday in December, and at Portland, in the county of Multnomah, on the third Monday in June, in each year."*

*An Act to Provide for Holding the Supreme and District Courts.*

SEC. 1. *"Be it enacted by the Legislative Assembly of the Territory of Oregon, That a Supreme Court shall be held at the seat of government on the first Monday of December, and in Portland on the second Monday of June, in each year."*

*An Act to Appoint Times for Holding the Supreme Court.*

SEC. 1. *"Be it enacted by the Legislative Assembly of the Territory of Oregon; That a Supreme Court shall be held at the seat of government on Thursday, the sixth day of August, 1857, and on the first Monday of August, annually, thereafter." Passed December 18, 1856.*

*Salary of judges, \$2,000.*

*No written opinions were given previous to the December term, A. D. 1853.*

# SUPREME COURT OF THE TERRITORY OF OREGON.

## ATTORNEYS—WHEN ADMITTED.

### DECEMBER TERM, 1851.

\*COLUMBIA LANCASTER,  
\*AMORY HOLBROOK,  
AARON E. WAIT,  
EDWARD HAMILTON,  
\*JOHN B. PRESTON,  
†ALEXANDER CAMPBELL,  
WILLIAM W. CHAPMAN,  
WILLIAM T. MATLOCK,  
JESSE QUIN THORNTON,  
\*SIMON B. MARYE,  
\*DAVID B. BRENNAN,  
\*CYRUS OLNEY,  
†JOHN B. CHAPMAN.

### DECEMBER TERM, 1852.

JAMES K. KELLY,  
\*JOSEPH G. WILSON,  
REUBEN P. BOISE,  
\*DAVID LOGAN,  
MILTON ELLIOTT,  
†JAMES McCABE,  
\*GEORGE McCONAHA,  
MATTHEW P. DEADY,  
ADDISON C. GIBBS,  
†A. B. P. WOOD,  
A. LAWRENCE LOVEJOY,  
†W. STUART BROCK.

### JUNE TERM, 1853.

†BENJAMIN STARK,  
P. Q. MARQUAM.

### DECEMBER TERM, 1853.

LAFAYETTE GROVER,  
ELI M. BARNUM,  
BENJAMIN F. HARDING,  
\*RILEY E. STRATTON.

### JUNE TERM, 1854.

†JAMES C. STRONG,  
\*MARK P. CHINN.

### DECEMBER TERM, 1854.

LAFAYETTE MOSHER,  
STEPHEN F. CHADWICK,  
†COLUMBUS SIMS,  
GEORGE K. SHEIL,  
\*DELAZON SMITH,  
\*NOAH HUBER,  
\*STUKELY ELLSWORTH.

### JUNE TERM, 1855.

†THOMAS H. SMITH,  
SYLVESTER PENNOYER.

\*Deceased.

†Removed from Oregon.

## DECEMBER TERM, 1856.

BENJAMIN F. BONHAM,  
ANDREW J. THAYER,  
JOHN KELSAY.

## AUGUST TERM, 1857.

WILLIAM W. PAGE,  
\*LANSING STOUT.

## AUGUST TERM, 1858.

R. B. SNELLING,  
BENJAMIN F. DOWELL,  
†CHESTER N. TERRY,  
†GEORGE B. CURRY,  
†JOHN R. McBRIDE.

## Supreme Court of the State of Oregon.

## DECEMBER TERM, 1859.

\*JAMES M. PYLE,  
JOHN H. REED,  
†DAVID W. DOUTHITT,  
†GEORGE L. WOODS.

## JULY TERM, 1860.

\*GEORGE H. CARTTER,  
ERASMUS D. SHATTUCK,  
WILLIAM C. JOHNSON,  
†WILLIAM S. BUCKLEY,  
\*JAMES A. ODELL,  
JOHN H. MITCHELL,  
†EDWARD C. NUGENT.

## DECEMBER TERM, 1860.

NELSON H. CRANOR,  
HARTWELL C. PRESTON,  
HYER JACKSON,  
JOSEPH C. POWELL,

JAMES D. FAY,  
JOHN C. CARTWRIGHT,  
CLARK P. CRANDALL.

## JULY TERM, 1861.

JOSEPH S. SMITH,  
†FRANKLIN MILLER,  
SEPTIMUS HUELAT,  
†J. J. HOFFMAN,  
†EDWARD W. MCGRAW.

## DECEMBER TERM, 1861.

†NATHAN T. CATON,  
WILLIAM LAIR HILL,  
GEORGE R. HELM,  
OWEN N. DENNY,  
HENRY A. GEHR,  
WILLIAM WALDO,  
\*CORNELIUS C. CURL.

\*Deceased.

†Removed from Oregon.

# Rules Adopted at the Supreme Court of Oregon Territory,

AT THE DECEMBER TERM, 1852.

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1. ATTORNEYS and counsellors at law, and solicitors in chancery, of the several District Courts of this territory, shall on notice in open court, be admitted to practice in the Supreme Court; but all the preliminary steps necessary to bring a cause to this court, and prepare the same for trial, may be taken by any attorney, solicitor or counsellor of any of the District Courts.

2. The attorneys and guardians *ad litem* of the several parties in the court below, shall be deemed the attorneys and guardians of the same parties in this court until others shall be retained, or appointed, and the appointments placed on file, and notice thereof served on the adverse party, or his attorney.

3. No private agreement, or consent, between the parties, or their attorneys, in respect to the proceedings in a cause, shall be binding, unless the same shall have been reduced to the form of an order by consent, and entered with the clerk; or, unless the evidence thereof shall be in writing, subscribed by the party against whom the same shall be alleged, or by his attorney or counsel.

4. If the party applying for the writ of error or appeal is a minor, and no next friend or guardian has been appointed for him in the court below, the court, or any of the justices

of this court in vacation, shall, upon a petition duly verified appoint some suitable person as a next friend for such minor, who shall be liable for the costs in this court; which said petition and appointment shall be filed with the clerk of this court.

5. The clerk of this court may, upon application and payment of his fees, issue blank writs of error under the seal of the court; which writs, when suitably filled up and subscribed by an attorney of this, or of a District Court, shall be effectual to bring up all causes properly removable to this court; and it shall be the duty of the clerk of any District Court, immediately upon being served with a writ of error, and upon being paid his legal charges, to note upon the back of said writ the date of its receipt, and to make up a complete transcript of his record of the process, pleadings, orders, proceedings and judgment in the cause, in the order in which they occurred; and after certifying the same, under his hand and seal of office, to return the same to the clerk of this court, by mail, postage paid, or by some other safe mode of conveyance.

6. The clerk of a District Court, returning the transcript of a record to this court, pursuant to an appeal, or in obedience to a writ of error, shall distinctly number and mark each folio in the margin thereof. Each folio shall be deemed to consist of one hundred words. Such transcript shall be fairly and legibly written; otherwise, the clerk of this court shall not file the same, but shall return it to the clerk transmitting it, with a statement of the reason why it is not received and filed.

7. A printed or legibly written copy of Rules Nos. 5 and 6 shall be attached to, and accompany each writ of error issued by the clerk of the Supreme Court; for which he shall be allowed the sum of fifty cents.

8. In all cases where the defendant in error resides out of the territory, and has no attorney therein, the plaintiff in



error shall cause publication of the cause to be made in some weekly newspaper, printed in the territory, for four consecutive weeks; the last insertion of which notice shall be at least four months prior to the first day of the term of the Supreme Court at which said cause is set for trial; and in all cases where it shall be practicable so to do, it shall be the duty of the said plaintiff to ascertain the residence of the said defendant; and, immediately after the first publication of the notice, send by mail a certified copy of said notice, directed to him at said place of residence, postage paid. If sufficient time shall not have elapsed for the publication, as aforesaid, of said notice, prior to the first day of the term, and subsequent to the filing of the writ of error with the clerk of the District Court, then such cause shall stand continued until the next term of the Supreme Court, unless the defendant shall voluntarily enter his appearance at said first term. *Provided*, It shall be discretionary with either of the justices of the Supreme Court, upon application, to direct in writing, to be placed upon the files of this court, such other mode of publication as may to them seem proper in the particular case.

9. In all causes coming up on a writ of error, errors shall be assigned, and a copy thereof furnished to the adverse party, or his attorney, if in attendance upon the court, by twelve o'clock on the first day of the term; and if the party shall fail to comply with this rule, the judgment of the court below shall be affirmed, or the cause continued at the costs of the plaintiff in error, or his attorney, as the court shall direct.

10. The defendant shall file his pleadings by four o'clock in the afternoon of the first day of the term, and furnish a copy thereof to the adverse party, or his attorney, if in attendance upon the court; and, in case he shall fail to comply with this rule, the judgment of the court below shall be reversed, or the cause continued, at the costs of the defendant, or his attorney, as the court shall direct. *Provided*, The plaintiff shall have complied with Rule No. 9.

11. Assignments of error shall be specific, and no error will be noticed by the court that is not specifically assigned, unless, for good and sufficient reasons, the court shall otherwise determine.

12. Whenever error in fact shall be assigned, the pleadings shall be accompanied by an affidavit of the party, or of some person cognizant of the matters therein set forth, that it is true in substance and in fact; otherwise the court, on motion of the opposite party, will strike the pleadings from the files of the court. Whenever an issue of fact is made up, the court may send the case down for trial to the District Court, in which the judgment was rendered, unless it shall otherwise direct.

13. Before the cause is called on for trial, the counsel for the affirmative shall furnish the opposite counsel a note of the points made and authorities cited, with an abstract of the argument; after receiving which, a like note of points and authorities, with an abstract of the argument in answer, shall be furnished to the affirmative counsel; and in all cases before the argument is commenced, the counsel, holding the affirmative, shall furnish each of the judges with an abstract of the case, and a brief of the points and authorities relied upon, printed or written in a legible hand; and the opposing counsel shall furnish a like brief of the points and authorities relied upon on the negative; for which the sum of twenty-five cents per folio shall be allowed to the respective parties, to be taxed in the bill of costs.

14. Within twenty days of the commencement of any term of the court, the clerk shall make up a docket of the causes brought up to this court by appeal or writ of error, and shall arrange the causes thereon in the order of time in which the appeal was completed, or writ of error filed with the clerk of the court below, and he shall specify in said docket the respective counties from which the causes were removed. He shall also make out a copy of the docket for each of the justices of the court.

15. In all cases where, under the law or rules of court, a written notice is required to be served on the adverse party, such notice may be served by some sheriff or deputy sheriff; or, if the case shall belong to the United States side of this court, then by the marshal or his deputy; and the return of such officer, that he has served an attested copy of such notice, shall be sufficient proof of such service. The party himself, or any other competent person, may make service of a copy of said notice, and the affidavit of the party making the service shall be sufficient *prima facie* evidence of the same. In all cases such proof shall be filed with the clerk on the first day of the term; *provided*, that in all cases not otherwise specially provided for by law, the agreement of the parties, or their attorneys, in writing, shall answer in the place of notice.

16. Motions shall be noted for the second day of the term, or sitting of the court, accompanied with copies of the affidavits and papers on which the same shall be made, and the notice shall not be for a later day, except when otherwise allowed by law, unless sufficient cause be shown and contained in the affidavits, or papers served, for not giving notice for the second day. The moving party shall give at least one day's notice of all motions, except when, from absence or other cause, service of notice cannot be made, when depositing the papers with the clerk of the court shall be sufficient.

17. In all causes where the judgment of the District Court is affirmed, interest at the rate of six per cent. per annum shall be computed on said judgment up to the time of the rendition of judgment in this court, and shall be included therein, and the party shall be authorized to collect interest at the same rate on the judgment of this court until the same is satisfied, and this shall in all cases be exclusive of the statutory damages, if any, for the delay.

18. In all cases, not otherwise specially provided for, where judgment may have been, or shall be rendered in this court,

a full and correct transcript of such judgment shall be made by the clerk, and a mandate shall issue from this court to the District Court from which the cause came, commanding the District Court to cause the same to be entered upon the record of the proceedings of said court, and to proceed to the enforcement of the same in like manner as if the said judgment had been rendered therein; which said transcript, and the mandate, the said clerk shall make out under the seal of the Supreme Court, and deliver to the party interested upon demand, and the payment of the costs which have accrued in this court; and the party advancing such costs shall have the same remedy for the collection thereof against the party condemned in costs, as in other cases where costs are advanced.

19. All causes upon the docket which shall not otherwise be disposed of at any term of this court, shall stand continued until the next term of this court.

20. Whenever a justice, or other officer, approves of the security to be given in any case, it shall be the duty of said justice, or other officer, to require each of the sureties to justify; and unless the sureties shall together justify that they are worth, over and above all debts and responsibilities they may owe or have incurred, a sum equal to twice the amount named in the penalty of the bond, such security shall not be deemed sufficient; *provided*, that, if such justice, or other officer, shall then be of opinion that such security is insufficient, he may require other and additional security.

21. No papers or records filed in court, or in the clerk's office, shall be taken therefrom, unless by leave of the court, or upon the written order of one of the justices thereof.

22. No attorney of this court, or the clerk, shall be received as bail or security in any case in court.

23. All chancery cases, brought up on appeal, shall stand for hearing upon the same pleadings and evidence as in the District Court, unless the court shall otherwise direct.

# CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of the United States,

FOR THE

TERRITORY OF OREGON.

DECEMBER TERM. A. D. 1853.

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GEORGE H. WILLIAMS, *Chief Justice*.  
CYRUS OLNEY AND  
OBADIAH B. McFADDEN, } *Associate Justices*.  
J. G. WILSON, *Clerk*.

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ROBERT THOMPSON, Plaintiff in Error, v. JACOB  
BACKENSTOS, Defendant in Error.

*Error to Multnomah.*

1. A motion is no part of the record.
2. A bill of exceptions, signed and sealed by the judge, is the proper mode of placing upon the record instructions, given and refused by the court to the jury.

ACTION—trespass *quare clausum fregit*. Plea—not guilty.  
Trial and verdict for defendant.

After verdict and before judgment, the plaintiff moved for a new trial, and in arrest of judgment. The motion sets forth certain instructions, in the giving of some, and in the refusing of others of which, plaintiff says there is error. Defendant insists that this allegation of error cannot be considered, because the proceedings, of which complaint is made, are not in any legal or sufficient manner before this court. No bill of exceptions was taken in this case; nor is there

any order of the court below making plaintiff's motion a part of the record; but such motion is subscribed as follows: "Allowed, Thomas Nelson, District Judge."

*Wait & Logan*, for plaintiff.

*Campbell & Boise*, for defendant.

WILLIAMS, C. J. The occasion or object of this endorsement cannot be determined by the record, but it was more reasonable to suppose it was intended to assist plaintiff in preparing a bill of exceptions, or for some other temporary purpose, than to suppose it was designed to make a record by which to settle the rights of the parties in the Supreme Court. None of the evidence or proceedings of the court below are contained in the motion, except three or four naked instructions; and this makes it difficult to conclude that any parties concerned, seeking or expecting a re-adjudication in a court of final resort, would have been content with such an imperfect statement of the case. The signing of a party's motion for a new trial by the judge, before whom the motion is made, with the view of subjecting questions to the judgment of a Supreme Court, is a proceeding unknown to practice and without precedent. Such an act, being a total departure from the known usages of courts, ought not to be taken as plaintiff contends, when it admits of another and far more reasonable construction. This court is governed by the record, which it takes to be verity, and the motions of counsel in the court below are no more a part of the record than their arguments, unless made so by the court; otherwise records might be made with reference to the interests of the parties, rather than the real facts of the case. The written statement of counsel, in the shape of a motion, endorsed by the judge of the District Court as "correct," does not become, by virtue of such endorsement, a part of the record. Section 19 of the Practice Act provides, that when exceptions are alleged in any civil cause, it shall be the duty of the

judge "to allow such exceptions, and sign and seal the same, and the said bill of exceptions shall thereupon become a part of the record in such cause." Under this statute the mere allowance of a bill of exceptions, as this motion was allowed, would not make such bill of exceptions a part of the record; it must be signed and sealed, and thereupon it becomes a part of the record. Plaintiff seeks to have his motion perform the office of a bill of exceptions, when it is neither sealed, nor made a part of the record, by any order of court or rule of law; and does not even show that any objection was made in the court below to the decision by which it was overruled. When a party brings the record of a District Court here for revision, and alleges that there is error in such record, he must show, not a possible or probable case of mistake, but positive error, injurious to his interests. This court will not go out of the record, into the regions of conjecture, to find such error; it must distinctly and affirmatively appear. The law provides a plain, simple and convenient remedy in a bill of exceptions, if a party feel aggrieved by the decision of a District Court; and we cannot permit the practice pursued in this case to take the place of that prescribed by law; for, independent of any legal objection, it would not only be perplexing to the court of review, but dangerous to the rights of parties. Without considering any other questions in the case, the judgment of the court below is affirmed.

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THOMAS STEPHENS, Plaintiff, v. AMI P. DENNISON and ZACHARIAH C. NORTON, Defendants.

*Adjourned from Washington. Motion to set aside execution and sale.*

1. An execution is a "writ" within the meaning of the 1st section of the Practice Act; and after sale and conveyance of real estate under it will not be set aside, because the sheriff is directed therein to make "due return thereof."

2. The plaintiff in execution, who buys in defendant's property to satisfy his debt, is chargeable with all irregularities; but a stranger, who buys in good faith, is only chargeable with substantive defects in the proceedings.

On the 4th of November, 1851, Stephens recovered a judgment for \$765 against Norton and Dennison in the District Court of Washington County. Execution was issued on the 23d day of March, 1853, requiring the sheriff, among other things, *to make due return* of the writ; and on the 15th of September, 1853, the sheriff returned that he had levied upon lot No. (2) two, in block 79, in Portland, and that on the 16th of July, 1853, he sold the same *according to law*, to W. H. Barnhart and D. C. Coleman for the sum of \$2,700.

The sheriff was ruled to amend his return, which he did by showing that he had posted up the necessary advertisements; but instead of giving defendant, Norton, a notice in writing of the time and place of sale, he told him he had levied upon the said lot, and Norton replied, "it was nothing to him, as he did not own the property." The date of the levy does not appear. The sheriff has paid the full amount of the execution out of the purchase money to Stephens, and made a deed to Coleman and Barnhart for the lot. Due notice of this motion has been given to them. Authorities cited: *Lee v. Chapman*, 6 *Humphrey*, 281; *Wilson & Wheeler v. Mance & Collins*, 11 *Humphreys*, 189; *Walter et al v. Nelson et al.*, 1 *Swan*, 7; *Jackson v. Pratt*, 16 *Johnson*, 386; *Jackson v. Davis*, 18 *Johnson*, 10; *Jackson v. Page*, 4 *Wendell*, 586; *Jackson v. Streeter*, 5 *Cowen*, 529; *Woodcock v. Bennett*, 1 *Cowen*, 737; 2 *Tidd's Prac.* 1032; 4 *Bingham*, 147.

Wait, for plaintiff.

Campbell & Boise, for defendants.

WILLIAMS, C. J. Norton now moved to quash the execution, because it commanded the sheriff to make *due return thereof*, instead of commanding him to return it *within thirty days from its date*.



Admitting a departure in this execution from the usual form, it does not follow that defendant's objection is well taken. The object of an execution is not to convey legal instructions to the sheriff, but to confer power. The mode of exercising such power when conferred is pointed out by law, to which the officer must look for guidance. Why may not the sheriff be referred to the statutes to learn the time for return of process, when he must consult such statute to find out when and how it must be served? Norton complains of an error, which works no harm to him in any way; and to destroy the title of a purchaser in good faith, because a clerical expression is too general, would be to attempt the correction of a harmless mistake by the commission of a great wrong. The command of the writ objected to is not contrary to law, but consistent therewith, and on motion would be corrected at any time by the court as a matter of course. We are asked to set aside the sale because it was made on the 16th of July, 1853, on an execution dated March 28d of the same year, and returnable by law in thirty days. If all this be true, the sale was irregular. The Iowa act, subjecting real and personal property to execution, was adopted (with some alteration) in this territory on the 29th of September, 1849. This act provides that, when the sheriff levies upon real estate, he shall post up advertisements of the sale for four weeks, and in addition thereto shall give defendant notice in writing of such sale, and makes executions returnable in seventy days from date.

No change was made in these provisions by our legislature, except in substituting thirty for seventy days; so that, while the sheriff was compelled to give four weeks' notice of the sale of land on execution, he was required to return such execution in thirty days from its issuance. In 1851 the Practice Act was passed, the first section of which declares, "*that all writs, issued by any court of record in this territory, shall run in the name of the United States of America, and bear test in the name of the clerk of said court; and shall be sealed with the seal of said court, and made returnable to the first*

*day of the next term after the date of said writ."* Does this section repeal that part of the act of 1849, which makes executions returnable in thirty days? An execution is a writ. To be regular, it must run in the name of the United States of America, must bear test in the name of the clerk, and be sealed with the seal of the court from which it issues, so that it must conform to the requirements of the said section in every other respect, if not as to the time of its return.

The term *all writs*, as used in this section, it is argued, cannot be taken in its broad sense, for then it would include writs of *habeas corpus*, *mandamus*, &c. Writs of *habeas corpus* are generally issued by the judge, and not the court; and it may well be doubted whether any writ, issued under the seal of a court of record, unless otherwise specially provided for, can be made returnable on any other than the first day of the next term after its date. If section first of the Practice Act does not intend *all writs*, as it says, what writs does it mean? The succeeding sections of the act mention writs of *capias*, *summons*, *subpoenas* and *execution*, and it would be hardly fair to conclude that only a part of these were contemplated by the first section. We cannot see upon what principle it is alleged that section first applies to a writ of summons, and not to a writ of execution, when they are both treated of alike in subsequent parts of the act. No interference with the act of 1849 was intended, it is said, because that was a distinct, and full law upon the subject of executions;—so there is a full and distinct *quo warranto* act; yet the section referred to would certainly control writs of *quo warranto*. Nothing can be more reasonable than this view of the question; for we have only to ascribe an ordinary share of common sense to the legislature to suppose, that, while they required four weeks' notice of a sale upon execution, they would give the sheriff more than thirty days in which to perform his various duties under the writ, and make return according to law. Officers, it is understood, have generally proceeded upon the assumption, that the first section of the Practice Act embraces writs of execution; and,

in cases of doubt—admitting this to be one—we are disposed to follow the prevailing construction of the law, for the sake of the public good.

The motion to set aside the sale is also placed upon the ground, that no written notice thereof was given to Norton. The sheriff's return shows, that when Norton was advised of the levy, he declared that "it was nothing to him, as he did not own the property," and thus, it is claimed, he waived any further notice of the sale. If the plaintiff in execution were purchaser here, the objection for want of notice might be fatal to his title; but to protect the rights of an innocent stranger as purchaser, we are inclined to hold that written notice was waived. As a general rule, when the plaintiff in execution buys in the defendant's property to satisfy his debt, he is chargeable with all irregularities; but a stranger, who buys in good faith, is only chargeable with a substantive defect in the proceedings of the officer. Norton, in this case, either owned the property or he did not. If he did, then he made a false statement to the sheriff, inducing the belief that no steps were necessary to protect his rights at the sale, as he had none to protect; and it would be wrong now to allow him to take advantage of that false statement, by alleging for error what was the probable, if not necessary result of his own conduct. If Norton did not own the lot, then he has not been injured, and cannot complain. The sheriff, it is said, treated and sold the property as Norton's; therefore, he was bound to give the written notice. Perhaps the plaintiff took the risk of sale, and the sheriff proceeded, believing what Norton had said about his ownership of the lot; but, at any rate, he was not prevented from regarding Norton's statements as a waiver of notice. When, as in this case, the money of a *bona fide* purchaser has irrevocably gone into the hands of the plaintiff in execution, and the sheriff has made a deed pursuant to sale, mere technicalities will not suffice to set aside such a title. Defendant, on execution, must show some positive injury to his rights, or, at least, room for injury; but here Norton complains of a want of notice, when,

in point of fact, he was officially informed of the levy, and then disclaimed all interest in the property seized, instead of taking any steps to protect himself from wrong. We think that Norton ought to be bound by his disclaimer to the sheriff, upon the well-known principle, that where a man is wilfully silent, when he stands by and sees property sold to an honest purchaser, *he* is thereby estopped from afterwards asserting a right to such property. No doubt but that a defendant in execution has a right to have the sale of his real estate set aside by motion, upon a proper presentation of facts to the court; but liberal intendments will be made in favor of a *bona fide* purchaser, who has paid his money and taken a deed. If any body must sustain injury in this matter, it should fall upon Norton; for, if not produced by his acts, he had the requisite knowledge and means to prevent it, while the purchasers, knowing that the sheriff had power, were not bound to inquire into the formal correctness of his proceedings.

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LEMUEL SCOTT, Plaintiff in Error, v. AMOS COOK,  
Defendant in Error.

*Error to Yamhill.*

Without a bill of exceptions, this court cannot notice errors in the proceedings of the court below, except such as are apparent upon the face of the record.

THIS was an action of assumpsit, brought to the October Term, 1851, of the District Court for Yamhill County; was tried on the general issue, and verdict rendered for plaintiff below. A motion was made in arrest of judgment, and for a new trial, reasons filed, motion overruled, and judgment was entered on the verdict.

*D. Logan*, of counsel for plaintiff in error.

*A. E. Wait*, of counsel for defendant in error.

McFADDEN, J. This case now comes before us for review. No exceptions were taken to the ruling of the court below, in overruling the motion of defendant to set aside the verdict and grant a new trial. As to whether the court erred, it is impossible for us to determine. The record shows no error. The defendant, not having filed any exceptions to the ruling of the court below, so as to make the action of that court, and all the evidence necessary to a correct determination of the question, a part of the record, it is not within the province of a Court of Error to pass upon the questions presented. Section 19 of the act, regulating the practice in the District and Supreme Courts of this territory, provides, that "if any party shall allege an exception to the opinion of the court, and reduce the same to writing, it shall be the duty of the judge to allow the said exception, and to sign and seal the same; and said bill of exceptions shall thereupon become a part of the record of any such cause." The record exhibits the fact that no exceptions were taken in the court below. Some papers on file in this case exhibit the fact that such a motion was made, with the reasons of counsel; but these constitute no part of the record, and are not examinable in this court. To this effect is the ruling of this court, in the case of *Thompson v. Backenstos*; and, in support of this position, the authorities are abundant. (*Wagus v. Dickey*, 17 *Ohio Rep.* 429; *Hicks v. Pierson*, 19 *Ohio Rep.* 426.)

This court will, however, reverse for error apparent upon the record; and this, whether exceptions be taken to the ruling of the court below or not; and this is the only thing examinable upon a writ of error. (7 *Ohio Rep.* 212.)

Where the record is regularly removed into this court, it is our duty to examine and see if there be error. Unless there be error, clear and palpable, upon the face of the record, this court will not disturb the judgment or decree of the court below.

The record in this case, although made up with negligence inexcusable, presents no such error on its face as would warrant us in reversing the judgment of the court below.

By the statute law of this territory a party, who conceives himself injured by the rulings of the district judge, can always protect himself by forcing such matter into the record, and making it a part thereof, so as to give himself the benefit of a review of the proceedings in a Court of Error. Should he fail to do this, by the exercise of the proper vigilance, he cannot complain that a Court of Error refuses to reverse the judgment or decree of the court below, when no errors are made apparent upon the record. It is also assigned for error, that the record shows a previous verdict for the defendant, not disposed of at the time final judgment was rendered. The record exhibits the fact, that the parties were in court when the case was called up for trial. A verdict was found for the plaintiff below, and judgment was rendered thereon. This judgment is the final judgment in the case; and the plaintiff in error is concluded, by his own act of consent in going into trial, from the assignment of this informality for error.

Judgment below affirmed.

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## UNITED STATES OF AMERICA v. TOM.

### *Adjourned from Clackamas.*

1. Oregon is not a part of the Indian country, as defined by the act of Congress of June 30th, 1834, and consequently, the provisions of that act did not originally extend to Oregon.
2. The act of Congress of June 5th, 1850, by extending the act of June 30th, 1834, to Oregon, so far as its provisions may be applicable, conferred upon the judiciary of the territory the power to determine how far, and in what respects, said act is applicable to the same.
3. So much of the act of Congress of June 30th, 1834, as prohibits the selling, exchanging, giving, bartering, or disposing of any spirituous liquors or wines to an Indian, is applicable to Oregon, and therefore the law of the territory.

TOM, an indian, was indicted, at the last term of the District Court for Clackamas County, for selling liquor to the

Indiana. A motion was made to quash the indictment, on the ground that Oregon was not Indian country, and the United States law of 1834 inapplicable.

*A. Holbrook*, U. S. District Attorney.

*D. Logan*, for defendant.

WILLIAMS, C. J. The question is not free from doubt or difficulty. Oregon is generally supposed to be a part of the Indian country named in the act of Congress of June 30th, 1834; but such is not the case.

Great Britain and the United States made a treaty in 1818 by which the northern boundary of the latter was extended west on the 49th parallel of north latitude to the Stony Mountains; and the territory beyond this was described as country to be held in the joint occupation of the two powers.

The Rocky Mountains then was the western boundary of the United States for legislative purposes, and so continued until 1846. The act of 1834 shows in terms, that it was intended as a country over which the general government had absolute and exclusive jurisdiction. Congress, by express enactment in 1850, extended said act to this territory, for the reason, as must be supposed, that it was not in force here before that time. The act of 1834 then has no vitality here, because Oregon is Indian country, but by virtue of the act of 1850, which gives it effect here so far as its provisions may be applicable. Is that provision prohibiting the sale of liquor to the Indians applicable? Very much of the act of 1834 is clearly unsuited to the present condition of the country. All which tends to prevent immigration, the free occupation and use of the country by whites, must be considered as repealed. Whatever militates against the true interests of a white population is inapplicable. Reference can be made to no law which, in express words, or by implication, repeals the provision in question; and no good reason can be assigned why it should be not held applicable to our condition.

If required in a country wholly inhabited by Indians, how much greater the necessity for its enforcement here, where defenceless white persons, women and children, are exposed to the violence of drunken savages. •

Selling liquor to Indians is not necessary to the welfare or prosperity of the people here; on the contrary, such a prohibition is a blessing to the Indians, and highly promotive to the safety, peace and good order of the whole community.

Motion overruled.

OLNEY, J. I concur with the Chief Justice, that no part of Oregon is Indian country, as defined by the act of 1834, and that none of the provisions of that act were put in force here by the law establishing the territorial government. It was a local statute, and was no more extended here by the last clause of section 14 of our organic act, than were the local laws of the District of Columbia. That clause extended over us the general laws of the United States, under which we possessed the right to import, and sell to all classes of customers, goods of any description, spirits and wine included. I arrive at the same conclusion with the Chief Justice, that up to June 5th, 1850, there were no restrictions or regulations touching the sale of spirits, or other commodities to Indians. On that day Congress enacted, "that the law regulating trade and intercourse with the Indian tribes, east of the Rocky Mountains, or such provisions of the same as may be applicable, be extended over the Indian tribes in the territory of Oregon." The law referred to is the act of 1834; by omitting to declare which of its provisions, if any, are applicable, Congress has devolved this task upon the courts. No rule being given whereby to determine which are, and which are not applicable, our first and perhaps most difficult duty is to fix upon such a rule. The Chief Justice thinks this particular provision beneficial to the whites, and therefore applicable. He makes "the true interests of the white population," or, in other words, *his* ideas of what is *expedient* for them, the test of applicability. In this I have not as yet been able



to concur. Congress has declared that this Indian code, in its application to Oregon, shall adapt itself to the existing state of things. If, therefore, any of its provisions conflict with existing laws, or rights under those laws, the former and not the latter must give way; thus making the *rights* of the whites, under existing laws, the test of applicability; and as the rights of unrestrained traffic with the Indians is admitted to have existed, the Indian code must adjust itself to, and not destroy that right.

McFADDEN, J. The opinions of Chief Justice Williams, and Justice Olney, as to whether the act of Congress of 1834, entitled "An act regulating trade and intercourse with the Indian tribes, and to preserve peace upon the frontiers," is applicable here, have been submitted to me with a request, that I should give an opinion on what seems to be a vexed question in this territory. Upon an examination of the several acts of Congress, and the treaties of joint occupation between the United States and Great Britain, I have no hesitation in stating the conclusions to which I have arrived.

It is proper to say in this connection, that this question came before the District Court of Clackamas County, on a motion to quash an indictment for the sale of liquor to the Indians. I was not present at the argument of the case, and cannot say anything on the facts involved in this particular case. On the abstract questions of law I will state my opinion. I concur in opinion that, that whenever vitality the act of 1834, entitled "An act to regulate trade and intercourse with the Indian tribes" may have in this territory, is derivable from the act of Congress of June, 1850, which extends the act of 1834, or so much of it as may be applicable, to the situation of affairs in the territory of Oregon. This act is positive and explicit in its terms; and, however objectionable the exercise of the discretionary power conferred upon the judiciary of the territory of Oregon may be, it is not a conclusive objection to the exercise of the power, if it be clearly delegated, as I apprehend it is, by the

act of Congress of June, 1850. If there be any portions of the act of Congress of 1834 not in contravention of a subsequent law of Congress, and not inapplicable to the existing state of affairs in this territory, so much of the act must be enforced here, until Congress shall see proper, by legislation, to direct otherwise. That the act of Congress of 1834 does contain some important provisions which may affect the welfare of the white settlers, as well as the peace and quiet of the Indians, I think cannot be well doubted. I might refer to sections 12 to 16 inclusive, which embrace important provisions, calculated to secure not only the peace and welfare of the Indian tribes, but their observance is necessary to the security of the white population. Section 20 provides, "that if any person shall sell, exchange, or give, barter or dispose, of any spirituous liquors or wine to an Indian, such person shall forfeit and pay," &c. The enforcement of this clause is important, as prohibiting the sale, or giving of liquor to Indians. The enforcement of it here, as has been aptly remarked by the Chief Justice, is not only necessary to the protection of "defenceless white persons, woman and children, who are exposed to the violence of drunken savages," but to the Indians themselves. Indian prosperity lies in the path of temperance; the reverse is certain and unerring destruction. This provision of the act of 1834 is well suited to the state of affairs here. Its enforcement would have a salutary influence on the community. It would contribute to the peace and quiet of the Indians, and, as a consequence, prevent the commission of crimes. It would not be in contravention of any act of Congress, or in conflict with any of the laws of this territory. The question, it is true, is not free from difficulty; but believing that no violence is done to the well-known and established rules of law in the construction given to the act of Congress, I have been constrained to this conclusion. On this question, therefore, I concur with the opinion of Chief Justice Williams.

As to whether this be Indian country or not, I am not so well satisfied. For the important purposes connected with

the civilization and settlement of the country, under the laws of Congress, it cannot well be regarded as Indian country. The settlement of this question, I think, is not necessary in determining whether the act of Congress of 1834, or any part thereof, be in force.

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JOHN McLAUGHLIN, Plaintiff in Error, v. JOHN  
HOOVER, Defendant in Error.

*Reserved from Washington.*

1. A second law does not repeal a former one, without a repealing clause, or negative words, unless so clearly repugnant as to imply a negative.
2. A body of acts *in pari materia* ought to be taken as one act, so far as they do not conflict with each other.

ASSUMPSIT on a promissory note for five hundred and sixty dollars, made on the second day of October, 1845, and payable one year from date. Plea—Statute of Limitations. Demurrer by plaintiff.

WILLIAMS, C. J. On the       day of       , 1845, the first statute of limitations was enacted in this territory. On the 29th day of September, 1849, the act of 1845 was repealed, and a new statute of limitations adopted. On the 6th of January, 1853, another "Act concerning the limitation of personal actions" was put in force without any repealing clause. Each of these acts provides a bar for an action of assumpsit, if not commenced within six years after the cause of action shall have accrued. When the statute of 1845 was repealed, it had run three years against the right to sue in this case, and the defendant claims that these three years, together with the succeeding three years under the act of 1849, ought to be considered as a bar to this suit. This proposition is correct, if the act of 1849 is not repealed by the act of 1852. A

second law does not repeal a former one without a repealing clause or negative words, unless so clearly repugnant as to imply a negative. (*Beale v. Hale*, 4 Howard, 37; 1 Black. Com. 89; 1 *Gallison*, 153; *The Argo Case*.)

So far as this kind of suit is concerned, the act of 1852 contains no repealing clause, no negative words, no expressions or ideas in any way repugnant to the act of 1849. The act of 1849 says, that "every action of assumpsit shall be commenced within six years after the action shall have accrued." The act of 1852 says, that "all actions of assumpsit shall be commenced within six years after the cause of action shall accrue, and not afterwards." Can these provisions be so much alike, and at the same time irreconcilable with each other? If they are not inconsistent, then both must stand; but of there is any conflict between them, the former must fall. *Leges posteriores priores contrarias abrogant*. In the case of *Davis et al. v. Fairbairn et al.*, 8 Howard, 636, the Supreme Court of the United States say, in reference to legislation at different times upon the same subject, "they are both affirmative statutes, and such part of the prior statute as may be incorporated into the subsequent one as consistent with it, must be considered in force." "This is the settled rule of construction."

The concurrence of the statutes in that case was much less apparent than in the case under consideration. There an act of 1776 provided that certain deeds should not pass title "unless acknowledged before some mayor, chief magistrate, or," &c. Another act, of 1785, provided that no estate shall be conveyed, &c., unless acknowledged or proved before a "general court, or court of county, city or corporation." In 1811 the deed in dispute was acknowledged before a mayor under the act of 1776, and the court held the acknowledgment good, because there was no repugnancy in the acts of 1776 and 1785. We cannot recognize this case as a sound exposition of law, without holding that our limitation acts of 1849 and 1852 are entirely consistent with each other. In the case of *Wood v. U. S. A.*, 16 Peters, 362, the Supreme Court, in

speaking of a legislative act, says, "that it has not been expressly, or by direct terms repealed, is admitted; and the question resolves itself into the more narrow inquiry, whether it has been repealed by necessary implication—we say, by necessary implication, for it is not sufficient to establish that subsequent laws cover some, or even all the cases provided for by it, for they may be merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new law and those of the old, and even then the old law is repealed by implication only '*pro tanto*' to the extent of the repugnancy." "Although two acts are seemingly repugnant, yet they should, if possible, have such construction that the latter may not repeal the former." (*Bac. Abr. Statute, C.*; *Foster's Case*, 11 *Coke*, 63; *Weston's Case*, *Dyer*, 347.) Virtual appeals are not favored by courts. A body of acts ought to be held as one act, so far as they do not conflict with each other. (*McGowan v. Hay*, 5 *Litt.* 287; *Snell v. Bridgwater Co.* 24 *Pick.* 296; *Planters' Bank v. The State*, 6 *Smede & Marsh*, 628; 4 *Watts & Serg.* 461; *Godard v. Boston*, 20 *Pick.* 407.)

Nothing can be clearer, than that the acts of 1849 and 1852 referred to, do not conflict with each other, and, according to the law laid down in the authorities above cited, must be taken as one act. They are in *pari materia*, and, therefore, by a well settled rule, they are to be taken and construed together. (*U. S. v. Freeman*, 3 *Howard*, 556.)

The court, in that case, says: "If divers statutes relate to the same thing, they ought all to be taken into consideration, in construing anyone of them; and it is an established rule of law, that all acts in *pari materia* are to be taken together as if one law." When we look at all our limitation acts, to ascertain the mind of our legislature, we find a repealing clause in the act of 1849, but none in that of 1852. We can only explain the difference in these two statutes by supposing a difference of intention, and a design to let the act of 1849 run against those causes of action upon which it had commenced to operate. We hold, therefore,

that the act of 1852 is a mere continuation of the act of 1849, and that both are to be taken, with reference to this case, as one limitation law. Can, then, a bar to this suit be allowed, by computing time before the act of 1849 took effect? *Shall have accrued*, in that statute, is peculiar phraseology, and seems to indicate causes of action then existing. Limitation laws effect the remedy, and the legislative power has the same right to regulate and restrict remedies upon causes of action in existence, as upon causes of action to be created. When the law is made operative *in presenti*, courts cannot legislate away the effect, and declare that it shall operate only *in futuro*.

Whenever judicial tribunals can apply the remedy and save the right, no discretion is left by the law; but all cases must be treated in the same manner, and adjudged upon the same principles.

We concur with the Supreme Court of the United States in the opinion expressed in the case of *Ross et al v. Duval et al*. 13 Pet. 45. The court there says, "it is a sound principle, that when a statute of limitations prescribes the time within which a suit shall be brought, or an act done, and a part of the time has elapsed, effect may be given to the act; and the time yet to run, being a reasonable part of the whole time, will be considered the limitation in the mind of the legislature in such cases." To the same effect is the decision in the case of *Piatt v. Sattier*, 11 *McLean*, 146. In *Gaubier v. Franklin*, 1 *Texas Rep.*, the court decides, "that upon the substitution of a new term of limitation or prescription, the time which has elapsed after the maturity of the contract, under the old law, is to be computed, in reference to its effect under the law, in ascertaining the time which would bar the action under the new law. If one-half of the time prescribed by the old law had elapsed when the new law was adopted, the lapse of one-half of the time would bar the right of action." If the legislature should pass an act, barring a past action, without any allowance of time for the institution of a suit in future, such an act would be so unreasonable as

to amount a denial of right, and call for the interposition of the court.

We conclude, then, that it is the duty of the court to apply the remedy by limitation in all cases, except where it would cut off the right, and then the court is bound, by the fundamental law, to give a party reasonable time in which to escape the effect of such remedy. We are aware that this opinion cannot be reconciled with the case of *Norris v. Slaughter*, 1 *Green Rep.*; but that decision was in conflict with the decision of two of the present members of this court, as district judges in Iowa, and, we believe, contrary to the weight of authority.

The plaintiff in this case had three years, after the act of 1849 took effect, in which to bring suit; and he should not complain if the same sort of legislation, which has admonished him to diligence since his right of action accrued, should now extinguish that right by giving effect to his delay.

Statutes of limitation are statutes of repose. They promote peace and harmony in society; they close the door to litigation, and should, therefore, be favored by courts.

Demurred overruled.

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LEVI GANT, Plaintiff, v. EDWIN P. DREW, Defendant.

*Injunction.—Appeal.—Umpqua County.*

The franchise of keeping a ferry does not belong of right to the owner of the soil; but he is entitled, by the statutes, to the preference, if he applies before license is granted to another.

IN December, 1851, the Board of Commissioners of Umpqua County granted to the defendant, Drew, the privilege of keeping a ferry over Umpqua River, at the crossing of the road from Winchester to Scottsburg, and fixed the first year's

tax at three dollars. There was no treasurer to whom the money could be paid until April, 1852, and it was not paid until September, 1853. Whether a bond was given, or a license issued, does not appear. In April, 1852, Drew again applied, and the year's tax was fixed at twenty-five dollars, which was paid, and a license issued for the ensuing year.

The plaintiff, Gant, who owned the land, applied for a license at the same time, and was denied; but in April, 1853, he obtained a license for a year, and paid the tax, but whether he gave a bond does not appear. Drew continued to run his boat until enjoined at the suit of Gant. The cause was heard before Judge Deady, at the September term, 1853, for Umpqua County, when the injunction was dissolved, and the bill dismissed, and the plaintiff appealed.

*Chapman & Logan*, for appellant.

*Stratton & Harding*, for appellee.

OLNEY, J. The plaintiff claims the right to keep all ferries established on his hand, as incident to, and part of his estate in the soil; that the statute recognises but does not create this right; and that the grant of it to a stranger, when the proprietor was an applicant, was void.

Judge McLean, in *Bowman v. Wathen*, 2 McLean, 376, lays down this doctrine in strong terms. In speaking of the owner of land in Indiana, bounded by the Ohio River, he says, "he has the right of fishery, of ferry, and every other right, which is properly *appurtenant to the soil*; and he holds every one of these rights by as sacred a tenure as he holds the lands from which they emanate." He says, "this right of ferry is a common law right, everywhere recognised in this country, and that the statute was intended to rescue it from violation." If, by the *right of ferry*, he means the right which, as he says, every man has "to keep ferry-boats for his own convenience upon his own land," the proposition is not only a truism, but was out of place, for the case did not



bring in question this right of the private use of one's own soil, by passing over it both by land and water, but the right to keep a *public ferry* for toll; and this latter was not necessarily in issue, as the case turned upon another point. He certainly speaks of the right to keep public ferries, when he says, "Some of these rights, which *appertain* to the *soil*, are of a *public nature*, and the *use* of them consequently subjects of legal control. Of this character is the right of ferry." His proposition, therefore, is, that the right to keep a public ferry for toll is part of the proprietor's estate in the soil.

This proposition cannot be maintained. There is a toll traverse known to the common law, or rather to the local customs of England, which is paid for the privilege of passing with beasts in certain places, not highways, when there is no right to pass without the proprietor's consent; and if it were not forbidden by our statute, doubtless *ferries* might be established here on a similar principle, making the toll a matter of contract, until it should grow into a custom. And if a *public ferry* should be established where there is no highway, the owner *would be entitled* to compensation for the use of the land, but not for the ferry, which was never his, but which is a thing newly located upon occasion, by act of the government, for the use of the public.

The right to keep a public ferry for toll is a franchise, which has no existence in England, until created by the king's license, or other proper authority. If held by prescription, an ancient grant is presumed. (8 *Bac. Abr.* 114; 1 *Black. Com.* 37, 38.)

It is the same in this country. Chancellor Kent says, that "franchises are certain privileges conferred by grant from the government, and vested in individuals;" and he enumerates among them, "the privilege of making a road, or establishing a ferry, and taking tolls for the use of the same." If they are created by public grant, then they do not emanate from the land. No precedent is cited for the rule laid down in *Bowman v. Wathen*; nor has any like case or *dictum* been cited here. On the contrary, in *Mills v. The*

*Commissioners*, 3 *Scammon's Rep.* 53, ferries are held not to appertain to the riparian owners. In the *Nashville Bridge Co. v. Shelby*, 10 *Yerger*, 280, the owner is held not to be entitled, as a matter of right, to keep the ferry. This right has probably been inferred from some ancient decisions in England, which were carelessly followed at an early day by a few cases in this country, that none but the owners of the soil have a right to use the highways for ferry landings. (*Cooper v. Smith*, 9 *Sergt. & Rawle's Rep.* 26.) But the reverse of this doctrine was settled in England by the case of *Peter v. Kendall*, 6 *Barn. & Cress. Rep.* 703; and the doctrine of this case has been generally received in this country. Chancellor Kent says, that the right to use the highways for ferry landings, without the consent of the owners of the soil, "is the most reasonable conclusion upon the right to the use of a public highway to which a ferry is connected."

A public ferry can seldom, if ever, be required, except where a highway terminates at, or extends across the water. In the present case the ferry is in the public road, where it crosses the Umpqua River; and if the right to keep it for toll is not inherent in the plaintiff, as proprietor of the soil, and the highway may be used for landings without his consent, it follows that defendant's ferry is no violation of the plaintiff's rights as such proprietor. The conclusion at which we have arrived, by the examination and comparison of the few authorities within our reach, is likewise the result of reasoning from first principles. When a road crosses a stream, or body of water, it is not interrupted, but the water, and the soil beneath it, within the limits of the road, are a continuous part of the road; and a bridge or ferry is also a part of the road as much as the embankments, excavations, pavements, causeways, and other artificial improvements for the ease of travel. The owner of the soil, being paid therefor, or having waived compensation, has no interest, except as a citizen at large, in the road as such, including its bridges, ferries and other betterments. If he has the exclusive right

to land ferry-boats on the shores, how can he be denied the exclusive right of placing the ends of a bridge upon them; or the exclusive right of being employed for tolls or other reward to make and keep in repair any other work or improvement that may be needed in the road elsewhere upon his land! It might be expedient to favor him with the preference in all these cases; and this the statute does in respect to ferries; but to recognise such a *right* would be as unreasonable in principle as it is unsupported by authority.

Rejecting the plaintiff's claim as proprietor of the soil, we come next to consider whether he has been invested with the franchise by the action of the Board of Commissioners. On this point it is only necessary to say, that the order under which he claims is like that in *Cason v. Stone*, decided at this term, which we held to be merely void.

The plaintiff having no title either at common law, or under the statute, the decree dismissing the bill must be *affirmed*.

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FENDAL C. CASON, Complainant, v. EDWIN T.  
STONE, Defendant.

*In Chancery.*

1. A ferry cannot be established by the county commissioners for a year. An order establishing a ferry for a year is a nullity.
2. They can only establish permanent ferries, and grant perpetual licenses.
3. They may establish as many ferries, and as near to each other as the public necessities require, and they are the final judges of such necessity.

THIS cause was commenced in this court, and an injunction was issued in vacation restraining the defendant from keeping a ferry near the ferry of the plaintiff, on the Clackamas River. The defendant has answered, and now moves to dissolve the injunction. The facts are, that one Henderson, owning the land on one side of the river, and wishing to es-

tablish a ferry, agreed with the plaintiff, who owned the land on the other side, to ferry him and his family free of toll for the privilege of landing on that side. Henderson obtained a license and established the ferry, and sold it with the land to the defendant. Both Henderson and the defendant have at all times performed their contract; but Cason claims that it was limited to two years. At the expiration of that time he obtained a license and established a ferry near the defendant's and then filed the bill upon which this injunction was allowed.

*J. K. Kelly*, for complainant.

*A. Campbell*, for defendant.

OLNEY, J. The Board of Commissioners had power to establish the plaintiff's ferry, if the two were necessary for the public accommodation, and of that necessity they are the final judges.

We are, therefore, to inquire whether the plaintiff has a valid license; for if not, the acts of the defendant are not injurious to him.

The bill states, and the answer admits, that the commissioners granted to the plaintiff a license to keep a ferry at, &c., for the term of one year.

If this order, merely directing a license to issue, and neither preceded nor accompanied by an order establishing the ferry, can, by extreme liberality of construction, be taken to import an establishment of the ferry, still it is an order establishing a temporary ferry for a single year. The statute requires the commissioners, when they deem a ferry necessary, "to establish and confirm the same by an especial order," and then to direct their clerk to issue to the proprietor a license to keep the same. They are also required to fix the rates of toll "from time to time." Such ferries are subject to an annual tax, and when any ferry is not kept as required by the act, they may summon the proprietor and revoke his license. This contem-

plates that the ferry is to be permanent, and the right to keep it as durable at least as the life of the license, unless sooner revoked. And this is important to the public as a means of securing safe, commodious and expeditious passage at low rates of toll. Oppressive tolls would be necessary, if the entire investment must be re-imbursed, with a profit, in a single year. Good ferries and cheap tolls can only be secured by making them a safe and permanent investment, as the statute contemplates.

As there can be no temporary ferry, this order cannot take effect according to its terms.

It must be construed to vest a permanent franchise contrary to the expressed intent, or be treated as merely void.

When a public body or tribunal exercises an inherent power, which, by its very nature, necessarily pertains to such body or tribunal, the act is valid, though not done in the mode directed. Thus, if a court, having inherent power to decide a cause, or a legislature, having inherent power to enact a law, proceeds in a different mode from that prescribed, the decision or law, though it may be erroneous; and in case any other tribunal, body or person possess the power of review, may be corrected or reversed, is, unless and until set aside by a direct proceeding instituted for that express purpose, valid and binding on all persons and things affected by it. But when such public body or tribunal attempts to execute a power not inherent, but specially given by a statute or other instrument, authorizing it to do a particular thing in a particular way, then the power to do the thing is inseparably connected with the mode of doing it, and any attempt to do it otherwise, or to do less or more than what is authorized, is not an exercise of that special power, but an idle and void act. (*Voorhees v. The U. S. Bank*, 10 Peters, 449.)

The power to establish ferries appertains to the legislature, and not to the commissioners. To the latter it has been delegated by statute to a limited extent. They are authorized to create that particular class or kind of ferry franchises which was thought to be, as a general rule, most advantageous to

the community. If any other is to be created, it must be done by the legislature directly, or by delegation of further power. An attempt on the part of the commissioners to create a different one, either in respect to duration or otherwise, is not an exercise of the power conferred, but an usurpation of further power. And for the court to say that the franchise, as intended, shall be construed into one that was not intended, would be to amend a defective thing by legislation, and not to ascertain what it really is by adjudication. We must, therefore, hold it void.

And, being void, the plaintiff has no title, and the injunction must be dissolved.

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GABRIEL WINTER and B. G. LATTIMER, Plaintiffs in Error, v. ZACHARIAH C. NORTON, Defendant in Error.

*Error to Washington.*

1. The attachment act of 1849 is not repealed by the attachment act of 1857, except so far as they conflict. Both are to be taken as one statute.
2. Pleading to the merits waives matter in abatement.
3. When the intention of one who makes a writing is to be judged of by the writing *per se*, it is a question for the court; but when a writing is to be judged of by extrinsic facts, and is a part of a transaction, the rest of which consists of words or acts, the whole evidence should be submitted to the jury.

IN July, 1851, plaintiff sued out of the Washington District Court a writ of summons in assumpsit, which was personally served on one of the defendants, the other not being found. At the same time he filed a bond, and an affidavit that the defendants were non-residents, and took out a writ of attachment under the provisions of the act of 1849, upon which the goods of the defendants were attached, and a bond taken for their forthcoming or their value, to abide the event of the suit. At the return term before Pratt, Justice, (an at-

torney sitting in the judge's place, without objection,) the defendants moved to quash the attachment, which was denied. They then pleaded the attachment in abatement of the summons, which was overruled. They then pleaded *non-assumpsit*, upon which the plaintiff had a verdict and judgment. A writ of error was brought, and the judgment and the cause remanded "for further proceedings according to law."

At the last Washington term, before Olney, Justice, the cause came on for trial. The defendants again moved to quash the attachment, which was denied. They then offered anew their plea in abatement, which was not received. To these rulings they excepted. The issue on the merits was then tried, and the plaintiff again had a verdict and judgment. By a bill of exceptions taken at the trial, it appears that the defendants were a mercantile house in San Francisco, to whom the plaintiff consigned a cargo of lumber from Oregon, which they disposed of and rendered an account, showing a balance of four thousand dollars in their hands subject to his order.

Some months afterward, defendant, Winter, being on a visit to Oregon, the plaintiff, by his agent, Leland, demanded payment of the balance, presenting, at the same time, a paper writing in these words: "Zachariah C. Norton demands of Winter & Lattimer the sum of two thousand dollars, due from them for money received to said Norton's use." Winter denied the amount, and expressed a willingness to pay a less sum, and wrote on the back of the paper these words: "Presented by Alonzo Leland, and answer, will pay him amount due as per account rendered him. Winter & Lattimer." The court instructed the jury, that if the case stood on the original transaction, they might well find the defendants to be depositaries of the plaintiff's money, and not liable until a failure to comply with his order respecting it. "But that the written demand and refusal, which it is the duty of the court to construe, showed that whatever might have been its original character, is then was, or thereby became, a debt due from the defendants to the plaintiff."

To this instruction the defendants excepted.

The errors assigned are—

1. Refusal to quash the attachment.
2. Refusal to receive the plea in abatement.
3. The instructions given to the jury.

OLNEY, J. No question is raised as to the regularity of the attachment under the act of 1849; but the motion to quash proceeds on the ground, that this act was repealed by the act of 1851, which took effect before the commencement of this suit. The act of 1849 gives an attachment as auxiliary to a suit commenced by process against the person to secure a sufficient fund for the payment of the judgment, to be recovered against the defendant *in personam*. The act of 1851 gives an attachment *in rem*, to subject *all* the property of non-residents and absconding debtors to distribution among all their creditors. The combined effect of the two is to enable a creditor, whenever he can bring his debtor into court by personal service, to secure his own debt by attachment; and as others had equal opportunity, he gets the benefit of his superior diligence. But if personal service cannot be had, so that no one is in fault, but all equally unfortunate, then notice must be given, and all may come in and have distribution. As the act of 1849 can have a modified effect in connection with that of 1851, the two must be taken together as one statute. (*McLaughlin v. Hoover*, at this term.) In refusing to quash the attachment, no error was committed.

The plea in abatement presented the same question, and would, if received, have been unavailing, but it was rightly rejected for another reason. By pleading to the merits, the defendants waived the matter in abatement—not that *putting on file* a plea to the merits necessarily waives a plea in abatement then or before filed. That depends on the course of practice in the particular court. Where, as under our practice, no pleas are filed in vacation, but the issue is made up in the hurry of the term, and the cause immediately tried, it is



found convenient to file at one time all motions, demurrers, and pleas of whatsoever nature, to be taken up in their order; but by taking up and proceeding upon any one of these, the defendant waives those which should have preceded. It is said, however, that the record shows these preliminary questions to have been settled, and the issue to have been made up by and before a person not authorized to hold pleas in that court; and the judgment must be supposed to have been reversed for that cause; and when remanded, those former pleadings should have been taken for nothing; and the defendants allowed to defend, as being for the first time in court.

But the pleadings are the *altercations of parties*, and the filing of them is their voluntary act. The court has only to decide the questions raised upon, and the issues made by those pleadings. If the defendants were dissatisfied with the decision on their plea, because of the alleged defect of power in the person making it, or for other cause, they should not have waived that plea by pleading over, but should have allowed judgment to go, and then brought their writ of error. Having taken their chances for success in a protracted and expensive litigation of the merits, they were not at liberty to fall back upon matter in abatement.

No repleader being awarded by this court, the cause went down for trial anew on the issue in the record. The District Court was competent to admit a new plea, if the justice of the case required it. But to allow the general issue to be withdrawn, and a plea in abatement filed for such a cause, would scarcely have been less than an abuse of discretion. It was not asked as a favor, however, but demanded as a right, and was properly refused.

The instructions, excepted to and assigned for error, present the inquiry, whether the effect of the written demand for payment, and the written reply, was a question of law for the court, or a question of fact for the jury. Law and fact are not always readily distinguishable. In respect to written instruments, it is sometimes difficult to say where the office of the court ceases, and that of the jury begins. When the

intention of the writer is to be judged of by the writing, it is a question for the court, but when the meaning is to be judged of by extrinsic facts, or when the writing forms part of a transaction, the rest of which consists of words spoken or acts done, or when, whatever its meaning, it is but a circumstance tending to establish some other fact, it is for the jury to say, whether the language was used in the sense imputed; or what is the character of the entire transaction, of which the writing forms a part; or what is the truth of the ultimate fact which it tends to prove. In these cases the writing must go to the jury, to be considered with the other evidence. In this a written and spoken demand were made, and a written and spoken answer given.

The spoken words were not merged in the writings, but the two were concurrent acts, and their combined effect was properly a question for the jury. Again, the written answer referred to an account previously rendered.

The original account of sale showed a larger balance than was now claimed, or admitted to be due. The defendants might well have argued to the jury, that the reference was to the original account, which placed them on their right and duty to have the money at San Francisco, subject to the plaintiff's order; and the plaintiff might have argued that the reference was to a later accounting, and amounted to a promise to pay a general balance, thus making its meaning and effect turn on a disputed fact outside of the writing.

In determining conclusively, as matter of law, the effect of these writings, which formed only a part of the transaction, and which also depended for their meaning on a disputed extrinsic fact, the court erred, and it is not for this court to say the defendants were not injured by it. But for that error, the result might and lawfully could have been different. The judgment must, therefore, be reversed, and the cause sent down for a new trial.

**Judgment reversed.**

\*ZACHARIAH C. NORTON v. GABRIEL WINTER  
and BENJAMIN G. LATTIMER.

*In the matter of the garnishment of D. H. Lownsdale.*

The defendant in a judgment cannot be garnished by a creditor of the plaintiff therein.

On the 8th day of May, 1852, Norton recovered a judgment against Winter and Lattimer, for the sum of \$4,496.86. Execution issued January 17, 1853, containing an attachment clause, which was served on D. H. Lownsdale, as garnishee, who appeared at the return of such execution, and answered as follows: "I stand indebted to the above defendants, on a judgment entered against me on the 29th of October, 1851, on the records of the District Court of this county, for the amount of \$1,400 and costs of suit."

*A. Campbell, for Norton.*

*Chapman & Wait, for defendants.*

WILLIAMS, C. J. Is Norton entitled to a judgment against Lownsdale upon this answer? Section 42 of the practice act provides, that in certain cases, a garnishee process may be served upon a person who has "property, rights and credits" in his hands belonging to defendant in execution.

Section 43 provides that, if such garnishee shall be found indebted to said defendant, &c., judgment shall be rendered against him, &c., and "such judgment shall bind all such property, effects, rights and credits in the hands of such garnishee, and the payment of the amount of the judgment by such garnishee shall operate as a conclusive bar to the right of any such defendant in execution to recover the amount paid under this process against any such garnishee."

\*See 62 Am. Dec. 297.

While the comprehensive expression of "property, rights or credits," if standing alone, might be taken to include judgments, we think it is repelled by the subsequent provisions of the statute for the protection of garnishees. When a judgment is rendered against a person as garnishee, the payment of such judgment, the statute says, shall operate as a conclusive bar to the right of defendant in execution "to recover" the amount so paid against such garnishee.

"To recover" in law is to "recover anything, or the value thereof, by judgment; as if a man sue for any land or other thing, movable or immovable, and have a verdict or judgment for him." (*Jacob's Law Dic. vol. 5, page 401.*) The "right to recover," then, as expressed in the statute, simply means a "right to obtain judgment." The process of garnishment is intended to lay hold of this "right to recover," or right to obtain judgment; but, after a recovery, as in this case such, right ceases to exist, and of course cannot be taken any more than a third person can take a right to sue on a promissory note after a judgment therein for the payee. The payment spoken of in the statute is to be a "conclusive bar," &c.

A "bar," in a legal sense, is a plea or peremptory exception of a defendant, sufficient to destroy the plaintiff's action. (*Jac. Law Dic. vol. 1, p. 289.*)

Would it not be absurd to say, that the payment of Lownsdale to Norton would destroy the action of Winter and Lattimer against him, when such action was ended by final judgment for the plaintiffs?

The plain effect of these provisions is to protect the garnishee from a second judgment for money paid on another and prior one, or, in other words, to protect him from two judgments for the same debt. To hold that the defendant in one judgment can therefore be subjected to another on garnishee process, is to hold that two judgments in favor of different persons may be rendered and remain of record at the same time, against the same person, for the same demand; that executions may issue on such judgments, and thus the

garnishee be driven to the trouble and expense of a suit to protect himself from twice paying the same debt.

A construction of the statute, productive of such a result, would be clearly wrong. In the case of *Howard v. Freeman et al.*, 3 Mass. Rep. 121, Chief Justice Parsons, under a statute similar to ours, says: "It is the design of the statute, and manifestly just, that the trustee shall not be twice charged for the same credit; once by the attaching creditor, and again by his principal. The credit, therefore, liable to this attachment, must be so situated that, if it be taken by the attaching creditor, the trustee may legally defend himself when called on by the principal." The same doctrine is affirmed in *Prescott v. Parker*, 4 Mass. Rep. 170; *Thorndike v. De Wolf*, 6 Pick. 119.

Garnishee discharged.

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WARREN PRATT, Plaintiff in Error, v. WILLIAM M.  
KING, Defendant in Error.

*Error to Washington.*

1. In the authentication of a record from any State, the certificate of the judge must show that he is the judge, chief justice, or presiding magistrate of the court from which the record comes.
2. The official character of the judge must appear from his own certificate.

THE plaintiff offered as his evidence what purported to be a record from the Circuit Court of Knox County, in the State of Missouri; to which the defendant objected, on the ground that it was not properly authenticated. Objection sustained, and plaintiff nonsuited. The following is as much of the authentication as is necessary to show the questions in the decision of which it is said the court below erred. The attestation of the clerk, with the seal of the court annexed, to which no objection is made; then this follows:

"STATE OF MISSOURI, }  
4th Judicial Circuit. }

"I, Addison Rees, Judge of 4th Judicial Circuit, do certify that Jesse John, whose name is subscribed to the foregoing, &c., is, and was, &c., and that said certificate and attestation are in due form of law, &c.

"Given this 3d of July, A. D. 1851.

"A. REES, Judge 4th Judicial Circuit, Mo."

Subjoined to which is the certificate of the said Jesse John, clerk, &c., with the seal of the court annexed, that Addison Rees, &c., "was and still is, Judge of the 4th Judicial Circuit of the State of Missouri, and Judge of the Circuit Court in and for said county of Knox," &c.

WILLIAMS, C. J. The act of Congress of 1790, (*U. S. Statutes at Large*, vol. 1, p. 122,) provides, "That the records and judicial proceedings of the courts of any State shall be proven, or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with the certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the attestation is in due form." The second certificate of the clerk is no part of the authentication of this class of records, as provided by the above-cited act, and therefore proves nothing. It is extra-official, and must be treated as the statement of a private person. (*Oaks v. Hill*, 14 *Pick.* 442; *Wolfe v. Washburn*, 6 *Cowen*, 261; 1 *Greenleaf's Evidence*, 655.) In the attestation of the clerk, and the attempted certificate of the judge, there is nothing to show that Knox County is in the 4th Judicial Circuit; so that Addison Rees may be judge of said circuit, as he says, and not Judge of the Circuit Court of Knox County, any more than of the Circuit Court of any other county in the State.

All the certificates together, if the third could be included, do not prove as much as the act of 1790 requires. They show that Addison Rees is Judge of the Circuit Court of

Knox County, but not that he is "*the judge, chief justice, or presiding magistrate*" of said court.

For aught that appears, the Circuit Court of Knox County may consist of three judges, and of each it might be said, as in the certificate, he "is judge of said court," but, *non constat*, that he is *the judge*, which implies unity, or the *chief justice*, or *presiding magistrate*, which implies more than one. The authentication is defective, and the judgment must be affirmed. (*Stephenson v. Bannister*, 3 Bibb. 369; *Kirkland v. Smith*, 2 Martin, 497; 1 Greenleaf's Ev. 661.)

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NIMROD O'KELLY, Plaintiff in Error v. TERRITORY  
OF OREGON, Defendant in Error.

*Error to Benton.*

1. The Legislative Assembly may authorize a district judge to appoint a time for holding a special term of the District Court.
2. Error will not be presumed in the acts and decisions of a District Court; it must affirmatively appear from the record.

NIMROD O'KELLY was indicted, tried, convicted of the crime of murder and sentenced to be hung, at a special term of the District Court in Benton County, holden on the 29th day of June, 1852. He sued out a writ of error and super-sedeas; and now comes with the record in the case, alleging various errors in the proceedings and judgment of the court below.

*J. K. Kelly*, counsel for plaintiff in error.

*R. P. Boise*, for defendant in error.

WILLIAMS, C. J. Error is assigned, in the first place, because the special term was unauthorized by law, and, in support thereof, it is argued as follows: The organic act pro-

vides that the District Court shall be held "at such times and places as may be prescribed by law;" but plaintiff in error was tried at a term of the District Court, held at a time appointed by the judge; therefore, the proceedings are void.

The premises are correct; but the conclusion does not follow. The act of Assembly (*Gen. Laws*, p. 100) requires any one of the district judges to hold a special term, &c., and the said district judge is authorized to appoint a day, &c. When, therefore, a district judge, pursuant to the power conferred upon him by this act, appoints a day for a special term of the District Court, such day is a time "prescribed by law," or legal authority.

The act of the judge is made law by the law-making power. If time, fixed by legislative enactments for holding a special term of the District Court, is time "prescribed by law," then time fixed by a district judge for such purpose is time "prescribed by law;" for the latter, by the expressed will of the former, is invested with all power over time in that matter, when circumstances arise evoking the exercise of such power. To fix a time for holding a District Court, it is said, is an act of legislation, and no judicial officer, or other person, can be empowered by the legislative assembly to do such an act; for, *delegates non potest delegare*. Delegated power, as a general rule, cannot be redelegated; but the Legislature of Oregon do not exercise delegated power. Their right is not derived from Congressional acts or conventional charters, but from the people, and is, therefore, an original and inherent right to make all laws that the legislature of any sovereignty can make, not inconsistent with the Constitution and laws of the United States. The people of Oregon, then, can accommodate themselves as to the times and places of holding courts, as they see proper, unless prohibited by some competent authority. The only pretence of prohibition is found in the requirement of the organic act, which says, that District Courts "shall be held at the times and places prescribed by law." Admitting, for the sake of



argument, that a time appointed by a judge, under the act in question, is not "time prescribed by law," in the sense of the organic act, then it does not follow that such appointment is prohibited, and, therefore, void. When the organic act declares that the District Courts shall be held "at times and places prescribed by law," it describes a duty of the judiciary, not the limits of legislative power. The judges are required to hold courts "at times and places prescribed by law," so that regular terms may be secured to the people; but no power is taken from the Assembly to provide for special terms, nor are the judges forbidden to hold other than the regular terms, if litigants in person, or the people in due form, consent to such other and special terms.

To say that a judge cannot appoint a time for holding a court, is to strip him of all judicial functions, except at the regular and stated terms of his court. How can a judge provide for hearing applications for, or motions upon, writs of injunction, attachment, *ne exeat habeas corpus*, &c., if he has no power to say when such applications or motions shall be heard? Should the legislature, without specifying time, impose upon a judge the duty of hearing and determining a case, the devolution of such duty would carry with it the right of saying when the proceedings should take place; so that, in one view of the subject, the appointment of a time is as much an incident of judicial authority as an emanation of legislative power.

Special terms of the district Court are proper; for while they prevent trouble and expense to the public, they save the prisoner from punishment without conviction, and thus motives of humanity and expediency harmonize with those principles of law upon which such terms are clearly sustainable. (*Harriman v. The State*, 2 *Green*, 270.)

Error is assigned, in the second place, because the judge did not give the prisoner ten days' notice of the court, as required by statute.

The force of this assignment is hardly perceived, for while it asserts that the prisoner did not have ten days' notice, the

record says that the court was holden on the 29th day of June, 1852, "after more than ten days' notice to Nimrod O'Kelly." Weight ought not to be attached to this statement in the transcript, it is said, because it is the clerk's recital of what transpired out of court. No part of this record can be discarded as the private production of the clerk, for it was made under the direction of, and approved by, the judgment of the court, and is the written uncontradictable evidence of what such court said and did in this case; and proves, if it proves anything at all, that the court found the fact to be, that more than ten days notice of the term had been given to the plaintiff in error. Again, no objection was made to a trial in the court below by the prisoner for want of notice; therefore, it must be presumed, as the jurisdiction of the court is not concerned, that the notice was given according to law. (*Frier v. The State*, 3 How. Miss. 422.)

But it is further argued for this assignment of error, that it is an assignment for error in fact; that the plea of *in nullo est erratum* admits the truth of the allegation as to want of notice. "If an error of fact that is not assignable be assigned, and *in nullo est erratum* be pleaded, it is no confession; as if it be assigned that such a day there was no common pleas sitting, because that is against the record; so, if a man says that he did not appear, and the record says he did, *in nullo est erratum* is no confession, but a demurrer, because it is against the record." (*Cro. Car.* 12, 29, 52; *Yelverton*, 58; 1 *Vent.* 252; 3 *Keb.* 229; 1 *Lev.* 76.)

Error is assigned, in the third place, because the indictment does not charge plaintiff in error with "feloniously killing," &c. Our statute declares, that "if any person shall purposely, and of deliberate and premeditated malice, kill," &c., "such person shall be deemed guilty of murder." The indictment charges that "Nimrod O'Kelly purposely, and of deliberate and premeditated malice, did kill," &c. The words of the statute are transferred to the indictment, and if they describe murder in the one place, they of course describe it in the other. Murder, by the common law, was the

"felonious killing," &c., therefore the necessity in charging the crime to say, "did feloniously kill;" but murder in this territory is a statutory offence, and the indictment is sufficient if it follow the statute. (*U. S. v. Lancaster*, 2 *McLean*, 431; *State v. Neal*, 2 *Black*, 548; *Chambers v. People*, 4 *Scam.* 351.) "Nothing need be stated in the body of an indictment, which is not required to be proved upon the trial, in support of the charge." (*Sec. 48, chap. 4, Criminal Proceedings.*) Certainly, nothing more need be proved than is stated in this indictment.

Error is assigned, in the fourth place, because the county commissioners did not select the jurors. Section 2 of the act regulating the mode of selecting jurors, (*Gen. Laws*, p. 161,) provides that at least thirty days previous to the sitting of the court, the commissioners shall select twenty-three good and lawful men, &c., and deliver a list to the clerk, who shall thereupon issue a venire to the sheriff, directing him to summon the persons so selected. Section 2 of the act relative to special terms, provides that the clerk shall issue a venire requiring the sheriff to summon at least twenty-four competent persons, &c. Manifestly a difference is made by these statutes, for in the one case the jurors are to be selected by the county commissioners, at least thirty days before the term of court at which they are to serve, while, in the other case, not more than ten days need elapse between the appointment of the term and the day on which it commences. The sheriff, in one case, is directed to summon twenty-three persons "selected;" in the other, he is to summon twenty-four competent jurors, &c. The common law mode of selecting jurors is prescribed for special terms, and a statutory mode for regular terms. The jurors were rightly summoned in this case.

Error is assigned, in the fifth place, because the court did not comply with the following section of the statute: "It shall be the duty of the District Court to cause each member of the grand jury to be sworn and examined as to his qualifications to serve as a juror." (*Sec. 5, Chap. 3, Criminal Pro-*

ceedings.) Twenty-four "good and lawful men," as it appears, were "empaneled and sworn," so that the court in some way determined that the grand jurors were "good and lawful men," or, in other words, men duly qualified to act as grand jurors; and this decision, like all others, we must suppose was made upon sufficient and legal evidence, until the contrary appears. The contrary does not appear; therefore, we conclude that the jury was legally empaneled. (*Commonwealth v. Parker*, 2 Dick. 549.)

Error is assigned, in the sixth place, because the journal entries do not show that any indictment was found against plaintiff in error. This assignment is true in point of fact; but avails nothing, for such entry is not required by law, where the accused was in custody, as in this case. The indictment, the statute says, "shall be filed and remain as a public record." The indictment, therefore, by filing, becomes accessible to all persons concerned, and proves, *per se*, by whom it was found, against whom and for what crime, in as full and public a manner as the minutes of the court could be made to prove such facts. No entries, descriptive of the indictment, can be necessary, unless a part is better than the whole, or a copy is more certain than the original. The record is, in this respect, perfect.

Error is assigned, in the seventh place, because the petit jury was not regularly empaneled. The record shows that "the defendant, having been brought into court, thereupon came, as a jury," &c. Certain persons it seems "came as a jury," but objection is made, because it does not appear that they were drawn and called according to law. Nothing need be more certain in legal procedure than that these persons, when they "came as a jury," did not come as volunteers to try the cause, but as they were called; and surely no one will pretend that the minutes of the court must show that the clerk wrote their names on slips of paper, put them into a box, and thus go into all the details of drawing a jury. This objection was not made at the time the jury was empaneled, and cannot therefore be now entertained. Chief-Justice Black,

of Pennsylvania in the late case of *Jewell v. The Commonwealth*, says: It would be a very great public misfortune if a person, charged with a public offence, could sit by while he was tried by a jury, to whom he makes no objection, and after a verdict against him on the merits of his cause, set it aside, on account of accidental and unavoidable irregularities in the summoning or calling of the jurors, by which he was not prejudiced.

Error is assigned, in the eighth place, because the verdict was not rendered in open court. Relative to this point it appears, by the record, that "the jury, after a short absence, returned into court the following verdict," &c. Strictly speaking, to return a thing means to serve, or carry it back; but the expression here used is common in legal phraseology, and its meaning cannot be mistaken; for where it is said that a jury have returned their verdict, it is understood that they have brought their decision into court, because no other mode of returning a verdict is known to our laws or practice. Possibly the verdict was returned in the absence of the jury, as has been suggested; but the record does not show, or even make it probable that such was the case; and bare possibility is far from proof of error.

Error is assigned, in the ninth place, because the prisoner was not present when the verdict was rendered. Doubtless it was error in the court below to receive the verdict in the absence of the plaintiff in error, if such was the fact. The prisoner was placed at the bar, the witnesses testified, the arguments were made, and the instructions given, and the jury retired, and, "after a short absence, returned their verdict," all of which took place at the same meeting, or sitting of the court; so that the inference, in fact, is strong, that the prisoner having been brought into court, remained there until the verdict was delivered, or that meeting of the court was ended. The presumption does not arise, as contended, that when the jury took the case, the prisoner was remanded to jail, for the directions of the court as to that matter would be as the circumstances of the particular case might require.

The plaintiff here charges error upon the court below, which is denied by the prosecution. No record or other evidence is adduced in support of such charge; but we are called upon to presume error, simply because it is alleged, contrary to the well-known rule, that plaintiffs in all courts, and in all cases, must prove their claims and charges, or be defeated. Wrongs are never presumed against private persons, much less should violations of law be presumed against a court in discharge of a solemn and sworn duty. But the error, it is said, lies in the defects of the record, not in the state of the facts. This position is untenable. The Supreme Court of Illinois, in *McKinney v. The People*, 2 *Gilman*, 540, says: "In a criminal case, after the caption, stating the time and place of holding the court, the record should consist of the indictment, properly endorsed, as found by the grand jury, arraignment of the accused, his plea, the empanneling of the traverse jury, their verdict, and the judgment of the court; this is all, in general, that the record need state." The Supreme Court of Iowa, in *Harriman v. The State*, 2 *Green*, 270, referring to the above decision, say: "This we consider a safe rule, comprehending all that is necessary to be enrolled, as constituting the record proper in the case." Upon exceptions the rule is the same in criminal as in civil cases. (*Slater v. The People*, 2 *Comstock*, 193; *Wiley v. The People*, 3 *Hill*, 194.) The case of *Dunn v. The Commonwealth*, 6 *Barr's Rep.*, seems to conflict with the above authorities in some respects, but it is adapted to the peculiar practice in Pennsylvania, requiring great strictness in the record; for prisoners are there not allowed to except to any of the opinions or acts of the court before which they are tried.

Prisoners in our courts are provided with counsel; confronted with the witnesses against them; allowed to except to all the court says or does upon trial; and it is no hardship to say that, if they have any objection to the acts of the tribunal before which they are tried, they shall make these objections known to such tribunal, or forever after hold their peace.

Time was when the unfortunate accused was dragged to trial without counsel, or a fair chance for self-defense; then other rules prevailed, and courts tried to make technicalities the means of justice; but, when prisoners come before our courts with more privileges and presumptions in his favor than he otherwise could have, these olden rules cease with the reasons on which they rested, and criminals cannot be allowed to take refuge from the judgments of our liberal laws in the cobwebs of an antiquated practice. The lawful import of these views to the plaintiff in error is not forgotten; but criminal laws were made to prevent crime, and their firm enforcement by courts is a duty as plain as it is painful. Executive clemency may be interposed in one case and withheld in another, as a matter of discretion, but this decision must be followed hereafter; and if judicial compassion now bends the laws to suit a seemingly hard case, a door may be opened through which the midnight assassin and mercenary murderer may escape from the punishment due to their crimes.

Judgment affirmed.

OLNEY, J., having been of counsel, did not sit in this cause.

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JOSIAH L. PARRISH, Plaintiff, v. THOMAS  
STEPHENS, et als., Defendants.

*Referred from Washington.*

1. No particular time is necessary to establish an abandonment of land to the public.
2. It is sufficient if it be used by the public, with the assent of the owner, for such time that an interruption would be an injury. Each case depending on its own circumstances.

THIS is a suit in chancery by the owner of property on Water-street in Portland, to enjoin the proprietors of the

town, and their vendees, from erecting buildings on the river bank, in front of the plaintiff's premises. The bill was filed in 1850, and an injunction allowed by Pratt, Justice; after which, the proprietors, particularly Coffin, as he states, set on foot a compromise with the citizens, whereby a portion of the levee was to be private property, and the remainder a public way; and pending the negotiation, Coffin and others, claiming under the proprietors, erected valuable buildings on the disputed ground. The compromise failing, the parties revert to their original rights, and bring the title of the entire levee under adjudication.

The cause came on to be heard in the Washington District Court, and under a late statute has been adjourned to this court for decision. The record and depositions are too voluminous to be set forth, but the prominent facts, and the most material evidence, will be found in the opinion of the court.

*J. McCabe*, for plaintiff.

*A. Campbell*, for defendants.

OLNEY, J. In 1845, F. W. Pettigrove and A. L. Lovejoy, as joint owners, laid out the town of Portland, and caused a plat to be made exhibiting blocks of lots, designated by numbers, with blank spaces between them, which coalesced with each other at their intersections, and with the surrounding blank spaces at the sides of the plat. Near the first row of blocks the Willamette River is laid down at such a distance as to leave a narrow strip between, which, owing to the meanders of the river, is of variable width, being in some places narrower, and in others wider, than the blank spaces between the rows of blocks. The front row of blocks is, at the lower end, deflected from a right line, to conform to the bend of the river, by which means it continues of the same width as the intervals between the blocks, instead of narrowing to a point as it otherwise would. The sizes of the lots and blocks, and the width of these several spaces, are not



marked; nor is there any evidence on the face of the plat that the spaces were intended for streets, except that they form a connected net-work of open space among and in front of the blocks, making all the lots accessible from each other and from the river, which is here an arm of the sea, within the ebb and flow of the tide, and a resort for shipping.

Upon this strip of ground, between the river and the front row of blocks, the obstructions are being erected. The proprietors claim that the street in front does not cover the entire strip, but leaves a narrow margin along the bank, not dedicated to the public, and on which they have sold lots and erected buildings. Their right is contested by the citizens, who claim the entire strip as public ground; and whether it be public or private property, is the question to be decided.

Upon the face of the plat there is the same evidence that this strip is a street, as that those spaces are streets which separate the rows of blocks. The cross streets terminate at its inner edge, and do not traverse it and terminate at the river; and if it be not a street, then the continuity of the streets is broken, and half the lots fronting on this strip are inaccessible without passing over private property. Indeed, it is admitted to be a street, and its eastern boundary alone is disputed. But the plat carries on its face no evidence of any other boundary than the river. As before stated, neither the width of the strip, nor the width of a street to be taken out of it, is stated; nor is any line drawn upon it between the front lots and the water line of the river; nor is any other intimation given that the entire strip is not as much a street as the entire strip between any two rows of blocks. It is not unreasonably wide for the quay of a commercial town, but on the whole, rather narrow for that purpose, being, in much of its extent, narrower, and but for a slight curve in the river would be nowhere wider than the ordinary streets of the town. And yet, from its location, it must necessarily be much more used than any other, for the carting of goods, and for the ordinary uses of city streets; and besides, it must be the receptacle of all the goods imported and exported by the

vessels resorting there. It is quite as important to the town proprietors as to the individual lot holders and other citizens, that the loading and unloading of vessels, which confers upon the town its principal importance, should not be embarrassed by the caprice and avarice of private persons who might own the land adjacent to the water; and they appear by the face of the plat to have adopted, as reasonable men, the usual and proper means of guarding against this evil. That this street was intended to adjoin the river, to form the connecting link between all the highways of the town and the great highway of water, upon which the town is dependent, is therefore, both reasonable in itself, and apparent from the face of the plat.

The Supreme Court of the United States, in passing upon a similar case which arose in Pittsburg, appears to have considered such a plat sufficient proof that the street extended to the river. They say "there is nothing on the plat which shows any limit to the width of Water-street, short of the river on the south. If a line had been drawn around its southern limit, there would have been great force in the argument, that the ground between such line and the water was reserved by the proprietors." (*Barclay v. Howell*, 6 Peters, 498.) And the Wellsville case was decided the other way by the Supreme Court of Ohio, because there *was* such a line, as well as a natural boundary, namely, a precipitous bluff, along the brink of which the outer line of the street was drawn upon the face of the plat. The street was bounded on the plat by two parallel straight lines, and in the open space between them was written, "width, 66 feet;" and the strip between this street, thus marked, and the river, from the top of the bluff to the water, was from 150 to 200 feet; nearly equal to a row of blocks in Portland. It was, therefore, evident, from the plat and topography of the place that the street was confined to the level ground and the top of the bluff; and there being no other evidence of dedication, but rather the contrary, the strip was held to be private property. (*McLaughlin v. Stephens*, 18 Ohio, 94.) In Louisiana, where

this subject assumed unusual importance from the widening of these quays by alluvial deposits, and where it has been thoroughly studied and discussed, such plats are considered sufficient evidence of dedication; and Chancellor Kent cites approvingly the opinion of Chief-Justice Martin of that State—a jurist, venerable, he says, for his age, learning and character—that when the plan of a city, fronting on a navigable river or the sea, has an open space between the front row of houses, or street, and the water, in public use, it becomes a part of the port, without any other designation or evidence of dedication. (3 *Kent*, 428, *note*.) This is precisely such a case, such a plat, such a strip and such a public use of it. And if the case stood upon this alone, there would be very little danger of error in pronouncing in favor of the dedication.

Before dismissing the case as made by the plat, it is proper to notice a document which is relied on as a limitation of the street to a part only of this strip. Only a copy of the plat is in evidence admitted by both parties to be correct, except as enlarged by subsequent additions. The absence of the original, which was made for the proprietors by Brown, the surveyor, is unaccounted for. The document referred to is upon a sheet exactly like that on which the plat is copied; and the back of the plat is placed against the face of the document, and the two are pasted together at the upper edge, so as to appear like a single sheet, and so that the document, if its presence were suspected, or the duplication of the sheet discovered, is to be found by raising the plat at its lower edge. The document is in tabular form. The columns are headed, respectively, "To whom sold," "When sold," "No. of block." In this tabular exhibit of sales one entry only is made, namely: "William Warren, January 1st, 1848, Lot 4, Block 27." As a caption, over the top of this table of sales is written: "All lots are 50 by 100 feet. Water-street, in front of blocks Nos. 4 and 5, is 30 feet wide, in front of blocks Nos. 1 and 8, is 60 feet wide. All other streets are 60 feet wide."

When and by whom this copy of the plat and this private document were made, does not appear. The plat shows more

to all of them. If any *other* street were wider or narrower than described, surely the excess could not be added to, or the deficiency taken from the adjacent lots; and if *lots* were found greater than described, surely the proprietors could not reclaim the excess. The streets and lots are *marked*, as well as their dimensions given. The boundaries of Water-street as marked, are the river on the one side, and the front lots on the other. If the quantity exceeds the description, the excess may as well be taken from one side as the other—as well next the lots as next the river. But the rule in all such cases is, that the land within the actual boundaries, and no more, passes by the deed or plat, or other conveyance, be it more or less than the quantity assumed. The grantor is neither allowed to reclaim an excess, nor required to make up a deficiency. This being a conveyance, not of *so wide a strip*, but of a *particular strip*, between marked boundaries, *described* as of certain widths at certain places, the memorandum containing that description must give way to, and cannot overrule, those boundaries, if the two conflict. In no view that we can take of this document, therefore, can it affect the *prima facie* dedication appearing on the face of the plat.

But the documentary evidence is not the only nor the principal basis of the plaintiff's claim. He insists that the proprietors, in disregard of plats, lines, memorandums and dimensions, did, *in fact*, set off this ground for a street and levee; and he claims to have proved this by witnesses to the original act of dedication, and to the subsequent conduct and declarations of the proprietors, repeatedly re-affirming it, and to the general belief and expectation of the citizens, thereby knowingly and intentionally produced, and to their public and notorious use of the ground for the purpose of the dedication in pursuance of that belief. The following is the substance of the testimony relied upon, so far as it relates to the acts and declarations of the original proprietors. Lovejoy laid out the town jointly with Pettigrove. Commenced near where the post-office stood in 1852, and ran down the river

to the claim line, allowing sufficient space for a street at the beginning and termination, running a straight line from point to point, without regard to the bend of the river. The front row of buildings is now on this line. "All from the street to the river was to remain as public property, open and free." Understood himself and Pettigrove to be perfectly agreed to this. Warren, in negotiating for lots, objected to one on account of the slaughter-house on the river bank in front. Pettigrove replied it was there temporarily, and could be removed at any time; and he exhibited the original plat, and another with additions, on neither of which were any lots laid out in the strip; and he stated that he did not intend to sell any lots on the bank of the river, nor let buildings go up there. The citizens always claimed it as public, and it was commonly understood to be so. Heard Pettigrove say it was public. *Stephens*—Frequently conversed with Pettigrove about the strip. He always refused to sell lots in it, and said he intended it should remain open as a wharf. Has heard Pettigrove say when offering to sell lots on this street, that they were valuable, because the ground in front of them would be left open to the river. *Ross*—Heard Pettigrove say that the strip was to remain open. *Wilson*—Was joint-owner with Pettigrove of block one. It was common report that the river bank was public. *Couch*—Understood Pettigrove, whilst owner, to say the strip was public property. The lots on the west of it were called *front* lots, by Pettigrove as well as others. *Pettigrove*—Did not lay out the strip into lots. Does not remember having told any one it was public property, or that he so intended it. Might have said so when in a pet, or under the influence of intoxicating drink. Lots, 50 to 100 feet. Streets, 60 feet, except *Front*-street, opposite blocks 4 and 5, where it is some 30 or 35 feet, as will be seen by the original plat. Has seen a true copy in the hands of the mayor. [This is the copy in evidence.] *Carter*—Pettigrove held out the inducement to me that I should have the refusal, by gift or purchase, of that part of the strip in front of my lots. At another time, standing at the wharf,

Pettigrove said that property immediately in front would some day make him a fortune. Has heard Pettigrove say it was public property. He was in a little pet after he had sold. *King*—Inquired of Pettigrove and Lovejoy, and they told him the ground was public. Again, in 1850, Pettigrove made the same statement. He was angry with Lownsdale. *Smith*—This ground was generally understood to be a public levee. Never heard it questioned till 1850. The lots on the west side of it were called *front* lots by the proprietors and citizens.

Here is the testimony of one of those who laid out the town, and not contradicted by the other, of an express setting apart of this ground for the use alleged. Pettigrove does not say it was not set apart, but merely that he does not remember having *said* so. Six witnesses, however, testify that he made that statement on more than that number of different occasions. His memory, saying nothing of his veracity, cannot, therefore, be trusted. The defendants brought this witness from Puget Sound, where his deposition could have been taken quite as well, if the facts, as they lay in his memory, were desired, and where he could have testified free from suspicion, in order to take his deposition under their personal superintendence. And yet, after that unusual proceeding, for which he declared he should be well paid, and after opportunity for private conference, they omitted to ask him the question whether, in laying off the town, "All from the street to the river was to remain as public property, open and free;" though the object of that long journey was to disprove that very fact, to which Lovejoy had already testified, and of which he was the only remaining witness. No reason can be imagined for this omission, except the knowledge obtained by those interviews, that, with all his frailties, he could not be trusted to answer that decisive question. It is enough, however, that Lovejoy swears positively to the act of setting it off, and the purpose for which it was done, in which act and intent both proprietors concurred; none of which is denied by Pettigrove; and that this original act of

dedication, thus satisfactorily established, was, for a series of years, repeatedly confirmed by the declarations and conduct of Pettigrove, contemporaneously with a corresponding use of the ground by the public, in full confidence of their right, with his knowledge and without objections, as a mass of testimony shows. This produces unhesitating belief in the mind of the court that the strip was thrown out to the public, precisely as Lovejoy states.

And, without any such original dedication, the abandonment of this land, from 1845 to 1850, to the free and apparently rightful use of the public, of itself, under the circumstances, estops the proprietors from re-asserting their ownership, and render the documentary evidence, and the evidence of express dedication, of little consequence; for he who induces the public to believe his land a gift, or knowingly permits them to use and treat it as their own, until they have so accustomed themselves, and adjusted their property and accommodated their business to it, that they cannot, without detriment, be dispossessed, confers a right which he can no more resume without wrong, than he can rightfully seize what was acquired otherwise than by his gift. *Turpe est fidem fallere*, "It is base to disappoint the expectations we have authorized," is the key-note of the common and the civil law, of which equity is compounded. It is a fundamental principle of natural justice, pervading all systems of jurisprudence, and common to all countries where man is civilized. (*Rugby Charity v. Merriweather*, 11 East, 372, note; *Jarvis v. Dean*, 3 Bingham, 447; *Gamble v. St. Louis*, 12 Missouri, 617.)

In the *St Louis Case*, one who had left open an alley through his ground for his private use, and allowed the public also to use it and treat it as a street, for two years, without objection, was held to have dedicated it to the use of the public as a highway, and was denied the right to re-assert his title. No particular length of time is necessary to establish an abandonment of land to the public. It is sufficient if it be used by the public, with the assent of the



owner, for *such* time that an interruption would be an injury—each case depending on its own circumstances. (*Cincinnati v. White*, 6 *Peters*, 431; and the *St. Louis Case* above cited.)

The concurrence of the testimony with the plat produces a degree of certainty, unusual to litigated cases, that the proprietorship came to the present owners incumbered with the public easement. Of this they had notice, both actual and constructive; for it was open and notorious; and the testimony, which is too voluminous for quotation, fully shows that they recognised and respected the public right, until, after much importunity from some of the witnesses, and, doubtless, others, who had an itching palm for this attractive property, they yielded, one of them after another, to the desire and hope of reclaiming the tempting prize. The testimony of Carter shows that he succeeded in turning the thoughts of Pettigrove wistfully in that direction. The same appliances were brought to bear upon his successors. It was the work of time for the poison to produce its effect; and then the plat, with its front street bounded by the river, had been so long before the public eye, and the public had so long used the whole street accordingly, in the full belief of their right, and the proprietors had so often encouraged that belief by declaring it destined for that use, that the time was passed when it could be rightfully or successfully reclaimed, even if it were not, as Lovejoy proves it was, originally so intended.

The wharf, on which stress is laid, and the slaughter-house, which Pettigrove explained as temporary, are not evidence of private property against such clear proofs of dedication. Even the sale of lots and the erection of permanent buildings have been held not to disprove a dedication otherwise established, as appears by the *Cincinnati Case*, above cited, and the *Lebanon Case*, 9 *Ohio*, 80. Neither is the state of titles in Portland material. In that respect, it is also identical with the *Cincinnati Case*, where the title was in the United States, who had bargained it to Symmes, and he to the town



proprietors; and yet the Supreme Court of the United States held the dedication good.

We have passed over the question whether it was strictly regular for the plaintiff to bring this suit in his own name. If the bill had been demurred to, or the objection taken by the answer, perhaps an amendment would have obviated any real or supposed defect, and so brought the merits to judgment. As the parties appear to have waived technicalities, and to have sought the opinion of the court upon the main question, that alone has received attention.

We have also disregarded the numerous objections to testimony, found scattered through the depositions. A motion to suppress depositions, or parts of depositions, must, in equity, precede the hearing, as at law it must precede the swearing of the jury; because, if suppressed, it may be necessary to continue the cause, or take other steps to replace the evidence thus excluded.

The ground being adjudged a highway and public levee, it becomes a question what order should be made respecting the several buildings erected upon it pending this litigation.

That they were wrongfully placed there, in violation of the injunction, is evident. Even if erected innocently, their removal would be the legitimate result of this decision, unless the public should suffer them to remain. But they occupy an inconsiderable part of a long line of front, leaving above, below and between them abundant space for the public accommodation, both for the present and for an indefinite future. Their removal is not to be ordered by way of retribution, for equity scorns revenge; and it cannot be done at present on the ground of necessity, for their place is not required for the only use to which it can be lawfully devoted.

By the Spanish law, if one erects houses on public ground they must be pulled down, "and if the corporation choose to retain them for their own use, they may do so." And Domat says, "If it should happen that buildings should be constructed on a public square, they might either be demolished, if found convenient, or suffered to stand, on condition of pay-

ing rent or making some other amends to the public, if that be found more advantageous." If this were authority here, we do not see its applicability to the present case. If one wrongfully builds on another's land, the building belongs to the owner of the land. The city is not the owner, but the guardian of this ground. It is the right and duty of the corporation to see that it is kept in a fit state for use, to the extent of the public wants. But having no title in the soil, it can have none in the buildings. These being in the highway, which is incapable of private ownership, belong to no one unless it be to him who built them. If he neglects to save them by removing them, the public, through the proper authorities, may destroy them not wantonly, but to clear the ground when needed for its legitimate use.

A decree will, therefore, be entered, declaring the public right, and making the injunction perpetual, and authorizing the city to remove all fences and other obstructions except the permanent buildings, which may remain until the further order of the District Court; to obtain which order, the city may apply by petition for the benefit of this decree, and for further directions whenever the interests of the public shall require it.

#### DECREE.

This cause came on to be heard upon the bill of complaint, and the several answers thereto, and the replications, exhibits and testimony, and was argued by counsel. And the court finds that Water-street in the said city of Portland is bounded on the east by the Willamette River, from block eight on the south, including the street on the south side of said block, to the claim of John H. Couch on the north; and that the defendants, at the commencement of this suit, were about to obstruct said street, to the special injury of the plaintiff, as stated in the bill. Therefore, it is decreed that the defendants, and all persons claiming under any of them, be, and they hereby are perpetually enjoined from erecting buildings upon, or otherwise obstructing the said street; and that the

defendants, Stephen Coffin, Daniel H. Lownsdale and W. W. Chapman, pay the costs of this suit in equal parts. And the court does not think fit to order the removal, at this time, of the building in the said street; but the city is hereby authorized to petition the District Court for the benefit of this decree, and for further directions, whenever such removal becomes necessary; and, in the mean time, the city may remove, without such order, all fences and obstructions other than tenantable buildings, whenever the public convenience shall require it.

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JOSIAH L. PARRISH, Plaintiff, v. THOMAS STEPHENS, et als., Defendants.

*Supplementary Opinion.*

An individual may have an injunction to prevent a public nuisance, when such nuisances, when created, will be an extraordinary injury to his property, irreparable in damages, or irremediable at law without a multitude of suits.

WILLIAMS, C. J. This case was decided at the last term of this court, and a decree making the injunction perpetual rendered for the plaintiff. The facts were then stated. Application is now made for a re-hearing. Defendants urge that the decree heretofore made ought to be set aside, because no injunction can be made perpetual in a case of this kind until the title to the property in dispute is ascertained at law. Chancery, it appears to us, is quite as competent as a court at law to decide the questions involved in this case, and having once got possession of the matters in controversy, will proceed to adjust them upon principles of equity and good conscience. If the chancellor thinks it advisable, he may send an issue of fact to a court of law, to be there tried; but such a course under our system of practice is not common, and, with little of good, is necessarily productive of delay and confusion in the proceedings. Either party in

chancery may ask the court to have an issue of fact made up and sent to a jury for trial, but when there is no application for such an order, no ground of complaint exists because it was not made. Defendants, having acquiesced in the mode of procedure adopted by the District Court, cannot now be allowed to reverse their position, and complain of what has been done by their tacit assent, or make objections here, which, if made in the court below, might have been obviated. No rule of law imperatively requires the chancellor to take the verdict of the jury upon any question in his court, and the office of such verdict, when taken, is to advise, and not bind his judgment upon the matter in dispute. (*Story's Equity Jurisprudence*, vol. 2, p. 938.)

Defendants say further, that the decree ought not to stand, because an individual cannot interpose by injunction to prevent a public nuisance. The bill alleges that if defendants proceed with their buildings, the injury to plaintiff will be irreparable; and certain it is, that if plaintiff is entitled to the use and advantage of a public levee in front and in the vicinity of his block, the exclusive occupation of such levee by the erection of houses thereon would be greatly prejudicial to his interests. The damages to the property for purposes of trade and commerce, to which it is adapted by its location, can hardly be estimated. So long as the nuisance continued, so long would the business facilities of such property be obstructed or destroyed. There is no adequate remedy at law. Suit after suit would have to be brought by plaintiff, as the damages are forever accruing, and he would be compelled at last to submit to the wrong, or to what is less desirable, the burden of an interminable litigation. Weight ought to be given to the fact that, at the time this injunction was sued out, there was no real estate in the territory subject to execution; so that a judgment recovered for any considerable amount would hardly be collectable.

No private person can step forward, it is said, to protect the public interests in a cause of this kind, because such right is exclusively confided to the public authorities. Ad-

mitting that an individual may not obtain an injunction to prevent a public nuisance, when the injury is the same to him as to others, still the right to such remedy by an individual may exist where the injury is *much greater* to him than to other persons. Plaintiff, it appears, paid \$10,000 for his property; and any person so disposed might make such property almost valueless by erections upon the adjoining levee if the city authorities, having the sole power to act in the matter, should decline for any reason to restrain him. Where the power to prevent such a wrong exists, the person threatened must be allowed to call it into exercise. No objection is found to the rule that an individual may have an injunction to prevent a public nuisance, where such nuisance will be, when created, an extraordinary injury to his property, irreparable in damage, or irremediable at law without a multitude of suits. (*Corning et al. v. Lorverre*, 6 Johns, Ch. Rep. 439; *City of Georgetown v. The Alexandria Canal Co.*, 12 Peters, 91; *Cowler v. Tucker*, 19 Vesey, 616; *Brown v. Manning*, 6 Hammond Rep. 298; *Leberg v. Gallipolis*, 7 idem, 217.)

Defendants also insist, that if the original proprietors of Portland did dedicate the levee to the public, such dedication does not bind those who succeeded to the rights of proprietorship. To which it may be replied, that if said proprietors legally transferred any portion of their possession or title to persons, or the public, such transfers will hold good against those afterwards buying them out, for the purchasers only take what said proprietors had left to sell. The streets and levee of Portland seem to have become the property of the public in the same way, and defendants, under pretence of ownership, might as well build their houses in the one as upon the other. The present proprietors having adopted and made sales by the map or plat of the town, as laid off by their predecessors, are now estopped from saying that the streets and public grounds are not such as said map or plat shows them to be. Something has been said about the inability of the proprietors to make a dedication of land when

the title is in the United States. Whatever the effect may be upon the rights of the United States, it is clear that the proprietors might sell and transfer whatever interests they had in the land, and having conveyed them and received compensation therefor, cannot re-possess themselves of such interests at pleasure. Dedication may be made of what a man has, be it much or little, and when made and accepted, binds the maker.

So far as the question of dedication is concerned, the former opinion in this case is full enough upon that subject. Courts and juries are bound to decide questions of fact in civil cases according to the preponderance of evidence. Eleven intelligent and unimpeached witnesses testify with more or less pointedness that the levee was held out by the proprietors, and generally regarded as public property, and their testimony is confirmed by the unchanging lines of the map produced in evidence. But two witnesses appear to bolster up the opposite side. Is not the conclusion irresistible, from such an exhibition of proof, that the levee was set apart for public use? Portland was laid out for what it has come to be, the emporium for a large country; and common sense forbids us to suppose that the first proprietors intended that the commercial transactions of such a place should be carried on through the back doors and windows of shops and stores crowded along the water's edge. Public levees are almost as necessary in such towns as public streets. Much reliance is placed by plaintiff upon the case of *Irwin v. Dixon et al.* 9 How. 25; but the only point decided there is, that no dedication had been made of the land in question, and the evidence clearly supported that conclusion. We think that the cases of *Cincinnati v. White*, 6 Peters, 431; *Barclay et al. v. Howel's Lessee*, 6 Peters, 498; *New-Orleans v. The United States*, 10 Peters, 662; *Trustees of Watertown v. Cowen*, 4 Paige Ch. Rep. 510, are authorities decisively showing a dedication, where the evidence to the point is as full as it seems to be in this case.

Application denied.

DEADY, Justice, dissenting.

# CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of the United States,

FOR THE

TERRITORY OF OREGON.

JUNE TERM, A. D. 1854.

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GEORGE H. WILLIAMS, *Chief Justice.*  
CYRUS OLNEY AND } *Associate Justices.*  
M. P. DEADY,         } *J. G. WILSON, Clerk.*

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HENRY MARLIN, Plaintiff, v. W. G. T'VAULT, JOHN  
FLEMMING and THOS. G. ROBINSON, Defendants.

*Action on Bond.—Reserved from Washington.*

1. The act of Congress of May 23d, 1844, relative to town sites, was never in force, or applicable to the land system in Oregon.
2. Lands upon which there had been the requisite settlement and cultivation under the provisional government, though held as town sites when the act of 27th September, 1850, was passed, may be held as donations under that act.

*J. K. Kelly*, for plaintiff.

*A. Campbell*, for defendants.

WILLIAMS, C. J. On the 18th day of February, 1847, defendants made to plaintiff their bond, reciting that plaintiff had conveyed to them a certain land claim in Tuality County,

and received therefor a block of ten lots in the town of Columbia and county of Vancouver, and binding themselves, under the penalty of \$1,000, to comply with all the requisites of the act of Congress granting donations of land to settlers in Oregon, so as to acquire title to said block, and then to convey, &c. The declaration avers that defendants have not in any way complied with said law, or obtained and made title to plaintiff according to the stipulations of said bond. Defendants demur, and for cause in the first place say, that at the date of said bond there was no act of Congress granting donations of land to settlers in Oregon. Words "*in presenti*" must have a future application where such is the obvious intention of those who use them. Courts proceed upon the presumption that all persons know the law, and we must therefore conclude that the parties to this bond, knowing the law, knew that it did not at that time provide for donating lands to settlers in Oregon. Public history in this territory, of which we may take judicial notice, shows that at the time this bond was made, it was expected that such a law would be enacted by Congress, and upon this understanding we must suppose the parties made their contract. There is an evident grammatical mistake in the phraseology of the bond; but defendants, having received plaintiff's property, ought not to be allowed to defeat his right to an equivalent therefor on any such ground.

In the second place, it is said that, between the bringing of this suit on the 21st of October, 1853, and the first day of the ensuing December, defendants had a right to take a claim, and therefore this suit is brought before any complete failure or disability to comply with the bond exists on the part of the defendants. Section 12 of the donation act provides, that persons claiming under such act, by virtue of a settlement and cultivation subsequent to December 1st, 1850, shall first make affidavit "that the land claimed by them is for their own use; that they have made no sale or transfer, or any arrangement or agreement for any sale, transfer or alienation of the same, or by which said land



shall enure to the benefit of any other person." Defendants could not, therefore, make any necessary affidavit to enable them to claim the land by virtue of a settlement, after December 1st, 1850, for they had made arrangement "for the sale of said land, and by which it was to enure to the benefit of another person."

In the third place, it is said that plaintiff seeks to make defendants liable for not doing, under the act donating lands to settlers in Oregon, what said act would not allow them to do. Nothing in law prevented defendants from taking the claim prior to the 1st of December, 1850, for the purpose of complying with the bond; and if it had been so taken, and legally held, title thereto might have been acquired for the use of plaintiff. But it is said defendants were not able to perform the obligation of their bond, because town sites cannot be taken and held under the donation act, and a late opinion by the commissioner of the general land office is cited in support of this position. Defendants, it appears, made the plan of a town, which they called Columbia, and sold a block to plaintiff; but there is nothing to show that there ever was a house in said town, or any thing to prevent the cultivation of every foot of the soil on which it was laid out. Imaginary lines, though running at right angles, will in no way interfere with such a settlement and cultivation as the donation act requires, and therefore their existence forms no excuse for the delinquency of defendants. For aught that appears, the land upon which this town was marked out, had been taken and used as a farm long before the idea of a town was conceived; if so, the mere mapping it out into blocks and lots can make no difference with the right to hold it under the donation act. Commissioner Wilson places the opinion referred to upon the following grounds:

1st. The act of 14th August, 1848, establishing a territorial government for Oregon, "shuts out" all claims under the territorial laws prior to its enactment.

2d. By said act of Congress, the laws of the United States were declared in force in this territory, so far as the same, or any provision thereof, might be applicable.

3d. The act of 23d of May, 1844, relative to town sites upon the public lands, being a law of the United States, was put in force here by said act of 1848, so that town sites were to be entered by certain public authorities, and not subject to be held as donation by private persons.

4th. That donations of land, under the act of September 27th, 1850, are only made for agricultural purposes.

We propose briefly to examine this opinion, and, relative to the first point on which it rests, have to say, the 14th section of the act establishing a territorial government for Oregon, provides "that all laws heretofore passed in said territory, making grants of land, or otherwise effecting the title to lands, shall be null," &c. Manifestly this provision abrogates any law of the provisional government granting or affecting title to land, but *non constat* that it repeals all laws regulating the possessory right of settlers acquired under such government. Prior to the passage of said act, many persons have taken and largely improved claims under the laws of the provisional government; and it must be supposed that Congress did not intend to leave these claims without any legal protection, but simply intended to assert and protect the rights of the United States. Congress did not mean to say that the claim laws of the territory should be void as between the citizens thereof, but that such laws should not bind or encumber the title in the United States. If, then, the act of 1848 does "shut out" all claims, it only shuts out the right as against the United States, and not the right of a settler to hold his claim and improvements against a wrongdoer attempting to dispossess him. Commissioner Wilson takes no notice whatever of those parts of the donation act which expressly recognise and adopt claims made under the laws of the provisional government. If the act of 1848 vacates such claims, as is alleged, the act of 1850 certainly makes them valid; and, so far as there is confliction between the two acts, the provisions of the act of 1850 must, of course, prevail. Section 4 of said act of 1850 grants to those "who shall have resided upon," &c., and also provides that the heirs of settlers

dying before patent issues, shall inherit, whether such descendants complied with the law "under the late provisional government or since." Section 7 of said act requires the surveyor-general to issue certificates upon the necessary proof of settlement and cultivation, "whether made under the laws of the provisional government or not." Whatever effect, therefore, the act of 1848 may have had upon claims made prior to that time, the act of 1850 clearly saves and protects them, and, for the purpose of obtaining a certificate, makes a residence and cultivation under the provisional government just as good as residence and cultivation under the Congressional government. No man can fall into a greater mistake than to suppose that the surveyor-general of this territory, in adjusting the rights of settlers to land here, is bound to ignore all rights acquired under the laws of the provisional government. When Mr. Wilson says that "land occupied as a town site, or for purposes of trade, prior to the act of 1850, is not subject to donation under this act," he lays down a proposition which cannot be maintained. Suppose that on the 1st of October, 1850, after the passage of the donation act, a qualified person settles upon and cultivates a claim till October, 1852, and then changes it into a town site, can the surveyor-general, for that reason, refuse to give him a certificate, when the residence upon and cultivation of any part of said claim are continued by such person as long as said act required? Clearly not, as any man of common sense must see. Now, let it be remembered, that the act of 1850, so far as this point is concerned, puts the rights of those who settled before its passage, and the rights of those who settled afterwards, upon precisely the same footing; so that whatever would not invalidate a settlement made after such act took effect, would not invalidate a settlement made prior to that time. If this argumentation be correct, it follows that, if said qualified person had made his settlement in 1847, and laid off a town in 1849, (residing and cultivating as in the above supposed case,) his rights under the donation law would be exactly the same as in that case.

Suppose a settler to have taken a claim of 640 acres in 1845, and to have resided upon and cultivated it for four consecutive years, and then, in 1849, to have laid it off into a town, in which he continues to reside; when such settler applies for a certificate, would it be the duty of the surveyor-general to say to him, it is true you have complied with the law in every respect, but you have forfeited every thing in attempting to build up a town, for "land occupied as a town site, prior to the act of 1850, is not subject to donation under that act?" Emigrants, from the first, came to Oregon with the idea that the lands here would be donated to them, and the first comers, having choice of the country, would, of course select such claims as, in their opinion, would be most valuable in the future growth of the territory. Suppose one of these early settlers to have taken a claim with the belief that it would, in process of time, be a good location for a town, and the course of events has proven the correctness of his judgment, is there any good reason why such settler should not have the fruits of his labor in fitting said place for a town, and the benefit of his foresight in the selection? He has a perfect right to admit persons to occupy under him, or to exclude them; and if he does so admit persons for the public good, ought his rights against the government to be less than they otherwise would have been? The public use of part of a claim is not inconsistent with such a residence and cultivation by a settler as the act of 1850 contemplates. Suppose a man to take and duly notify for a claim of 640 acres, and then reside upon and cultivate forty acres, with the avowed purpose of holding the whole, does the manner in which he may use the residue of such claim make any difference with his right to a certificate for the entire section? Certain it is, that if said 600 acres were left in a state of nature, his right would be as perfect as to the forty which he had fenced and ploughed; and ought anybody, much less the government, to object if the settler, instead of letting lands in his possession lie in a wild state, puts them to any use of profit to himself, and of advantage to the public? Residence upon

and cultivation of a part of a claim, with the *bona fide* intention of holding and securing title to the whole, is all that has ever been required, where "settling upon" is made the mode for acquiring lands of the United States. When a man settles upon vacant land in Oregon, and his possession thereto becomes property, which the laws of the territory will protect, he must be allowed to hold such land against all junior claims, provided he complies with the donation act. No person can lawfully enter upon such a settler's claim without his consent; and if persons by means of such consent do get in as town residents, tenants, or in any other way, ought they be permitted to turn around and deny the right of him under whom they hold? "Prior in time, prior in right," though a maxim in equity, is the only safe and certain rule that can be applied to settlers in Oregon, all other things being equal.

Is the act of 1844 applicable to town sites in Oregon? On the 9th of September, 1850, Congress established territorial governments for Utah and New-Mexico, and, as in our act of 1848, declared the laws of the United States in force in said territories as far as applicable, &c. President Pierce, in his first message to Congress, says: "I recommend the extension of the land system over the territories of New-Mexico, Utah," &c. Commissioner Wilson, in his report accompanying the message, says: "The expediency and propriety of early action for the extension of the land system over the territories of New-Mexico and Utah is suggested and recommended." Now if the land system did not go to New-Mexico and Utah by force of their acts, it certainly did not come to Oregon by force of ours, for the language is the same in all the acts. This act of 1844 is a part of said "land system," and only acts with the system to which it belongs. Disjointed and standing alone here, it would operate about in the same way as the separate wheel of a watch serves to keep time. It is well known that there are no land system and land laws in Utah and New-Mexico, and there were none in Oregon till the act of 1850. That was a system of donating and not selling lands to settlers, and the laws of the selling system, there-

fore, seem inapplicable. The act of 1844 provides, that when any part of the "surveyed" public lands shall be occupied as a town site, &c. The town sites of Oregon were made upon "unsurveyed" public lands. Mr. Wilson, however, argues that the distinction between surveyed and unsurveyed lands is inconvenient, and, therefore, does not exist. Will the commissioner abolish the difference between such lands in all constructions of the donation act? By the act of 1844, county courts and city governments are to "enter town sites at the proper land office at the minimum price," &c. Now, what is the minimum price of lands in Oregon? How can lands be entered at the surveyor-general's office? What law authorizes him to receive moneys for land? Can he grant a certificate except for residence and cultivation, and how is it possible for a county court or city government as such, to reside upon and cultivate a town site? Again, these town sites, under the act of 1844 are to be entered "before the public sale of lands in which they are included is commenced." When did the public sale of lands around the towns of Oregon commence? If it never has commenced, it certainly never will, for such lands have become private property under the donation act. Manifestly, therefore, there never was and never will be a time when town sites in Oregon could or can be entered in accordance with said act of 1844, and will it on that account be pretended that the commissioner, or any other officer, can cut and carve as he pleases to meet some supposed public exigency, and say that one provision of the act is in force, and all other provisions of the same act, because inconvenient, are void? No part of the pre-emption system, it is quite clear, was ever in force in Oregon. No land districts were ever laid out, or land offices established by Congress, where lands might be entered. No claims were ever taken with reference to such laws, and nobody ever dreamed of being governed by them until the late decision of the commissioner as to town sites.

The pre-emption laws of 1838 and 1841, and the California land law, except town sites from private entry; but the Ore-

gon act, while it excepts mineral lands, salines, &c., like the other laws, says nothing about town sites. Why this difference in form unless some difference in fact is intended? The act of 1850 specifically grants the "Oregon City claim," showing that the subject was before the mind of Congress. All other claims seem to be left upon the same footing, to be given to those who could show a first possession, and a compliance with the donation act. True, a person might take a claim for purposes of trade alone, and not be entitled to a certificate therefor, because "cultivation" is necessary to establish right. So several persons may take simultaneous possession of a tract, and thus make it impracticable to give a certificate to either; but the remedy for such cases, if they need any, is to be found in further legislations by Congress, not in far-fetched constructions by the general land office, "making confusion worse confounded."

Policy, the commissioner says, is as strong as the law in support of his opinion; and so it is, and no stronger. Let the common council of a city enter the land upon which such city is situated, then the legislature must prescribe "its rules and regulations," as to the disposal of the lots, and the proceeds of the sales thereof; then the said common council, whose members, changing with every election, are more or less interested in the question, must examine and decide upon the titles, and thus years might elapse before contentions between owners would cease. How much easier and quicker for Congress to authorize some disinterested person to act in the matter, as provided for lots sold in Oregon City prior to 1849. Such special acts are not uncommon. Titles in Burlington and Dubuque, in Iowa, and other towns in the west, were acquired under such legislation.

Again, people have universally acted upon the belief that the act of 1844 was not in force here. Claims have been located, improvements made, homes secured, and moneys invested upon this assumption, and the effect of a contrary rule is now to unsettle rights, and strike a blow at the prosperity of nearly every town in Oregon. If policy is to be consulted

in construing the donation act, it ought to be a policy as liberal to the first settlers of the country—to the men who braved the perils of the then unbroken wilderness—as to those who have since followed in their footsteps. Secretary McClelland, it appears has decided adversely to the foregoing views, but such decision rests entirely upon the reasoning of Commissioner Wilson, and if such reasoning is good, so is the decision, otherwise not. These general views, fuller, perhaps, than the necessities of the case required, have been expressed to show in what light courts of law might regard the question. The other points made by the demurrer are entitled to no particular notice.

Demurrer overruled.

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**\*WILLIAM WATTS et al., Plaintiffs in Error, v. ISAAC WARD, Defendant in Error.**

*Error to Washington.*

1. The finder of lost property is not entitled to a reward for finding it, if there be no promise of such reward by the owner.
2. The finder of lost property cannot use it without the knowledge or consent of the owner to remunerate himself for the trouble and expense of finding and taking care of it.

THE parties emigrated to Oregon, in 1852. Ward lost two horses in the Indian country, and plaintiff in error found and recognised them as belonging to plaintiff. They took the horses to bring and deliver, as they said, to Ward, when he should pay them for their trouble, but used them on the road for driving cattle, hunting buffalo, &c. They also permitted another emigrant to use one of the horses two months. One of the horses died on the journey, and the other in the following winter. The testimony differed as to whether the horses died from hard usage or sickness; but both died in

\*See 62 Am. Dec. 299.



possession of plaintiffs in error. The court instructed the jury, in substance, that the defendants had a right to take up the horses, and use them as much as was necessary and proper to bring them to plaintiff, but had no right to use them for their own benefit, or for purposes other than the bringing of them to the owner. Verdict and judgment for Ward, for \$160.

*M. Chinn*, for plaintiffs in error.

*Jas. McCabe*, for defendant in error.

WILLIAMS, C. J. The instruction of the court, it is said, was erroneous. No doctrine is better settled at common law than that the finder of lost property is not entitled to a reward for finding it, if there be no promise of such reward by the owner. (*Brinstead v. Buck*, 2 Bl. R. 1117; *Nicholson v. Chapman*, 2 H. Bl. R. 254; 2 *Kent's Com.* 356; 5 *Met.* 352.) Some of the authorities maintain that the finder of lost property is entitled to recover from the owner thereof his necessary and reasonable expenses in the finding and restoration of said property. (*Amory v. Flinn*, 10 *Johns.* 102; 2 *Kent's Com.* 356.) Other authorities seem to take the ground that the finder has no legal right to any thing from the owner for his trouble and expense in finding lost property. *Brinstead v. Buck*, *Nicholson v. Chapman*, before cited, appear to stand upon this principle. Chief-Justice Eyre, speaking upon this subject in the latter case, says, "Perhaps it is better for the public that these voluntary acts of benevolence from one man to another, which are charities and moral duties, but not legal duties, should depend altogether for their reward upon the moral duty of gratitude." Chief-Justice Shaw, in *Wentworth v. Day*, 5 *Met.* 352, says that "the finder of lost property on land has no right of salvage at common law." Where one person gratuitously performs an act of kindness for another, the law, as a general rule, does not recognize the right to a compensation for such act.

In the case of *Holmes v. Tremper*, 20 Johns. R. 28, it was held that the plaintiff was not entitled to any recompense for services rendered in saving defendant's property from fire, because such services were entirely voluntary, and without any express or implied promise on the part of defendant to pay for them. No person is bound in law to take trouble with property which he finds; and if, without any knowledge of the owner's wishes, he does incur expense on account of such property, does he not in so doing trust the liberality of the owner rather than the force of law for it may be that such owner did not desire to have his property disturbed, or if lost, preferred to find it himself. Much of the stock in this country is permitted to run at large; and if every animal lost, or appearing to be lost, can be taken up, and the owner thereof legally charged for all trouble and expense thereby incurred, the business of finding cattle would certainly become profitable, and persons might be largely involved in debt without their knowledge or consent. Where a reward is offered for lost property, the finder, when he complies with the terms of the offer, has a right to retain the property in his hands until the promised reward is paid to him. (*Wentworth v. Day*, 5 Met. 352.) Persons are apt to offer a reward if they wish to pay for the finding of lost property. All the authorities make a difference between the finding of property lost at sea and the finding of property lost on land. Commercial policy allows salvage in the one case, because there is peril in the finding, and immediate destruction threatens the property; in the other case there is no peril, and generally no danger that the property will be destroyed. But if it be admitted that the owner of lost property is bound to remunerate the finder for his trouble and expense in the finding, it is certain that such finder cannot pay himself as he goes along by using the property for that purpose. He cannot be permitted to judge as to how much his demand for trouble and expense shall be, and then as to how much he ought to use the property to satisfy such demand. The owner has rights in these matters, and must be consulted.

Let the property, when found, be returned to the owner, and then the amount and mode of compensation, if any, can be determined. Plaintiffs in this case having treated and used the horses as their own, for their own benefit and gain, defendant had a right to charge them with a conversion of the property, and maintain his suit for its value.

Judgment affirmed.

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JACOB CLINE, Plaintiff in Error, v. L. C. BROY,  
Defendant in Error.

*Error to Washington.—Assumpsit.*

The affidavit of jurors will not be received to impeach their verdict.

DEFENDANT in error is a physician, and brought suit against Cline for medicines and professional services. Verdict in favor of plaintiff for \$38. Motion for a new trial. Motion overruled. Judgment on the verdict.

*J. McCabe*, for plaintiff in error.

*M. Chinn*, for defendant in error.

WILLIAMS, C. J. Plaintiff in error, it is said, was entitled to a new trial, for the reason that no bill of particulars was filed with the declaration, and because the jury adopted an illegal mode of ascertaining their verdict. The record shows that a bill of particulars was produced upon the trial, which the clerk testified was sent to him with the declarations, but which he omitted to mark "filed." This omission by the clerk cannot prejudice the rights of the plaintiff. The defendant in a case of this kind is entitled to a continuance, if no bill of particulars is filed, but cannot exclude plaintiff's

evidence, or defeat his action upon that ground. (*Gen. Laws*, p. 200.) One of the jurors who tried this case makes affidavit that each member of the jury marked his finding, and the aggregate of the different findings was divided by twelve and the result taken and returned as a verdict. Nothing appears to prove the incorrectness of this verdict but the said affidavit, which will not be regarded as evidence for that purpose. Affidavit of jurors will not be received to impeach their verdict. (1 *Tenn. Rep.* 11; 5 *Cowen*, 106; 1 *Wendell*, 297; 2 *Tyler*, 11.) When a new trial will be productive of more injury than advantage to the party applying therefor, the court, in the exercise of a sound discretion, may refuse to grant such new trial; and, on account of the smallness of the verdict in this case, we think the decision of the court below right upon that ground.

Judgment affirmed.

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ROBERT SHORTESS, Plaintiff, v. A. E. WIRT,  
Defendant.

*Appeal from Justice of the Peace.—Reserved from Clatsop.  
—Unlawful Detainer.*

The title to land cannot be inquired into, in an action of forcible entry and detainer before a justice of the peace.

CALVIN TIBBETTS died in 1849, possessed of a land claim in Clatsop County. The said claim was sold at an administrator's sale, and, after passing through several hands, came to the possession of the defendant. Plaintiff now, as the guardian of the infant children of said Tibbetts, sues defendant for an unlawful detainer of said claim, on the ground that the title thereto is in said children, and the sale thereof by the administrator was void.

*J. K. Kelly*, for plaintiff.

*A. B. Wait*, for defendant.

WILLIAMS, C. J. No pretence is made that plaintiff or his wards were ever in the possession of said claim, but the right to a recovery is based upon the fact that, when the said Tibbetts died, the title to such claim descended to, and became vested in, his said children.

Section 23 of the forcible entry and detainer act (*Laws* 1851 and 1852, page 38) provides, that "the estate, or the merits of the title, shall in nowise be inquired into in any complaint which shall be exhibited by virtue of this act." It is impossible to sustain this action without inquiring into "the merits of the title" to the claim in question, for plaintiff does not seek to recover on account of a former possession from which he has been evicted, but because the title is in his wards. Not only must defendant be allowed to controvert this title, if the action proceeds, but he must be permitted to establish, if he can, the title under which he holds possession. The whole case then becomes a question as to the validity of conflicting titles. The sole object of this action is to determine the right of immediate possession to real estate, without reference to title, and to hold otherwise would be to allow justices of the peace to adjudicate titles to land contrary to the express provisions of the organic act. It is said that the commissioner of the general land office has decided, that the heirs of persons who died before the passage of the donation act cannot hold by virtue of any settlement made by such decedents prior to that time; but no opinion is given upon this point. The first objection taken is fatal to the action.

ALEXANDER ZACHARY, Plaintiff in Error, v. JACOB  
SWANGER, Defendant in Error.

*Assumpsit.—Error to Washington.*

1. In an action for violating a contract, where the contract furnishes the measure of damages, no other will be adopted.
2. Witnesses, except upon questions of skill or science, are not allowed to give their opinions as evidence where they have no personal knowledge of the facts in the case.

*J. McCabe*, for plaintiff.

*A. Campbell*, for defendant.

WILLIAMS, C. J. Several objections are made to the proceedings in the court below, only two of which deserve particular notice. Evidence was given on the trial to prove that the parties made a contract by which defendant in error was to cultivate, in wheat and rye, a certain quantity of plaintiff's land—plaintiff to furnish seed, team, &c., and defendant to thresh and deliver one-half of the grain to plaintiff. Further evidence was given to show that defendant, after taking possession of, did not cultivate the said land in wheat and rye, but permitted a volunteer crop of oats to grow upon it. The District Court instructed the jury that the "reasonable rent" of the ground was the rule by which to estimate damages for the violation of said contract. We regard this instruction as incorrect. Where the contract furnishes the measure of damages, no other will be adopted. The value of the grain which the plaintiff would have received from compliance with the contract by defendant, is the proper standard for estimating damages in this case. No injustice is worked by requiring a party to perform his agreement, or pay in damages what would be equivalent to a performance.

But this mode of computing damages, it is said, is too vague and uncertain. Farmers acquainted with the land in question can tell about how much it would produce with proper cultivation, and there is no greater danger of mistake here than in any other case where an exercise of judgment is necessary in the estimation of damages. Suppose Zachary had sued Swanger for want of skill and inattention to the crop, by which it was injured, it certainly would be competent for Zachary to show what sort of a crop skill and attention would have produced upon the ground, in order to ascertain his damages; and if this is practicable and safe in case of a poor crop, it is surely none the less so in case of no crop at all. It is a general rule of law, respecting the manner of damages, that when an injury has been sustained, for which the law gives a remedy, such remedy shall be commensurate with the injury to which it is applied. (*Rockwood v. Allen*, 7 Mass. 254; *Swift v. Barnes*, 16 Pick. 194.) To make the rent of land the measure of damages in this case, would be to deny to plaintiff full reparation for the injury which he has suffered. By the delinquency of defendant, plaintiff has lost an ascertainable quantity of grain, as much so as if defendant had agreed to deliver a certain number of bushels at a specified time, and had failed to do so. The court below permitted a witness, who had never seen the volunteer crop of oats, to form an opinion as to its value from the other testimony in the case, and give such opinion as evidence to the jury. This was contrary to the well-established rule that witnesses, except upon questions of skill or science, are not allowed to give their opinions as evidence where they have no personal knowledge of the facts in the case. (*The People v. Bodine*, 1 Denio, 281; *Woodburn v. Farmers' and Mechanics' Bank*, 5 Watts & Serg. 447; *Rider v. Ocean Insurance Company*, 20 Pick. 259; *Beard v. Rirk*, 11 New-Hampshire, 397; *Doe v. Reagan*, 5 Black, 217.) The other proceedings of the District Court in this case seem to be unexceptionable.

Judgment below reversed.





# CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of the United States,

FOR THE

TERRITORY OF OREGON.

DECEMBER TERM, A. D. 1854.

GEORGE H. WILLIAMS,	<i>Chief Justice.</i>
CYRUS OLNEY AND	} <i>Associate Justices.</i>
M. P. DEADY,	
J. G. WILSON,	<i>Clerk.</i>

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WILLIAM F. TOLMIE, Plaintiff in Error, v. THOMAS  
OTCHIN, Defendant in Error.

*Error to Columbia.*

*Judgment for failure to answer a complaint, amended, after a demurrer thereto was sustained, is erroneous, if the record does not show that defendant had notice of the amendment.*

THIS suit was brought in the District Court of Columbia County, to recover damages for the violation of a contract. Tolmie, the defendant below, appeared at the proper time and demurred to the complaint. His demurrer was sustained. Otchin obtained leave to amend his complaint. Judgment was afterward rendered against Tolmie for a failure to answer the complaint so amended, and a jury assessed plaintiff's damages at four thousand dollars. Tolmie sued out a writ of error to reverse the judgment, because no copy of the amended complaint was served upon him.

*A. Holbrook*, for plaintiff in error.

*A. Campbell*, for defendant in error.

WILLIAMS, C. J. Section 43, page 72, Oregon Statutes, provides, that "if the complaint be amended, a copy thereof shall be served on the defendant, or his attorney of record, and the defendant shall answer the same within such time as may be prescribed by the court; and if he omit to do so, the plaintiff may proceed to obtain judgment as in other cases of failure to answer."

Section 71, page 76, declares, "if the demurrer be sustained, either party may amend any pleading demurred to, upon such terms as may be just, and he shall serve a copy of the same on the adverse party, within such time as may be prescribed by the court." These sections clearly show that a copy of the amended complaint in the case should have been served on the defendant in the District Court. No evidence of any such service appears upon the record, nor is there any thing to show that Tolmie was aware of the steps taken against him in the suit after the decision sustaining his demurrer. Tolmie was no more bound to appear and answer the amended complaint, before a copy thereof was served on him, than he was bound to appear and answer the original complaint without such service as the law requires.

Judgment for a failure to answer an amended complaint is to be obtained "as in other cases of failure to answer." Nothing, then, appearing to show power in the District Court to proceed to judgment against defendant on the amended complaint, we think there is error in such judgment, and hold that the record ought to show affirmatively some evidence of a service of the amended complaint on Tolmie, or some act of his in court, after such amended complaint was filed, rendering a statutory service unnecessary.

Judgment reversed.

OLNEY, J. Whilst I do not dissent from the opinion of the court, I would have been quite as well satisfied with a different construction of the statute. I see no very good reason for making this an exception to the general rule, by which the service of papers in the progress of a cause, though required by statute, need not affirmatively appear on the record to support the judgment. When the court has jurisdiction of the person and the cause, errors in the exercise of that jurisdiction ought not to be presumed. It is certainly illegal and erroneous to give judgment for want of answer to an amended complaint not served. The only question is, whether the service should appear of record. My brethren think it ought; and in this conclusion I acquiesce, rather than assume the attitude of dissent upon an unimportant question of mere practice.

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ZACHARIAH NORTON, Plaintiff, v. GABRIEL  
WINTER, et al., Defendants.

*Adjourned from Washington.*

In an action on a forthcoming bond given in an attachment suit, under the act of 1851, it is no answer to say that the defendants in the attachment "surrendered themselves to the process of the court" in that suit.

NORTON sued Winter and Latimer in the District Court of Washington County, and attached their goods and chattels, on the ground that they were non-residents of the territory. Defendants gave a bond to the attaching officer, conditioned that the property attached, or its appraised value in money, should be forthcoming to answer the judgment of the court. Plaintiff now sues for damages, averring a judgment in favor of himself, and against said Winter and Latimer in the said suit, and a breach of the condition of said bond by defendants. Defendants, for answer, in substance say, that the said Winter

and Latimer, in the said attachment suit, "surrendered themselves to the process of the court, and appeared and answered to the action." Plaintiff moves to strike out this pleading by defendants, on the ground that it is a sham and irrelevant answer.

*A. Campbell*, for plaintiff.

*M. Chinn*, for defendants.

WILLIAMS, C. J. Section 9 of the "Act allowing and regulating writs of attachment," (*General Laws of Oregon*, page 60,) declares "that it shall be competent for such defendant, (meaning the defendant in an attachment suit,) at or before the second term, to file special bail or surrender himself into custody, or elect to have the property attached remain in custody."

The same section further provides, "that if the defendant shall enter special bond, or surrender himself into custody, as aforesaid, the operation of such attachment upon the property and moneys of said defendant shall cease in respect of the plaintiffs, whose declarations may have been pleaded to in custody, or by reason of having filed special bail." Admitting that Winter and Latimer, by surrendering themselves into custody, or filing special bail, could thereby have dissolved the bond upon which this suit is brought, the answer does not show that they did either of these acts.

What defendants mean by saying that Winter and Latimer "surrendered themselves to the process of the court," is not very apparent, but there seems to be an effort to get at a defence by implication, which cannot, with truth, be set up in a direct averment. When a defendant appears in person, and answers to any suit against him, he may in one sense be said to surrender himself to the process of the court; but *non constat* that he is "*in custody*," for in a majority of civil cases there is no power to hold a defendant "*in custody*." When the goods and chattels of Winter and Latimer were seized under the writ of attachment, they were "*in custody*"

of the sheriff, but Winter and Latimer might have taken the place of their goods, and *then they* would have been "in custody" as the statute contemplates; but if they did not thus substitute themselves instead of their property, then they "elected to have their property attached remain in custody."

Defendants' answer does not show that Winter and Latimer took the place of their goods "in custody," or that they did anything more than personally to appear in court and answer to the suit, and therefore fails to show that Winter and Latimer's goods were released from the attachment, or that defendants' obligation in the forthcoming bond was discharged.

Nothing appearing in the answer to bar, or in any way affect plaintiff's right of recovery, the motion to strike out ~~must~~ be sustained.

Motion granted.

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HANNER, JENNINGS & CO., Plaintiffs in Error, v.  
STEPHEN COFFIN, Defendant in Error.

*Error to Clackamas.*

Judgment on an award made by referees, after the time of making such award has expired, is erroneous.

*A. E. Wait*, for plaintiffs.

OLNEY, J. This is a writ of error to reverse a judgment of the District Court of Clackamas County on an award of referees. The cause having been referred in that court, the time for making and filing the award was afterwards enlarged to the first day of the then next term. It was made and signed on the third day of the term, and filed on the fourth. The District Court, in treating as unimportant the delay to put the paper on file, appears to have overlooked the fact, that the award itself was not made until after the authority of the referees had expired.

Judgment reversed.

EDWIN T. STONE, Plaintiff, v. FENDAL C. CASON, et al., Defendants.

*Reserved from Clackamas.*

The dissolution of an injunction is a technical breach of the injunction bond.

CASON obtained an injunction restraining Stone from running a ferry; which being dissolved, Stone brought this suit on the injunction bond for the loss of ferriages. Cason answered that the ferry was on his land, and Stone had no license or other right to keep it, and that the ferriages would not more than have defrayed the expenses of running it. Stone demurred to this answer, and the question thus raised was adjourned into this court by the District Court of Clackamas County.

*A. Campbell*, for plaintiff.

*J. K. Kelly*, for defendants.

OLNEY, J. The bond is conditioned to pay all costs and damages occasioned by the injunction. This must not be taken strictly by its words, but conditionally, if the injunction was improperly obtained, or should be dissolved. The dissolution of the injunction was a technical breach of the bond, for which nominal damages may be recovered. The matters set forth in the answer go to the question of damages, not to the right of action.

Demurrer sustained.

THOMAS N. CUTLER, Plaintiff, v. THE STEAMSHIP  
COLUMBIA and OWNERS, Defendants.

*Appeal in Admiralty, Washington.*

1. New evidence cannot be received in this court in Admiralty causes.
2. A rehearing will not be granted for newly discovered evidence, unless it appear that the evidence is new, and not cumulative, and that the application could not have been made in the District Court.
3. Where a collision occurred between a steamship going down, and a brig coming up the Columbia River—*Held*, that the steamship was guilty of the primary and greater fault:—1st. Because she was running close to the larboard shore; 2d. Because she was running down stream in the night, at full speed, when there was danger of meeting other vessels; 3d. Because she incautiously attempted to pass between the brig and the shore.

HOLBROOK, for the defendants, asked leave to introduce new evidence in this cause, which was opposed by Campbell, for the plaintiff.

*A. Holbrook*, for defendants.

*A. Campbell*, for plaintiff.

- WILLIAMS, C. J. The Admiralty practice, which has grown up under the federal judiciary acts and rules of court, is not the practice of this court. The act of Congress creating this court is as high authority as any other act of Congress. By that act writs of error, and appeals in causes of federal recognizance, are to be made to this court "the same as in other cases." In no other case can new evidence be received in this court. Chancery causes are heard anew, but on the same pleadings and proofs as in the District Court. Admiralty causes must be governed by the same practice.

By the Court—Leave refused.

Holbrook then filed affidavits, and asked to have the cause remitted to the District Court for rehearing on newly discovered evidence.

OLNEY, J. It is indispensable to this application that it could not have been sooner made, and that the evidence be new and quite material. None of these conditions exist in this case. No good reason is shown why the application was not made in the District Court below; and besides, the same evidence is already in the record, testified by another witness.

By the Court—Application denied.

OLNEY, J. This is an appeal by the owners of the steamer from the decree of the District Court of Washington County, awarding six hundred dollars to the owners of the brig Francisco, for damages by collision. The District Court decided that the steamer was principally in fault, but that the brig might, by the exercise of ordinary attention and skill, have avoided the collision, and therefore divided the loss between them, and awarded the costs against the steamer.

It appears that the brig was running up the Columbia River before the wind, at the rate of five or six knots an hour, near the south or west shore, and the steamer was running down, at the rate of twelve or fifteen knots an hour, near the same shore. It was about ten o'clock at night; but the moon shone, and the vessels discovered each other at a considerable distance. The brig put her helm a-port, and the steamer put hers to starboard, each intending to run between the other and the shore; so that the course of each was across the track of the other. As the steamer was crossing the bow of the brig, the bowsprit of the latter ran into the steamer's paddle-box, and was carried away, with much of the works on the brig's starboard quarter. The injuries were repaired at an expense of about six hundred dollars, and the losses by detention were about six hundred.

As usual, each casts the blame on the other; and the cir-



circumstances by which their conduct, after they saw each other, is to be judged, are obscurely developed by the evidence. But there are some general rules, recognized elsewhere, which navigators on this coast cannot too soon learn will be applied by the courts as tests of their care and skill. Among those relating to the navigation of frequented rivers, are the following: Vessels going down are entitled to the benefit of the current in the middle of the channel; and vessels going up are entitled to the benefit of the eddies along the shore. Vessels bound either way, when they run near shore, are to take the shore on their starboard side, unless some local cause or other exigency makes the larboard preferable. A steam vessel, having occasion at night, or in a fog, to run on the larboard side, or, indeed on either side, or, in any place where there is a known probability of falling in with other vessels, should slacken her speed, and increase her vigilance in proportion to the danger, and be momentarily on the alert to reverse her engines, or to make any manoeuvre in her power necessary to the safety of other vessels.

Had the steamer been in the middle, or on the north side of the river, which, at that place, is near a mile in width, the two vessels would never have come into dangerous proximity. Or if, running in the night, on the side belonging to vessels bound up, against a wind of which such vessels would be certain to avail themselves, she had run at half instead of full speed, on discovering the brig, the more leisurely to watch her manoeuvres, and had reversed her engines when danger became imminent, the accident hardly could have happened. The opinion of some of the witnesses, that checking her speed would have caused a more dangerous collision further forward on the steamer, must be understood to relate to the time when it had ceased to be in the steamer's power to avoid it. The fact that full speed carried her only half way across the brig's path, proves that a reversal of her engines a minute before would have given the brig time to pass. That the necessity for this was, or ought to have been, seen in time, is certain. The witness, Frazier, a passenger on board the steamer,

**TERRITORY OF OREGON, Plaintiff, v. WILLIAM M. KING, Defendant.**

*Agreed Case from Washington.*

Compensation, fixed by statute for certain services, cannot be increased.

*A. Campbell, for territory.*

*W. H. Farrar, for defendant.*

OLNEY, J. This is an agreed case submitted to this court. The facts, as stated, are, that King, one of the commissioners to erect the penitentiary, was chosen by the board as acting commissioner, whose duty it was "to preside at all meetings of the board, and superintend the performance of all contracts for labor and materials which may have been authorized by the board, to see that the terms of each contract are fulfilled, and to do and perform such other duties, pertaining to the erection of said penitentiary, as the board shall direct." For this service the statute provides him a compensation of one hundred dollars a year. It is agreed he performed services as such acting commissioner, by making journeys in search of building rock, and looking after the execution of contracts, worth, including expenses, two hundred and seventy-three dollars more than the compensation fixed by law; which extra compensation has been allowed and paid to him by the board; and this suit is brought to recover it back.

The statute having fixed the compensation, it was not competent for the board to increase or diminish it.

**Judgment for the territory.**

TERRITORY OF OREGON, Plaintiff, v. SHUBRICK  
NORRIS, Defendant.

*Agreed Case from Washington.*

When the statute required the board of commissioners for erecting a penitentiary to have a secretary, without fixing his salary—*Held*, That he was entitled to a reasonable compensation for his services.

*A. Campbell*, for territory.

*W. H. Farrar*, for defendant.

OLNEY, J. This is an agreed case submitted to this court. The facts, as stated, are, that Norris, one of the commissioners to erect the penitentiary, was chosen by the board as their secretary and, for his services as such, received from them two hundred and fifty dollars; and this suit is brought to recover it back.

The statute requires the board to have a secretary, but makes no provision for his appointment or compensation. The duty to have a secretary implies the power to appoint one, in the absence of all other legal means of procuring the services of such an officer. The duties of a secretary do not appear to be incompatible with those of a member of the board. Both could be performed as effectually by the same person as by different persons; and in neither capacity would he be likely to have views or interests inconsistent with his duties in the other capacity. There is no reason, therefore, why a member of the board could not be employed as secretary.

The fund which ought to pay for that service being subject to the order of the board, the power to employ might include power to compensate out of that fund. But, however that may be, the defendant having, according to the agreed statement of facts, received but a reasonable compensation, is entitled to retain it against the territory.

By the Court—judgment for defendant.

**TERRITORY OF OREGON, Plaintiff, v. WILLIAM M. KING, Defendant.**

*Agreed Case from Washington.*

Compensation, fixed by statute for certain services, cannot be increased.

*A. Campbell, for territory.*

*W. H. Farrar, for defendant.*

OLNEY, J. This is an agreed case submitted to this court. The facts, as stated, are, that King, one of the commissioners to erect the penitentiary, was chosen by the board as acting commissioner, whose duty it was "to preside at all meetings of the board, and superintend the performance of all contracts for labor and materials which may have been authorized by the board, to see that the terms of each contract are fulfilled, and to do and perform such other duties, pertaining to the erection of said penitentiary, as the board shall direct." For this service the statute provides him a compensation of one hundred dollars a year. It is agreed he performed services as such acting commissioner, by making journeys in search of building rock, and looking after the execution of contracts, worth, including expenses, two hundred and seventy-three dollars more than the compensation fixed by law; which extra compensation has been allowed and paid to him by the board; and this suit is brought to recover it back.

The statute having fixed the compensation, it was not competent for the board to increase or diminish it.

**Judgment for the territory.**

TERRITORY OF OREGON, Plaintiff, v. SHUBRICK  
NORRIS, Defendant.

*Agreed Case from Washington.*

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*A. Campbell*, for territory.

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OLNEY, J. This is an agreed case submitted to this court. The facts, as stated, are, that Norris, one of the commissioners to erect the penitentiary, was chosen by the board as their secretary and, for his services as such, received from them two hundred and fifty dollars; and this suit is brought to recover it back.

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The fund which ought to pay for that service being subject to the order of the board, the power to employ might include power to compensate out of that fund. But, however that may be, the defendant having, according to the agreed statement of facts, received but a reasonable compensation, is entitled to retain it against the territory.

By the Court—judgment for defendant.

In *White v. Guirons, Minor*, 331, it was held that one who had contracted with the owner to settle on the land and make improvements, and perform certain conditions, and then to have a deed, was entitled to an action for possession against a stranger.

In *Gilday v. Watson, 2 Sergeant & Rawle*, 410, it was held, that a settlement with intent to take the whole of a vacant tract, under a law of Pennsylvania, which entitled the settler to a patent, on proof of compliance with certain conditions, part of which were settlement and improvement, gave the settler legal possession of the whole tract.

Occupancy, with a view to obtain a settler's right under the laws of Pennsylvania, has always been regarded as giving the occupant a legal title and possession, to the extent of his survey, though unenclosed, against all persons except the State. This is believed to have been the doctrine of all the colonial proprietors and States, who disposed of lands by this and similar modes, though the dearth of books in this territory renders an investigation of the subject impracticable. It is, however, quite clear upon principle, that when the government, or other owner contracts with the purchaser that he shall occupy the land in order to entitle himself to a conveyance, the contract gives the right of possession; and actual occupancy under the contract is possession of the entire tract, whether enclosed or not; and this possession and right of possession are exclusive, and sufficient to support an action for trespass, unless the defendant shows a better right. As the settler has possession, and a right to the exclusive possession of his entire claim, it follows that he must have a remedy for any wrongful invasion of it.

The surveyor general can only decide the abstract question of right between the claimants. He cannot protect the true owner against wrong-doers. This can be done only by the judicial tribunals. Congress has established the land office and the courts. To the one it has given the power to *determine* the right, and to the other power to *protect* the right.

It being the right of the settler to be protected in his pos-

session, while he continues to comply with the terms of the law, and the duty of the courts to afford him that protection, the existence and extent of his alleged possession must be ascertained. If two claim adversely to be in possession of the same tract, by virtue of having included it within their respective boundaries, the legal possession is in him in whom the right is. In such a case of mixed possession, it becomes necessary to ascertain which is the true owner, in order to determine which has possession, and to afford him the protection to which he is entitled. The court must, therefore, adjudicate the right, not as an end, but as a means to an end.

When a qualified settler has set lawful boundaries to his claim, and has commenced his residence and cultivation, the land is severed from the public domain, and has become his private property. When forfeited or abandoned, and not before, it falls back into the mass of public lands, and becomes again subject to settlement. Whilst it remains private property, the owner has the same rights and remedies against third persons, as if his title, such as it is, were indefeasible. That title is an equitable one, accompanied by possession, and the right of possession, which is sufficient to maintain and defend an action at law, against third persons, not clothed with the legal title.

Rickey, having first included the disputed tract within his boundaries, was the true owner, and was, therefore, in possession, and entitled to maintain the action, unless the other claimant gained priority by filing the first notification. The record does not contain sufficient to present this question. It does not appear that Rickey could not file a notification, dating his settlement prior to the notification of the adverse claimant. The instruction was, therefore, properly refused.

By the Court—Judgment affirmed.

*Harding & Grover*, for plaintiff.

*Barnum*, for defendant.

and Latimer, in the said attachment suit, "surrendered themselves to the process of the court, and appeared and answered to the action." Plaintiff moves to strike out this pleading by defendants, on the ground that it is a sham and irrelevant answer.

*A. Campbell*, for plaintiff.

*M. Chinn*, for defendants.

WILLIAMS, C. J. Section 9 of the "Act allowing and regulating writs of attachment," (*General Laws of Oregon*, page 60,) declares "that it shall be competent for such defendant, (meaning the defendant in an attachment suit,) at or before the second term, to file special bail or surrender himself into custody, or elect to have the property attached remain in custody."

The same section further provides, "that if the defendant shall enter special bond, or surrender himself into custody, as aforesaid, the operation of such attachment upon the property and moneys of said defendant shall cease in respect of the plaintiffs, whose declarations may have been pleaded to in custody, or by reason of having filed special bail." Admitting that Winter and Latimer, by surrendering themselves into custody, or filing special bail, could thereby have dissolved the bond upon which this suit is brought, the answer does not show that they did either of these acts.

What defendants mean by saying that Winter and Latimer "surrendered themselves to the process of the court," is not very apparent, but there seems to be an effort to get at a defence by implication, which cannot, with truth, be set up in a direct averment. When a defendant appears in person, and answers to any suit against him, he may in one sense be said to surrender himself to the process of the court; but *non constat* that he is "*in custody*," for in a majority of civil cases there is no power to hold a defendant "*in custody*." When the goods and chattels of Winter and Latimer were seized under the writ of attachment, they were "*in custody*"



of the sheriff, but Winter and Latimer might have taken the place of their goods, and *then they* would have been "in custody" as the statute contemplates; but if they did not thus substitute themselves instead of their property, then they "elected to have their property attached remain in custody."

Defendants' answer does not show that Winter and Latimer took the place of their goods "in custody," or that they did anything more than personally to appear in court and answer to the suit, and therefore fails to show that Winter and Latimer's goods were released from the attachment, or that defendants' obligation in the forthcoming bond was discharged.

Nothing appearing in the answer to bar, or in any way affect plaintiff's right of recovery, the motion to strike out must be sustained.

Motion granted.

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HANNER, JENNINGS & CO., Plaintiffs in Error, v.  
STEPHEN COFFIN, Defendant in Error.

*Error to Clackamas.*

Judgment on an award made by referees, after the time of making such award has expired, is erroneous.

*A. E. Wait*, for plaintiffs.

OLNEY, J. This is a writ of error to reverse a judgment of the District Court of Clackamas County on an award of referees. The cause having been referred in that court, the time for making and filing the award was afterwards enlarged to the first day of the then next term. It was made and signed on the third day of the term, and filed on the fourth. The District Court, in treating as unimportant the delay to put the paper on file, appears to have overlooked the fact, that the award itself was not made until after the authority of the referees had expired.

Judgment reversed.

agent the statute provides that notice of the commencement of suit shall be given.

Again, the note described in the complaint, and signed by C. C. Baker, is dated "June 15th, '54"—the date of the service is the "15th day of September, A. D. 1854." Admitting that the court would be authorized to infer from the execution of the note that Baker was the "agent" of the company upon whom service might be made, within the meaning of the Code, on the "15th of June, '54," *non constat*, that Baker was such agent upon the "15th day of September, A. D. 1854," when this summons was served.

But the court are of opinion that the question of service, or no service, must be decided by an inspection of the nature of the officer or other person serving the summons. No averment contained in the plaintiffs' pleadings can cure a defect in such return. If the law were held otherwise, this case would serve to illustrate what the result might and often would be. The officer certifies that he served the summons on C. C. Baker; but the other important fact, without which the court cannot acquire jurisdiction, to wit, that C. C. Baker was, at the time of such service, the "managing agent" of said corporation, the party himself is permitted to supply, by an averment in his complaint. If this be untrue, the company have no remedy for a false return, because the officer has not made such a return. He only returns that he served the summons on C. C. Baker. The defence to the suit below may have been that Baker was not agent, and therefore not authorized to make the note; if this defence were true in point of fact, as it might be, service upon Baker would not be notice to the company; and by collusion between Baker and the plaintiff, in the making of the note, and suit upon it, the company without remedy might have a judgment rendered against them, without notice of the suit, or even the existence of the cause of action.

*Per curiam*—Judgment reversed.

D. C. COLEMAN, Plaintiff, v. BENJAMIN STARK, Defendant.

*In Chancery.—Adjourned from Washington.*

1. Principal bound by the acts of his agent. Principal must adopt or reject the act of his agent as an entirety.
2. Where one of the two must be injured by an act done, he who caused it should suffer rather than another.

On the 20th day of March, 1850, Lownsdale, Coffin and Chapman, as proprietors of the town of Portland, conveyed a certain parcel of land therein situate to T. A. Hall, W. Hall and S. S. White. On the 13th day of August, 1853, W. Hall conveyed to Dennison. On the 3d day of January, 1851, S. S. White and T. A. Hall conveyed to F. M. Smith. On the 1st day of August, 1851, F. M. Smith conveyed to Flannery. June 5th, 1852, Flannery conveyed to B. F. Smith and S. B. Marye. January 10th, 1853, Marye conveyed to Dennison. July 15, 1853, B. F. Smith and Dennison conveyed to Coleman, so that Coleman thus became vested with such title to said land as Lownsdale, Coffin and Chapman had on the 20th of March, 1850.

On the 16th day of September, 1853, Stark made a deed of the same property to Coleman, and covenanted with him that if ever it should be made to appear that the said title which Coleman derived from Dennison and Smith was good as against him, then he would refund to Coleman whatever he received from him for said property. On the 1st day of March, 1850, in San Francisco, Lownsdale and Stark divided the town of Portland between themselves by deed of partition, in which Stark agreed to ratify all sales made by Lownsdale prior to that time. On the 13th of April ensuing, Coffin and Chapman ratified this act of partition with a qualification that all lots, sold prior to notice of such partition, should stand on the same footing with lots sold before it was made.

On the 15th day of the same month, Couch, as the attorney in fact of Stark, agreed to this qualified ratification by Coffin and Chapman. According to the division between Lownsdale and Stark, the lot in dispute was in that part of the town allotted to Stark, and was not one of the sales ratified by him in the deed of division, unless the said agreement of Couch be regarded in law as the agreement of Stark. On the 26th day of September, 1849, Stark executed to Couch a power of attorney, authorizing him "to do any and all acts during Stark's temporary absence from the territory, which Stark might lawfully do if personally present. Couch testifies that he had this power of attorney when he agreed to the modification of said deed of partition by Coffin and Chapman. Stark says that the said power of attorney was revoked on the 17th day of January, 1850, by the appointment of George Sherman, and that Couch had notice of such revocation about the first of the following month. Couch states that before making the said agreement with Coffin and Chapman, he had notice that Stark had appointed another agent in respect to real estate, and that he informed Coffin and Chapman of that fact.

*M. Chinn*, for plaintiff.

*Hamilton & Stark*, for defendant.

WILLIAMS, C. J. Taking the answer and evidence together, it is quite evident that there was no revocation of the power of attorney to Couch, except a notice from Stark to him that Sherman had been appointed agent in respect to real estate. This notice to Couch did not necessarily revoke his power to act as Stark's attorney, for a man may have two agents at the same place for the transaction of the same kind of business, and it cannot be denied in this case that Sherman and Couch were both acting at the same time as agents for Stark, in Portland. Stark admits that Couch was his agent for some purposes at the time he made the arrangements with Coffin and Chapman, but denies that he had authority to do that

act. Stark's power of attorney to Couch was unlimited in its terms, and what precise portion of the power so conferred was revoked by Stark does not appear, and was not even known to Couch; for he testifies that when he signed the contract with Coffin and Chapman, he believed he had authority to do it.

Stark sent the said deed between him and Lownsdale to Couch, in Portland, so that their arrangements might there be confirmed by others, and entirely consummated, and thus treated Couch as his agent in regard to that matter. Coffin and Chapman, knowing that Couch had the aforesaid power of attorney, and finding the said agreement in his hands, had a right to suppose that he was authorized to act for Stark; and Coffin testifies that if he had not supposed that such was the fact, he would not have ratified the said deed of partition. True, Stark denies that Couch could bind him in that transaction, but the broad terms of the power of attorney, the insufficiency and uncertainty of the alleged revocation, the fact that Stark sent the deed of partition to Couch, and the belief of Couch that he had authority to act as he did, go far to overthrow that position.

Admitting that the power to bind Stark, in this matter, had been transferred from Couch to Sherman, then it does not follow that Stark is not bound; for the evidence shows that Sherman and Couch acted together, and, as far as parol confirmation could go, Sherman confirmed the conduct of Couch in assenting to the said agreement. Stark, in person, could certainly have adopted the act of Couch by parol so as to bind himself; and if the power of attorney to Sherman was like that to Couch, then Stark would be bound by Sherman's acts; for Sherman might do whatever Stark "could lawfully do if personally present." Stark says, in his answer, that the concurrence of Coffin and Chapman, in his arrangement with Lownsdale, was not necessary to its validity; but the bill and exhibits show that they were joint proprietors with Lownsdale in the town of Portland, and that they were the only persons contemplated in said deed of partition whose refusal to ratify it in six months should give Stark a right

to have it cancelled; and these facts are not controverted by the answer.

More than this, the bill shows that Stark has acted and occupied in accordance with the arrangement between him and Lownsdale, and so has taken the benefit of the ratification by Coffin and Chapman, which this answer does not deny, but avers that the agreement between Couch, Coffin and Chapman has been repudiated by defendant.

That Coffin and Chapman were joint proprietors with Lownsdale, in the town of Portland, on the 1st of March, 1850 is not to be disputed in this case; therefore, their ratification of the deed of that date, between Lownsdale and Stark, was necessary to give Stark undisturbed possession of the land therein set apart to him. Stark must adopt or reject that ratification as an entirety. He cannot avail himself of what operates to his advantage, and discard that which he dislikes.

Prior to the 1st day of March, 1850, it seems that Lownsdale, Coffin and Chapman made sales in Portland without restriction, which were valid; and it would be a very great hardship on purchasers in good faith if the sales made by the same persons, just after that date, were void, on account of a private arrangement between Stark and Lownsdale in California, of the existence of which, nothing was known in Portland. Coffin and Chapman's modification of the said deed of partition was manifestly just, and Couch, in ratifying it, was only doing what he knew Stark, in good conscience, ought to do. No great injury is worked to Stark if the understanding between Couch, Coffin and Chapman is regarded as binding upon him, for then he will be entitled to the money for the lots sold by Lownsdale, Coffin and Chapman, after the said deed of partition was made, and before notice of its existence in Portland. But if such understanding be held void, then Coleman must lose the money which he has paid Dennison and Smith for the lot; and if one or the other of the parties must be injured by the act of Couch, it should be Stark, and not Coleman, upon the principle that where

one is the cause or occasion of a mischievous act, he must suffer the consequences thereof, rather than another who has had nothing to do with it.

Admitting Lownsdale, Coffin and Chapman to be in the joint occupation of the town site of Portland, and claiming as proprietors, which is not denied in this case, it may with great reason be urged, that the sale of a lot by them, when Stark was out of the country, to a person ignorant of his claim, would pass a perfect right as against Stark. Equity holds that Coleman has made it appear, in this case, that his title to the land in dispute, derived from Dennison and Smith is good against Stark, and therefore Coleman is entitled to recover back the \$300 he has paid Stark for said land, and to an injunction to restrain Stark from collecting the balance of the \$800 note given on the purchase money.

Decree for plaintiff.

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STEAMER GAZELLE, Plaintiff, v. WELLS LAKE, Defendant.

*Error to Washington.*

After a lien was acquired under the boat law of 1851, the law was repealed. Held—1st. That proceedings under the boat law of 1854, to enforce such lien, were regular. 2d. That the repeal of the act of 1851 did not divest the lien.

At the September term, A. D. 1854, of the court below, judgment by default was rendered against the plaintiff in error, for the sum of one thousand four hundred and ten dollars. The complaint alleges that the defendant in error had furnished lumber for the building of the steamer Gazelle; that said lumber was furnished in the months of November, A. D. 1853, and February, A. D. 1854. Suit in the court below was commenced on the 28th day of August, A. D.

1854. By act of Assembly, passed February 4th, 1851, among other things it was provided, that "mechanics, tradesmen or others," who furnished "supplies or materials" for and on account of the building or repairing, &c., of boats and vessels within the jurisdiction of the territory, should "have a lien on such boats or vessels." By act of Assembly, which took effect May 1st, A. D. 1854, this act was repealed. By the latter act it is provided, that "any person having a demand" of the character sued upon in the court below, "instead of proceeding for the recovery thereof against the master, owner, &c., of the boat or vessel, may at his option, commence an action against such boat or vessel by name."

*A. E. Wait*, for plaintiff.

*J. K. Kelly*, for defendant.

DEADY, J. The errors assigned are three in number. The first error relating to the manner of service was abandoned in the argument, and need not be noticed by the court. The second ground of error is, that the record shows that the lumber was furnished before the first of May, A. D. 1854, and that consequently the indebtedness accrued to Lake before the passage of the present act, giving a direct remedy against the boat. When the defendant in error brought his suit in the court below, he adopted the remedy prescribed by the then existing laws. Although the act in force on the subject of liens at the time the lumber was furnished might have given a different remedy, that particular form of remedy was abolished by the repeal of the statute, and could no longer be used to enforce the liability. If the new statute substituted no other statutory remedy for the one abolished, the party would then be compelled to resort to his common law remedy, and proceed to enforce his claim by an action at law against the persons on whose account the materials were furnished, or by bill in equity to subject the boat to the pay-



ment of the demand. But the new statute gives a specific remedy. It contains no words from which the court can infer that it was the intention of the legislature to exclude the operation of the new remedy from demands of that character, existing at the time of its enactment; on the contrary, the words of the statute are plain and clearly embrace all existing demands. "Any person having a demand as aforesaid," cannot by any reasonable rule of construction be interpreted to mean "only a person that shall *hereafter* have a demand." It is competent for the legislature, at any time, to alter or change the remedy or mode of enforcing a right, and all proceedings instituted thereafter must conform to the new remedy.

The third ground of error is, that it does not appear by the record that Lake had any lien against the boat. The conclusion that the court has come to upon the error already considered, makes this an immaterial question for the purpose of determining the correctness of this record; but as this question has been argued at length, and pressed with a good deal of earnestness upon the court, by the counsel for plaintiff in error, we will give our views upon it. Did the repeal of the act of February 4th, 1851, destroy the defendant's lien upon the steamer? We think not. It is admitted, according to the doctrine cited from *1st Hill, Palmer v. Butler*, that rights given by a statute, which at the time of the repeal of the statute are merely inchoate, fall with the statute. But the right of Lake to hold the steamer as a pledge, or security, for the materials furnished for her erection, was not an inchoate right when the statute was repealed. The transaction out of which the right grew was complete, that is, the delivery of the lumber. By virtue of such delivery, the lien attached to the boat. By operation of law, it practically became a personal mortgage. On the 1st of May, A. D. 1854, when the act was repealed, Lake's right was not inchoate, but perfect. In the language of Dwarries, on the construction of statutes, "nothing remained to be done," and the subsequent repeal of the statute could in no

way impair or destroy the obligation of the contract as it stood at the time the contract was consummated. That obligation was not merely that the owners of the steamer would pay the price stipulated for the lumber, but that Lake should have a lien upon the steamer for the security of its payment.

By the Court—Judgment affirmed.

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HART & BLISSETT, Plaintiffs in Error, v. TERRITORY  
OF OREGON, Defendant in Error.

*Error from Clatsop.*

When it appears from the record that an irregularity in the court below could not prejudice plaintiffs in error, the judgment will not be reversed on that account.

At the August term, A. D. 1854, of the court below, the plaintiffs in error were indicted and found guilty of keeping open a house on Sunday for the sale of spirituous liquors. Hart and Blissett then moved for a new trial, on the ground of irregularity in drawing the trial jury. The motion for a new trial was overruled, and a bill of exceptions signed. The bill of exceptions shows that "the clerk, in calling a jury into the box, read the names of the jurors from a list, and did not draw them by ballot from a box. All the regular jurors in attendance were called, and the jury not being then full, others were called in of the bystanders to complete the jury." It is admitted that the calling of the jury was irregular in this case.

*M. Chinn*, for plaintiffs.

*A. Campbell*, for defendant.

DEADY, J. The Code provides that "the clerk shall prepare separate folded ballots containing the names of the petit

or trial juries, and deposit them in a box. He shall draw from the box twelve names, and the persons drawn shall form a jury, unless some are rejected by challenge, disqualification or otherwise."

The court incline strongly to the opinion that a party, to take advantage of the irregularity, should object at the time of the departure from the mode prescribed by the law, or otherwise he shall be deemed to have consented to it. But it is not necessary to the determination of this case, to pass upon that question. If an irregularity has been committed in the course of the trial, and it also affirmatively appears that no prejudice resulted to the prisoners from the irregularity, the judgment will not be reversed. In this case it appears from the bill of exceptions that the prisoners had all of the regular panel in attendance, and that it was necessary to summon talesmen from the bystanders to complete the jury. Manifestly, then, the manner of selecting the jury in this case made no difference with the result. The jury would have been the same, if they had been drawn from a box by folded ballots.

**Judgment affirmed.**

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**J. P. DAY, Plaintiff in Error, v. L. D. KENT, Defendant  
in Error.**

*Appeal from County Commissioners in District Court.  
Error to Douglas.*

1. The votes of a precinct cannot be rejected because there was no poll-book sent to the county clerk.
2. Irregularities in collecting evidence as to the result of an election, will not avail in contesting such result, if it can be properly ascertained to whom a majority of the legal votes were given. The office will be awarded to him who is found to have such majority.

DAY and Kent were candidates for the sheriffalty of Douglas County, at the June election, 1854. When the county

canvassers had duly examined the returns of said election for said county, they found that Day had received the highest number of votes for said office, and gave to him a certificate of his election. Day then entered upon the discharge of his duties as sheriff of Douglas County. On the 3d day of July, Kent gave notice to Day that he would contest the said election, in which notice he stated as cause for such contest:

*First.* "That there never was any legal election held in Cow Creek precinct, in said county, or if legal, no return was made to the auditor of said county."

*Second.* "That the return of the polls from the precinct of Canyonville are irregular and insufficient in law."

Justice Deady heard the case at chambers, on the 18th of July, and decided that there was no legal return to the county auditor of the election in Cow Creek precinct, and therefore Kent, and not Day, was entitled to said office, and a certificate of election as sheriff of Douglas County was thereupon issued to him.

According to the returns of said election, including that from Cow Creek precinct, Day had 228 votes, and Kent 207, for sheriff of said county; but rejecting the return from Cow Creek, Day has 205, and Kent 207 votes for said office. Nothing is now said by Kent as to the incorrectness of said election, further than Cow Creek precinct is concerned, so that the sole question for this court to decide is, whether the votes of Cow Creek precinct ought to be counted for Day or not. The following is the return from said precinct:

"Pursuant to this notice, an ——— was held at the house of G. F. Hall, Cow Creek precinct, Douglas Co., O. T., June 5th, 1854, for the election of the following named officers for county and precinct agreeable to an order of the acting clerk of the county commissioners, Douglass Co., O. T., (R. H. Dearborn,) votes having been cast by the citizens of Cow

Creek for the following named officers: 'For Council, A. V. Bentley received seven votes, 7;' 'For Council, James Maver received two votes, 2;' and so on through all the county and precinct offices. In the list is this statement: "For Sheriff, J. P. Day received twenty-three votes, 23." Subjoined to said list is the following:

"Hardy Elliff, judge of the election appointed by the court of Douglas County, O. T.; G. F. Hall, by the same; third judge by G. F. Hall and Hardy Elliff, A. V. Bentley, as appointed by G. F. Hall and Hardy Elliff, judges of election; also B. E. Simmons and W. P. Coats as clerks of said election do hereby certify that the polls were opened and closed according to law, and that the same number of votes for and against the aforesaid candidates, and the same we verily believe to be correct; furthermore, that twenty-four votes were cast against becoming a State of the Union, and remaining as we now are, a territory.

G. F. HALL,

HARDY ELLIFF,

A. V. BENTLEY,

*Inspectors.*

B. E. SIMMONS,

W. P. COATS,

*Clerks.*

Filed June 15th, 1854.

R. H. DEARBORN,

*Deputy Auditor, Douglas County, O. T."*

Section, 27, Oregon Statutes, page 57, provides that the clerks when the poll-lists are made to agree, shall write out upon the poll-book a certificate, as nearly as circumstances will admit, in the following form:

"At an election held, &c., (giving place and date,) the following named persons received the number of votes annexed

to their respective names, for the following described offices, to wit:

A. B. had ——— votes for delegate to Congress.

C. D. had ——— votes, &c., (and in like manner for any other person voted for.)

Certified by us, G. H., J. K., L. M., judges of election.

Attest, A. B., C. D., clerks of the election."

Section 28 provides for sending one of these poll-books, certified as above required, to the clerk of the board of county commissioners, and for depositing the other with one of the judges of the election, to be "subject to the inspection of any elector, at any time thereafter, who may wish to examine the same."

*B. P. Boise*, for plaintiff in error.

*B. F. Harding*, for defendant in error.

WILLIAMS, C. J. Kent says that no poll-book was sent by the judges of the election in Cow Creek precinct to the county auditor, as directed in section 28, and, therefore, the return from said precinct should be wholly rejected.

Assuming the premises to be true, the legal conclusion drawn therefrom does not follow. County canvassers are only required to decide who has received "the highest number of votes," for any office to be filled by an election of the people, and no poll-book is necessary to enable them to make that decision. Clerks and judges of election in each precinct of a county are compelled to send to the county auditor a certificate, to which the one from Cow Creek conforms in substance, and these certificates together constitute the evidence upon which the county board determine the result of the election for that county. Had the poll-book of Cow Creek precinct been returned with the certificate, as the statute contemplates, such poll-book would only have shown that A., B. and C. voted at the election, and not for whom

they cast their votes, so that the county canvassers, with the poll-book, could not have decided otherwise than they did without it. True, the clerks should have written out their certificate in the poll-book, but this error is not fatal to the return, for in point of fact it makes no difference whether the certificate is written on one piece of paper or another, provided it is written, and contains in substance what the law requires. When, therefore, the county canvassers had all the evidence as to the choice of the electors in Cow Creek precinct, which a technical compliance with the law would have furnished, and their decision accords with that evidence, nothing in law or reason seems to demand a reversal of such decision, because some collateral and immaterial act was not correctly performed by a ministerial officer. Each clerk at an election is required to keep a poll-book, which is properly nothing more than a list of the voters' names. One of these books is to be held by a judge of the election, for the examination and use of the electors; the other is to be sent to the county auditor, for the convenience, it is to be presumed, of the county officers. When no poll-book is filed with the county auditor, it is said no opportunity is afforded to contest the validity of the election by one who may feel aggrieved at the result of the canvass. This, if true, proves nothing to the point in this case. Judges and clerks may omit to show all about an election, and yet show that one has taken place, and how it terminated. Evidence for those wishing to contest an election, which is the poll-list, is one thing. Evidence for the county canvassers, which is the certificate, is another and different thing. The non-existence of the one does not involve the non-existence of the other. Poll-books, however, are kept in all the precincts of the county, to accommodate those who wish to inspect or use them with reference to the election. Much of the argument for Kent proceeds upon the assumption that no lists of the voters' names were kept at the election, but there is nothing in this case to support this position. No such list, it seems, was returned to the county clerk, as the statute requires; but it is very illogical to argue

that because a thing does not exist in a particular place, it does not exist, therefore, at all. Judges and clerks of elections will be presumed to discharge their sworn duties until the contrary appears. To keep a poll-book is a duty enjoined upon the clerks by law, and without any evidence to prove otherwise, courts will presume a compliance with that law. Admitting, however, that no poll-books were made by the clerks of the election in Cow Creek precinct, it does not then follow that there was no election in that precinct. No one pretends that there was any fraud or corruption in this matter, nor is it even pretended that Day did not get twenty-three legal votes at the Cow Creek polls, but the defect in the said return is supposed to be fatal to all the other facts and rights in the case. Statutes, prescribing the manner in which a public officer shall perform an act, are generally regarded as directory, and admitting the officer to have power, his disregard of such statutes, in doing the said act, will not destroy the rights of an innocent person. (4 *Wheaton*, 503-7; *Iredell*, 157-313; *Monroe*, 344-7; *Blackford*, 158.)

To sacrifice the end of an enterprise, when attained, for mistakes in the mode of procedure, is to throw away the kernel and preserve the shell. Times and places for holding popular elections are appointed by law, to enable freemen to make choice of persons to fill the offices of the government.

When, therefore, the qualified voters of an election district, at the time and place fixed by law, deliver their ballots to a legal depositary, the choice of the people of that district is made. Whoever has received a majority of the legal votes cast, is as much elected at the closing of the polls, as he possibly can be by means of that election. The choice of the voters has become a perfect fixed fact. To make proof of that fact is all that remains to be done. Counting the votes and making the returns are no part of the election, but the mere steps of the agents of those who have voted, to make known the result. Now, it must be evident that it is quite immaterial to the electors and the elected, whose rights are involved in the transaction, in what way the choice of the



people is discovered, if the means used suffice to carry that choice into effect. The whole object of the election is then accomplished. For the sake of convenience, expedition and certainty, the law points out a mode for collecting the evidence, but a failure to follow that mode amounts to nothing, if the same effect is gained which an adherence to the mode would have produced, and the man receiving a majority of the votes gets the office. Truth, if recognised, is not to be rejected because it comes through an imperfect channel. Suppose the law had required a judge to save the ballots for evidence, instead of the poll-book, would their destruction, after they had been given and counted, invalidate the election?

Suppose there had been no return whatever from Cow Creek precinct, but Day had received the certificate of election, and Kent had then contested, Day would be allowed to prove by parol that he had received twenty-three votes in said precinct which had not been counted for him, and thus sustain his right to the office, for his rights would not depend upon the acts or omissions of judges and clerks, but upon the votes of the people. Is Day worse off, with an imperfect return, than he would be with no return at all? Legal distinctions have been confounded in what has been said for Kent in this case, for it has been contended that the doctrine here laid down would make the choice of a person for office, by any loose assemblage of men, an election.

Voting implies something more than the mere expression of an elector's will. When a man votes he must express his will *viva voce* or by ballot, at a time and place fixed by law, and to a person having color of right to receive such expression, and these are all necessary and essential parts of the act of voting. To vote, an elector must do all that the law requires *him* to do in the performance of the act, and then he has voted, and nothing can afterwards be done by others to deprive him of the benefit and effect of that sovereign act. Judges and clerks may prove ignorant or corrupt, may return poll-books or not, as they please; but the just judgment of the

law will give the elector his vote, when its intent and effect are made to appear before the proper tribunal. Surely there is a broad difference between the perfect effective act of voting, and the mere attestation of a clerk to such an act. These views, it is said, open the door to fraud and corruption in elections. How this is to happen does not appear. Judges and clerks of election (five in number) are sworn "to perform their duties according to law and the best of their abilities and studiously endeavor to prevent fraud, deceit or abuse, in conducting the election" at which they act. All their proceedings are public, and it is next to impossible for the judges of an election to add to or take from the legal votes of a precinct, without detection and exposure. Those guards which the law throws around the ballot-box cannot be knowingly disregarded by the officers of an election without the moral guilt of perjury. Mistakes will, however, sometimes occur, but there is no reason in allowing them to destroy all the right and good with which they happen to be connected. Citizens, when they vote, acquire the right to have their suffrage regarded, and the person to whom they are given acquires the right to have them estimated in his favor; and it would be unjust, not to say absurd, to hold that all these rights are destroyed by the mistakes of every petty officer who has to deal with the evidence of the election. To do this would be to sacrifice substance to form; to make the incident of a thing of more consequence than the thing itself. More evils, it is believed, will result in allowing clerical returns to control and decide elections, than in allowing the votes of the people to control and decide them. When a man seeks to put another out of office, and put himself in, by contest, as in this case, he must show that he has received a majority of the legal votes for such office; it is not enough for him to show that A., B. or C. has made some mistake about the returns, or that there is a chance of his being elected. The fact of his election must affirmatively appear. There is not a particle of evidence in this case to show that Kent had more legal votes for sheriff of Douglas County than Day; but all the evidence

we have upon the subject proves the contrary, and that Day's majority over Kent for said office was twenty-one votes. Our statute says, that courts shall determine such contests as this in a manner "to carry into effect the expressed will of a majority of the legal voters, as indicated by their votes, not regarding technicalities or errors in spelling the name of any candidate for office." Effect is to be given to the will of the majority, as expressed by their "votes," and not as it appears from the returns. Courts, in cases of this kind, are not bound by the acts or decisions of canvassing officers, but are to hear parol or other competent evidence, and then give the office to him who appears to have a majority of legal votes for it. This conclusion seems to harmonize with the theory of our government and the substantial requirements of the law. Let the judgment be reversed, and a certificate of election be issued today.

Judgment reversed.

DEADY, J., dissented, by the following opinion:

The determination of the question, who is legally entitled to the certificate of election in this case, is a matter of secondary moment. However decided, the effect in this particular instance will be but transitory, and cannot extend beyond the existing term of the office about which the controversy arises. A majority of the court have decided the question in favor of the plaintiff in error. Although I differ from the majority in their reasoning and conclusions, from beginning to end, yet, if the decision in its consequences ended with this case, I could be content to dissent in silence. But the doctrine now sought to be established, and armed with the authority of *stare decisis*, extends in its consequences beyond this occasion into the future. The principles involved in this case are of vital importance to the well-being and peace of a community like ours. The genius of our institutions, and the tendency of the age, combine to make the polls the final arbiter of all questions involving a choice of public

agents, or public policy. From this tribunal there is no appeal; and however repugnant to the feelings, or adverse to the interests of the minority, may be its decisions, they must yield it submission, or raise the arm of rebellion and anarchy.

Experience has shown that, in times of public excitement and desperate party strife, all manner of nefarious devices and expedients are frequently resorted to for the purpose of improperly affecting the result of the election. To preserve, then, unimpaired the authority and usefulness of the polls, must be among the most important duties of the law-making power. Accordingly, we find that the legislature of the various States, as well as that of our own territory, have from time to time, as experience demonstrated their necessity, enacted laws intended and calculated to guard the purity and secure the correctness of the polls, by decreasing, as far as possible, the temptations and opportunities for fraud and mistake.

These laws are two-fold in their character—preventive and remedial. The remedial are such as provide a remedy or mode of proceeding, by which the result of the election, in any particular, may be scrutinized or contested, whenever it is conceived that it is vitiated by fraud or illegality; but by far the most important and useful of those regulations are the preventive. Without them, an election would be unworthy of the name, and degenerate from a law-appointed and law-regulated proceeding into a mere voluntary assemblage, where the right of the elector, the manner and evidence of the exercise of that right, would be governed and protected by no more certain and just rule than the caprice of the hour, or the interested and uncertain passions of the greater number.

Upon this subject the Code of Oregon, after providing for the public notice of elections, the number and manner of selecting judges and clerks, substantially enacts, that the clerk of the county commissioners shall furnish one of the judges of the election with two poll-books, at least five days

before the election; that the judges and clerks of the election, before receiving any votes, shall be sworn to "studiously endeavor to prevent fraud, deceit and abuse in conducting the same;" that the person administering such oaths shall cause an entry thereof to be made and subscribed by him, and prefixed to the poll-books; that the elector shall in full view deliver his ballot to one of the judges of the election; that said judge shall, upon the receipt thereof, pronounce, with an audible voice, the name of the elector; and if the name be received, "the clerks of the election shall enter the name of the elector and number in the poll-book." After the polls are closed, the canvass shall be made by a comparison of the poll-lists, containing the names and numbers of the electors, until they shall be found or made to agree; that the ballots shall then be counted, unopened, except so far as to ascertain whether each ballot is single; that if the number of ballots shall exceed the number of votes on the poll-list, "one of the judges shall publicly draw out and destroy therefrom so many ballots unopened as shall be equal to such excess." After this, the votes are to be counted, writing in the poll-book the name of each person voted for, and the number of votes he received; to which shall be attached a certificate of the judges and clerks, certifying the same to be correct. This constitutes the return. One of these poll-books, containing this return, is to be sent, under seal, to the clerk of the county commissioners; the other, with the ballot-box, to be deposited with one of the judges of election, "subject to the inspection of any elector, at any time thereafter, who may wish to examine the same." In case of a contest for any county office, after the proper preliminary proceedings, the same shall be tried by the District Court, or the judges thereof at chambers; the court shall hear and determine (without the intervention of a jury) the same, in such manner as shall carry into effect the expressed will of a majority of the legal voters, as indicated by their votes, for such office, not regarding technicalities, or errors in spelling the name of any candidate for such office.

The only question for determination in this case is the legality of the election said to have been held in Cow Creek precinct. No other evidence exists of an election having been held there than is furnished by the certificate of certain persons professing to act as judges and clerks of the election at that place. This certificate asserts that, at an election held in that precinct, certain persons received a certain number of votes for certain offices; and, among others, that the plaintiff in error received for the office of sheriff twenty-three votes. Although not technically correct, it is substantially such a return as the law contemplates. It is the statement of the judges and clerks that an election was held, and their conclusions as to what was the result. But whether these persons, professing to be judges and clerks of election, have stated the facts in these particulars, does not appear, because no poll-book has been returned, nor is there any evidence that one was ever kept. The poll-book is the record of the election. In it, and it only, is to be found the oath of office of the judges and clerks, the names and number of the voters, the challenges made, whether allowed or disallowed, and all the other separate facts which transpire at and constitute an election. This statement, certificate or return, if made with authority, is drawn from the poll-book, and the poll-book should accompany it; so that any errors of calculation that appear upon its face may be corrected by it; but in this case no poll-book exists, no list of the voters' names was kept, no record of the oath of office appears, and there was nothing remaining, or, rather, ever existed, from which they could certify any thing. How, let me ask, did these judges and clerks ascertain that these supposed ballots, to which they have certified, agreed with the number of electors who voted at that election? Certainly they did not ascertain it in the way in which the law requires, by comparing the number of such ballots with the number of voters upon the poll-books; for that was a physical impossibility, as no such thing as a poll-book existed. What assurance had they, have we, or has the defendant in error, that while twenty-three ballots might

have been found in the ballot-box for Day, they were not given by only ten electors, or any number less than twenty-three. In this case, as a matter of fact, no such fraud may have been practiced. It is not alleged by the defendant in error whether it was or was not; nor, as a matter of fact or law, can it be presumed that any one knows it.

But the law founded upon experience presumes that such devices will be practiced, and the defendant in error is entitled to have that security against such contingencies that the law has provided; that is, a comparison of the poll-list (kept name by name publicly, as the election progresses) with the ballots before the votes were counted. If a fraud has been practiced in this particular, (and if it was, the judges and clerks would not likely have been aware of it, for they had no means of detection,) the defendant in error would be almost powerless to detect and expose it. It could not be done without an exact knowledge of the number of voters. How is that to be obtained, when no record was kept of them: Whose business is it to stand by and keep count, and remember it, and if it were any one's, whose memory could be relied upon with any degree of certainty for such information? especially in a precinct that would cast a thousand votes, an event not uncommon in densely populated neighborhoods. But to go further. Suppose it were true that twenty-three ballots were given at Cow Creek for the plaintiff in error, ten, or any number of them less than twenty-three, may have been given by persons not electors of the county.

The judges and clerks are not bound to know that every man who votes is qualified, nor is it possible that they can. But the law, founded upon experience, presumes that illegal votes may be thrown, and therefore it has provided that a poll-book be kept, the simple inspection of which will determine *who did* vote at a given election. The leading fact being known without doubt, a party who has been injured by illegal votes being cast against him, is enabled to show the fact. Besides, to vote illegally, knowing the same, is a criminal offence, and therefore it is important that a poll-book be kept.

But, as in this case, if no poll-book were kept, how could the defendant in error, or any one else, ascertain whether illegal votes were thrown or not, and if so, how many and by whom.

The first step to be taken in the matter is to ascertain who did vote; this, by the security which the law has provided for him, the defendant is entitled to know from the poll-book; but by the decision of a majority of the court, it depends upon whether the judges of election see proper to keep a poll-book or not. If, through ignorance, negligence or corruption, they omit to keep a poll-book and return it, the burden of their ignorance or corruption must fall upon him. If they certify that A. B. had twenty-three votes, or one thousand, he must find out *who* gave them the best way he can; and if he cannot, as in most instances he could not, of course he is practically concluded from showing their illegality, although, in point of fact, one-half of them might have been so.

It is said, however, that the court is to disregard "technicalities" in the decision of this case; true, so the Code declares, but in the same sentence, by a *particular expression*, is defined in what sense the word technicalities is here used. The whole expression is, "not regarding technicalities or errors in spelling the name of any candidate for such office." To my mind the inference is absurd, that because the law commands the court to disregard *such* "technicalities" as error in the spelling of a candidate's name, that therefore the judges and clerks need not be sworn, that therefore there need be no list of the voters' names, that therefore there need be no comparison of the poll-lists and the ballots before counting the votes; in short, that therefore all the security and guard which the law has thrown around the poll is merely so much parliamentary advice to the judges and clerks of election, which, whether they follow or not, shall make no sort of difference with the result.

Again, it is said that the court is to regard the *will* of the majority as indicated by their *votes*. The argument which has been drawn from this partial statement of the law, if it proves any thing, proves too much. That *will* of the ma-



jority must not only exist, but it must be *expressed*, and that substantially in the mode designated by the law. If the elector were to vote *viva voce*, he would express his will, but not in such a mode as would authorize the court to consider it, because the law directs that his will shall be expressed by ballot. In this case, the record containing no evidence of what is known to the law as an election in Cow Creek precinct, then, although the majority of the voters of that precinct, if such an election had been held, would have willed the election of Day, there is no expressed will upon the subject. But it is said, the omission to keep a poll-book and return is the neglect of the judges and clerks, and the voters of that precinct should not be prejudiced by such neglect; that when the elector deposits his ballot he is entitled to have it received by the county canvassers, no difference what may occur by reason of the ignorance, negligence, or corruption of the officers who held the election. This argument is liable to the objection that it assumes the fact in question, that is, that there were legal voters in Cow Creek precinct, and that they did deposit their ballots at an election therein for the plaintiff in error. Of all this there is no legal evidence in this record. No parol evidence has been taken; the certificate of those persons professing to be judges and clerks is of no effect, because nothing appears from which they could certify such result, or any other. But if it were otherwise, the doctrine is erroneous, and is subversive of the true principles which lie at the foundation of the proceeding known as an election. All the regulations which the Code prescribes for holding elections are not merely directory to the officers. Some of them, I admit, are, and should be so held, but others are of the very essence and substance of the proceeding, without which it can have no effect. The rule which distinguishes between the statute that is directory and that that is not, though frequently difficult of application, is in itself simple and plain.

For instance: the Code directs that the clerk of the county commissioners shall furnish the judges of election with two

poll-books, five days at least before the election. The object of this statute is to secure poll-books properly prepared for the records of the election. As the most convenient method of securing this end, the clerical officer of the county is directed to furnish them. But suppose he omit to do so, and the clerks of the election provide themselves with poll-books, and the election proceeds in all respects as if the statute had been obeyed by the auditor. This provision is directory, and a neglect to obey it by the auditor would not vitiate the election, provided the poll-books were obtained in some way and used. The result, in all respects, would be the same. But a poll-book, containing a list of the electors, and their numbers, bears a very different relation to the main object to be accomplished, to wit, an election. Without something substantially conforming to it, there is no legal evidence that the event transpired, although there might be an assemblage of persons qualified to vote, and an individual expression of opinion upon some question to be decided at that election. If the poll-book can be dispensed with, then a collective expression of the will of the voters of the precinct may also be dispensed with, and each individual voter may send his vote by mail, or otherwise, direct to the county canvassers. The necessity of the poll-book is not to be determined altogether with reference to the interests and rights of the supposed electors of Cow Creek precinct. The election is a public proceeding, in which the whole public have an interest, carried on at different places all over the territory at the same time. These twenty-three votes, purporting to have been thrown at Cow Creek for Day, if counted, negative the expressed will of twenty-three legal voters in some other portion of Douglas County, say in Deer Creek precinct. Now, the twenty-three voters of Deer Creek precinct have a right to demand that, before the same number of voters shall be counted from Cow Creek precinct, negating their legally expressed will, the legal evidence that an election was held at the latter place should exist and be produced.

It is said that although these provisions of the law are di-

rectory, and may be obeyed or not at pleasure, without affecting the result, yet there is sufficient security against fraud or mistake in the fact that the election is held openly and publicly, and that the judges and clerks, five in number, are sworn to "studiously endeavor to prevent fraud, deceit and abuse in conducting the same." By the same oath they are bound to conduct the election "according to law;" yet, according to the doctrine of the majority, this part of the oath is only directory, and whether kept or not will not vitiate the election. For the same reason so much of the oath as relates to "fraud, deceit and abuse" may be considered directory by the judges and clerks, and kept or not at pleasure. But this security against fraud and mistake, which is found in the publicity of the transaction, and the oaths of the officers, under the doctrine now established, is a mere mockery. The judges and clerks may omit to take the oath, the statute requiring them to be sworn being only directory. They may hold the election with closed doors, the statute requiring publicity is only directory. The voter is not to lose his rights upon account of these omissions, and so the election is left to the caprice of those who hold it. If illegal votes are received, quite likely no one remembers who gave them, no record has been kept of the voters' names, and, until this becomes known, no steps can be taken to show their illegality, or even to ascertain the fact that they were illegal.

To be certain, then, of any security from fraud or mistake, or to have the means of its detection, if made, there must be some limit to what is directory, something must be imperative. In *Kneass' Case*, page 581, *Parsons' Select Equity Cases*, Judge King says: "the manner of receiving and recording votes is also prescribed, and the procedure in this respect demanded by the law is most important to the prevention of fraud." Again, he says of the same duty, "this direction is among the vital provisions of the law, which no inspector, disposed faithfully to execute his duty, ought to omit, and the absence of which must tend to make the conduct of the election suspicious, if not absolutely illegal."

For these reasons, I conclude that the law requiring the clerks to keep a list of the names and the number of electors, is not merely directory, but absolute and imperative. That it is of the very substance of the thing to be done as the election proceeds, forming a vital and substantial part of the proceeding. To hold otherwise, would open a wide door to fraud, controversy and dispute, that could only be settled by a resort to the uncertain and contradictory memory of judges, clerks and bystanders—the very evil which this provision is intended to guard against. And if, in this particular instance this instruction of the law would operate to exclude votes which were actually given in good faith, it is a misfortune which the parties must submit to for the time being. Mistakes are of daily occurrence in human affairs; and if the law were to be lengthened or shortened to meet each particular case, it would beget more confusion than it would correct.

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WILLIAM LATSHAW, Plaintiff in Error. v. TERRITORY OF OREGON, Defendant in Error.

*Error to Lane.*

1. It is not error for the court to refuse instructions to a jury upon a state of things of which there is no evidence in the case.
2. When several persons are jointly indicted, one is not a competent witness for another, without being first acquitted or convicted, though the defendants have separate trials.

At the October Term, A. D. 1854, of the court below, Latshaw and one Crisman were jointly accused by the grand jury of the crime of extortion, by means of malicious threats, against the person of the prosecuting witness. The prisoners severed in their trials, and Latshaw was tried, convicted, and sentenced by the court to "six months imprison-

ment in the common jail, and to pay a fine of one hundred dollars, and the costs of prosecution." The prisoner then moved for a new trial, which was overruled. Subsequently the judges, before whom the cause was tried, allowed a writ of error to bring the record into this court for review.

*M. Chinn*, for plaintiff in error.

*R. P. Boise*, for territory.

DEADY, J. Section 34, page 189, of the Code, upon which this indictment was found is as follows: "If any person, either verbally or by any written or printed communication, shall maliciously threaten any injury to the person or property of another, with intent thereby to extort money, or any pecuniary advantage whatever, or to compel the person so threatened to do any act against his will, he shall be punished upon conviction," &c.

The errors assigned by the prisoner are as follows:

*First.* That the verdict was contrary to the evidence.

*Second.* That the verdict was contrary to law.

*Third.* That the court misdirected the jury.

*Fourth.* That the court improperly refused the testimony of the witness, Archibald Crisman.

The bill of exceptions contains all the evidence given to the jury. The prosecuting witness was the only witness called to the stand. The first two grounds of error are a mere repetition of one another. We think the evidence warrants the conclusion of the jury; and although it should be a question of doubt whether the guilt or innocence of the prisoner is the correct conclusion from the facts, the question has been decided by the jury; it was their peculiar province to decide

it, and the court below was correct in refusing to set the verdict aside.

The third error, "that the court misdirected the jury," will now be considered. Before the jury retired, the counsel for the prisoner asked the court to charge the jury, as follows: "That if the jury believe, from the evidence that Latshaw and Crisman, or either of them did, by assault and putting in fear, feloniously rob, steal and take from the person of witness, John P. Williams, the watch mentioned in the indictment at the time herein specified, they, or the one making the assault, either being armed or unarmed, the jury cannot find defendant guilty under this indictment." This instruction the court gave in charge to the jury, but added, "that in this case no assault was made." It is now contended for the prisoner that the court erred in adding the words "that in this case no assault was made," and to support the argument, that familiar axiom of the law is cited, "that it is the province of the court to decide upon the law, and the jury upon the facts." Whenever there is *any* evidence tending to prove a fact within the issue, the jury must pass upon it; and it is error for the court to instruct them that such a fact does or does not exist, that it has or has not been proven. But when there is *no* evidence tending to prove a fact, and counsel seek by instructions or argument to submit the question to the jury, the court in its discretion, may very properly say to the jury that no such question can arise in the case. The court is not bound to give instructions which, although as abstract propositions of law may be correct, yet with reference to the case made, are irrelevant. Such instructions can only serve to embarrass the minds of the jury by burdening their deliberations with the considerations of questions of fact, and the application of principles of law that are foreign to the issue they have sworn to try. We think there was *no* evidence given to the jury that an "assault was made." The threats of personal injury are all made with distinct reference to some time in the future, and upon contingency that the witness should continue to withhold from the pris-

oners the property sought to be obtained by such threats. An *assault* is an attempt with force or violence to do a corporal injury; the act must be accompanied with such circumstances as denote at the *time* an intention, coupled with a present ability of actual violence against the person of another. (*See 1 Selw. N. P. 6th edit. 27; 1 Russel, 826; Bac. Abr. Assault.*) From this definition of assault, it is clear "that in this case there was no assault made," and, therefore, no error in the court to so instruct the jury.

A second instruction was asked by the counsel for the prisoner, which was refused by the court. It is in these words: "That if defendant Latshaw, or Latshaw and Crisman, together, did, by threats, and putting witness, J. P. Williams in fear, compel him then and there to give up his watch to defendant Latshaw, then Latshaw cannot be convicted under this indictment." That the refusal to give this instruction to the jury was not erroneous, is so plain that it need only be compared with the words of the section upon which this indictment was founded. The instruction describes substantially the very offence embraced in the thirty-fourth section, and if the jury believed "that defendant, Latshaw, did, by threats, and putting witness, J. P. Williams in fear, compel him to give up his watch," and that said Latshaw made such threats with the intent, then it was their duty to find the prisoner guilty. The fact that the property had been given up under the influence of the threats, could not palliate the prisoner's guilt, or take the offence out of the statute. The intent of the prisoner constitutes the *gravamen* of the offence, without reference to the effect produced upon the party threatened. The latter may be a courageous man, and refuse to give up his property, whatever may be the threats or intention of the prisoner; or he may be a timid man, and immediately deliver it; but in either event, the intention of the prisoner to extort the property is the question to be determined by the jury, and if they find he made the threats with the intent to extort the property, the subsequent conduct of the party threatened can neither enhance nor palliate the guilt of the

accused, although it may be considered by the jury, for the purpose of determining the main question, the intent.

The only remaining error to be considered is the refusal to permit Crisman, the co-defendant, to be sworn upon the trial as a witness on behalf of the prisoner. As this seems to be the point relied upon by counsel for the prisoner, we have given it careful attention, and conclude that upon authority, reason and public policy, the refusal was correct. Counsel for the prisoner have, in the argument, placed Crisman in the position of an accomplice. The authorities cited to show that he is a competent witness, have reference to accomplices, and accomplices merely. While it is admitted that Crisman is an accomplice, it is equally apparent that he is something more. He is a co-defendant, jointly indicted with the prisoner, and a party to the record. For the prisoner, it has been said, that if one, jointly indicted with others, cannot be a witness for his co-defendants, the prosecution may oppress a defendant by including in the indictment the names of the defendant's witnesses, and thus preclude him from the benefit of that testimony, which would exonerate him from the charge. But the assumption is incorrect in point of fact. The prosecution is not the suit of a private person, which is sometimes converted into the means of gratifying private malice or spleen, rather than the enforcement of a right, or the redress of a wrong. The prosecution is the act of the people collectively, moving by means of preconstituted authorities, uninterested in the result, save to punish the guilty and to acquit the innocent. It is not likely that twenty-four grand jurors, sworn to act impartially, would lend their sanction to oppression of this kind; and if by misapprehension such an instance should occur, the accused is not without remedy. Upon the close of the testimony for the prosecution, if no evidence whatever be given against any one of the persons joined in the indictment, such person is then entitled to his discharge, and may be examined on behalf of the other defendants. (*See Chitty's Crim. Law. vol. 1, p. 626, and authorities there cited;*



*State v. Shaw*, 1 Root, 134; *C. & H.'s Notes*, part 1; *Phil. Ev.* n. 25.)

In this territory, all persons jointly indicted for felony may have separate trials, as a matter of right. (*See Code*, sec. 2, p. 252.) All persons jointly concerned in the commission of a crime must, in the very nature of things, have a strong interest in the acquittal of their fellows. If, by severing in their trials, they may be witnesses for each other, each has an inducement, with which no pecuniary interest can compare, to procure the acquittal of the other. Reason and experience teach that if the practice was established, it would be highly dangerous and subversive of justice. No authority has been found making a person so situated a competent witness for his co-defendant. "When several persons are jointly indicted, one is not a competent witness for another, without being first acquitted or convicted, and it makes no difference whether the defendants plead jointly or separately." (*The People v. Bill*, 10 *John. Rep.* 95.) So, where two were jointly indicted for larceny, and being separately arraigned, pleaded and were tried separately, it was held that a party in the same indictment cannot be a witness for his co-defendant, until he has been first acquitted, or, in some cases, convicted whether the defendants be jointly or separately tried. (*Campbell v. The Commonwealth*, 2 *Virg. Cas.* 314.) "Defendants, jointly indicted, cannot be witness for or against each other until they are discharged from the prosecution, or convicted." (*State v. Mooney*, 1 *Yerger*.) "When several defendants are indicted together, one of them cannot regularly become a witness for the others." (*Chitty's Crim. Law*, vol. 1, p. 626.)

Judgment affirmed.

TERRITORY OF OREGON, Plaintiff, v. WILLIAM  
LATSHAW, Defendant.

*Indictment for Extortion.—Petition for a new trial.*

Newly discovered evidence to impeach a witness upon a former trial,  
is not ground for a new trial.

*R. P. Boise*, for plaintiff.

*M. Chinn*, for defendant.

DEADY, J. At the October term, A. D. 1854, of the District Court for Lane County, the defendant was indicted, tried and convicted of malicious threats against the person of John P. Williams, with intent to extort certain property from the said Williams. The record was afterwards brought to this court, on error, by the defendant, and at this term the judgment of the court below was affirmed. The defendant now petitions in this court for a new trial, on affidavit of newly discovered evidence. The proceeding is founded upon the 6th section, page 247, of the Code. It authorizes the Supreme Court to "grant a new trial for any cause for which by law a new trial may be granted." The newly discovered evidence is appended to the petition of the defendant, in the form of affidavits of various persons, and is to the effect that the affiants would not believe the said John P. Williams on oath. The said Williams was the only witness called and sworn on the trial below.

Without considering the question of diligence on the part of the defendant in not ascertaining this testimony in time to be used on the trial, we think the application for a new trial must be refused. This evidence all tends to impeach the credibility of the prosecuting witness, and to nothing else. To entitle a party to a new trial, the evidence "must be ma-

terial to the issue joined, material to the point to be decided by the verdict, and not collateral; it must go to the merits of the case, and not to discredit or impeach a former witness." (*State v. Carr*, 1 *Foster's* (N. H.) R. 166.)

The issue to be tried was, whether Latshaw had been guilty of extortion or not. While it was competent for the defendant to show to the jury that the prosecuting witness was more or less unworthy of credit, and thereby lessen the weight of his testimony with the jury, yet the credibility of Williams was not the issue to be tried. It was a collateral question. In deciding motions for new trials, on account of newly discovered evidence, courts have found it necessary to apply somewhat stringent rules, to prevent the almost endless mischief which a different course would produce. In criminal cases, especially, would this be the case.

Petition dismissed.

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\*S. W. MOSS, Plaintiff in Error, v. THOMAS CULLY,  
Defendant in Error.

*Error to Clackamas.*

In a suit upon a note, an allegation in the complaint that "defendant made his promissory note in writing, and thereby promised to pay plaintiff," is sufficient to show that plaintiff is the owner of the note.

A. E. Wait, for plaintiff in error.

A. Campbell, for defendant in error.

DEADY, J. This was an action at law upon a promissory note made by Moss to Cully. At the September term, A. D. 1854, of the court below, judgment, on demurrer to the complaint, was rendered against Moss, for the sum of three thousand five hundred and forty dollars and fifty cents.

\*See 62 Am. Dec. 301.

It is not necessary to formally pass upon any of the errors assigned, except the fourth. The others refer to the sufficiency of the summons; and the party, by appearing to it, and pleading to the action, has confessed that it answered the purpose for which it was intended; that is, to bring the defendant into court.

The fourth error is, that the complaint does not show that Cully was the owner of the note sued upon. The complaint alleges that Moss "made his promissory note in writing, and thereby promised to pay to the plaintiff," &c. No delivery is expressly averred; and now it is said for Moss, that delivery being essential to the plaintiff's title, it must be expressly averred or fairly implied from the allegations which are made. We think the doctrine is correct, and that the case is clearly within the rule. Although delivery be essential to a *deed*, yet it need not be expressly averred, the delivery being implied in the allegation that the deed was made. (*See Chitty's Plea. vol. 1.*)

Here the allegation is that the party "made his promissory note, and thereby promised to pay the plaintiff." How could this be done without a delivery of the note; and if it was done, what doubt can be raised that the plaintiff is not *prima facie* the owner of the note, and entitled to sue upon it. Counsel have suggested that for aught that appears upon the face of the complaint, the plaintiff *may* have obtained the note surreptitiously, by mistake, or fraud. True it is, all this and more *may* be, but *is it so?* If it is, the defendant knows it, and can plead his own defence. The plaintiff states his own case and not the defendant's, nor is he bound to anticipate every or any possible defence that may be made and negative the same. The complaint is a legal statement of the facts which constitute the plaintiff's cause of action.

**Judgment affirmed.**

TERRITORY OF OREGON, ex rel. M. G. KENNEDY,  
v. THOMAS PYLE.

*Action at law for usurping the office of Sheriff of Jackson County.—Reserved from Jackson.*

1. In a case of a contested election the office will be given to him who has the right by the votes of the electors.
2. The legislature can change the term of an office, after it is filled, from two years to one.

THIS cause was reserved for the decision of this court, upon an agreed state of facts, in the place of a special verdict. From this it appears that at the general election held on the 6th day of June, A. D. 1853, one William Galley received four hundred and eighty-three votes for the office of sheriff for Jackson County—the relator received four hundred and eleven votes for the same office. Subsequently, the relator contested the election of Galley, under the act of February 3d, 1851, to provide for and regulate general elections, on the ground that Althouse, Brownsville and Sucker Creek precincts were situated south of the forty-second parallel of north latitude, and consequently not in the county of Jackson. The three justices, who by the statute were authorized to decide the contest, determined, on the testimony of a sea-captain, that those precincts were south of the forty-second parallel, and gave the office to the relator. The relator was then duly qualified, and entered upon the discharge of the duties of the office. By an act of Assembly, passed on the 31st day of January, 1854, the electors of Jackson County were authorized to elect a sheriff at the next election, on the 6th of June, 1854. At this, the relator and the defendant were candidates for the office of sheriff. Pyle received four hundred and eighty-nine votes; the relator three hundred and twelve votes. Pyle was duly qualified and entered upon

the discharge of the duties of the office. This action was then brought by the prosecuting attorney on the relation of Kennedy, to oust Pyle from the office.

*Boise & Chinn*, for relator.

*L. F. Mosher*, for defendant.

DEADY, J. The first question raised to be determined by the court is the right of the relator to the office, independent of the act of Assembly under which the election was held, when Pyle, the defendant, was elected. It is admitted that the relator was sheriff *de facto* prior to the election of Pyle. He was in the office by color of right, and exercising the powers and duties of it. So far as the rights of third persons or the public were concerned, his acts were as binding as if he had been an officer *de jure*. (*Burke v. Elliott*, 4 Iredell, 355; *Gilliam v. Reddick*, 4 Ib. 368; *Schlencker v. Bisley*, 3 Scam. 483.) But in this proceeding the question is directly raised, and the relator is a party. In his complaint he alleges that he was "duly elected." This is denied by the defendant. "Where suit is brought against individuals, who justify as public officers, they must show themselves officers *de jure*." (*Blake v. Sturtevant*, 12 N. Hamp. 587; *Schlencker v. Bisley*, 3 Scam. 483.)

And, by a parity of reasoning it matters not whether the party claim a right as party plaintiff or defendant. If he claims the right in question by virtue of being a "public officer," he must show that he is such officer *de jure* before he can maintain such action or sustain such defence. By the agreed case it is admitted that the relator was not elected at the general election, held in June, A. D. 1853; but that one Galley received a majority of the legal votes cast at that election for the office of sheriff. But it is insisted that the determination of that question on the contest, by the three justices, is final and conclusive, and that this court cannot go behind that determination, however the fact may be. The

inquiry by the justices is in the nature of an *inquisition*. By the law they are made part of the machinery of election, for the purpose of ascertaining who has received a majority of the votes, in case the contingency of a contest should arise between two candidates for any county office. Where the right to the office is the question directly in issue, it is merely *prima facie* evidence of that right, and may be overcome by the party who denies such right. Upon these principles, it is not a question of doubt (the facts being admitted) in whose favor the law and the right is, upon the first question presented by the record. The right to the office is not in the relator. The admitted facts overcome the *prima facie* case made by the inquest of the justices, and show that that inquest was erroneous; that the precincts thrown out were not south of the forty-second parallel, but north of it, and, consequently, in the county of Jackson; and, therefore, that the relator was not, in point of fact, "duly elected" at the general election in 1853, as he alleges in his complaint.

The second question is the validity of the act of Assembly under which the defendant claims to have been elected. For the relator, it is contended that the office is a franchise—a property of which consists in the fees and emoluments of the office. That, by election, the office was vested in him for a term of two years, and it was not competent for the legislature to shorten his term of office, by providing for the election of a successor before the expiration of that time. We think differently. Public offices are created for the convenience of the public, and not the officer. It is competent for the legislature to abolish such offices when created, to shorten or lengthen the term of office, or to increase or decrease the compensation. This position, of course, is to be understood with reference to such offices as are not protected from such interference by constitutional inhibitions upon the legislative power. In this territory there is no limitation upon the legislative power in this respect, and the subject rests in the sound discretion of the legislature. If, in the exercise of that discretion, they deem it proper to pass a law

restricting the term of office for sheriff to one year, the court cannot review that discretion. It will make no difference whether the law in question be general and apply to the whole territory, or whether it be special and apply to one county. That is the case.

Admitting the relator to have been "duly elected," after such election the legislature cut down the term of office from two years to one. If the legislature had reduced the fees of the office one-half, instead of the term of office one-half, the effect as to the relator would have been the same, so far as pecuniary injury is concerned. No one will contend for a moment that, in the absence of any constitutional inhibition, it was not competent for the legislature to have thus reduced the fees. Yet, if the position of the relator's counsel be correct, that the office is a franchise, the property of which (consisting of the fees and emoluments) is vested by election in the relator, it is not perceived wherein lies the difference in the two instances, so far as the power of the legislature is in question. If it is competent to reduce the value of the office one-half, by decreasing the officer's emoluments, it is equally competent to do the same thing by changing the term of office from two years to one.

Although some of the older cases and decita of elementary writers may be opposed to the doctrine we have announced, touching the nature of public offices and the power of the legislature over them, it is sustained by the more modern decisions, by the common practice of nearly all the legislative bodies of these States, and the genius and spirit of our institutions.

**Judgment for the defendant.**



LOUIS VANDOLF, Plaintiff, v. DANIEL OTIS,  
Defendant.

*Appeal from Marion—Chancery Injunction*

A settler, with an Indian woman for a wife, is a "married" man, within the meaning of the 4th section of the donation act.

IN the District Court of Marion County, at the November term, an injunction in this cause, previously granted by the chief-justice, on a hearing at chambers, was rendered perpetual, enjoining the defendant from further use and occupation of the plaintiff's land claim. Defendant appealed from the decision of the District Court, and, upon hearing in the Supreme Court, the decree in the court below was affirmed.

*J. K. Kelly* for plaintiff.

*J. G. Wilson*, for defendant.

WILLIAMS, C. J. The difficulty in this case consists in determining whether a settler, in all other respects qualified, can hold 640 acres of land under the donation act, when the wife of such settler is a woman of the Indian race. Defendant admits that he has attempted to take and use the south half of plaintiff's claim; but says the said south half has been set apart by the surveyor-general to the Indian wife of plaintiff; therefore, he has a right to take and treat the land so set apart as vacant land.

Plaintiff claims under section four of said act, which provides that "there shall be and hereby is granted to every white settler or occupant of the public lands," &c., but it is said that "plaintiff's wife is not white," therefore she cannot take and hold under said section.

Admitting the premises to be correct, the conclusion does not follow, unless the wife is to be regarded as a "settler"

within the meaning of the donation act. Beyond all question, if the wife must be qualified as a "settler" in one respect, she must be so qualified in all respects; so that she must not only be of the required color, but of the required age and capacity, or she is entitled to nothing under said act. If the wife of a competent settler has no rights under the donation act, because she is not "white," then it is perfectly certain that the wife of such a settler has no rights under said act, unless she is over the age of eighteen years, for the law, in one breath, prescribes both age and color. Such a conclusion would not only contravene the obvious meaning and uniform construction of said act, but would destroy the hitherto unquestioned right to a large amount of property in Oregon. Furthermore, if the wife only takes as a "settler," she must be a "citizen of the United States;" or, in the language of the act, must have "made a declaration according to law of his intention to become such." Independent of any inference to be drawn from this language, it can hardly be supposed that Congress intended to drive the wife of an American citizen, if of foreign birth, to the extraordinary and unusual process, for females, of naturalization by the courts, before she could participate with her husband in the benefits of the said act.

Section five of said act provides, that to "all white male citizens" emigrating &c., shall be granted, &c.; "if married, 320 acres, one-half to the husband, and the other half to the wife, in her own right." This section differs in phraseology somewhat from section four, but the manifest object of that difference is to give persons, emigrating to Oregon after 1850, one-half as much as section four gives to emigrants before that time. So far as the provisions for the wife are concerned, the language of both sections is substantially the same. Now it is demonstrably certain that the wife, under section five, does not take on account of her color, age, or conduct as a settler, but by virtue of her matrimonial relations to a legal settler. If this be not so, then the wife, to hold under said section, must be a "white male citizen," which is impossible. Congress surely did not intend to make it more

difficult for females, coming to Oregon prior to 1850, to hold land, than for those who came after that period. Section four grants to every "white settler, or occupant," &c.; section five to all "white male citizens." Whatever difference as to females may be found in these sections, certain it is, that section five is more exclusive in its language than section four.

Section six provides, that at certain times "each of said settlers shall notify the surveyor-general of the precise tract, or tracts, claimed by them respectively." "Said settlers," referred to here, are the settlers mentioned in sections four and five. Now, if the wife is one of "said settlers," she must notify the surveyor-general of the precise tract which she claims, and this she cannot do, for she is not allowed to claim any precise tract till it is designated for her by the surveyor-general. If, then, she is not bound to notify under section six, she is not a "settler" under sections four and five. Provisions is made in section eight for the widow, where one is left by the decease of any "settler," but there is no implication that "any settler" may die and leave a widower. Taking all parts of the law together, it is evident that the qualifications of a husband, as a "settler" *per se*, qualify the wife, so that each gets an equal share of the donation. Whenever a claimant is otherwise competent, he is entitled to 640 acres, under section four, "if a married man," and no other exposition of his family affairs is necessary to establish his right. More than this, the surveyor-general has no authority, by law, to inquire into, or receive evidence as to the age or complexion of a claimant's wife; such claimant is not bound to prove more, or permitted to prove less, than the said act requires, to perfect his title to a land claim.

Now, is not a man, legally married to an Indian woman, as much a "married man," to all intents and purposes, as though his wife were the "fairest of the fair?" Is not an Indian woman, married to a white male citizen of the United States, "a wife in every sense of the law?" If two women are married in the same way to the same sort of men, can it

be said that one is a "wife" because she is white, and that the other is not a "wife" because she is copper-colored? Are the children of a white man and an Indian woman, legally married, bastards, because their mother is not white? The conclusion is irresistible that an Indian woman, married to a "settler," is a "wife," within the meaning of the donation act, and, therefore on account of her wifeship, entitled to one-half of her husband's claim. But it is said that an Indian woman is an alien, and, therefore, has no inheritable blood, and cannot be endowed of her husband's estate. Admitting this to be true, it is wholly immaterial, and avails nothing in this case. The question here is, not what would be the rights of an Indian wife in the estate of a deceased husband, at common law, but what are her rights under the donation act, as the wife of a living legal settler. Congress could give land to an Indian wife as well as to any other person, and the simple question is, whether Congress has done so or not. If Congress has done so, which is evident, then the matter of blood is as unimportant as that of color. But this absurd doctrine that one has inheritable blood, and another has not, is exploded here, for by our law aliens can purchase, inherit, hold and convey property as if they were native-born citizens. It is said that the policy of the government has been to keep the whites and Indians apart, and therefore, it is not to be supposed that Congress would, by law, sanction marriages between them.

Whatever policy upon this subject government may have pursued elsewhere, its course here has been different, for white persons were invited to settle in this country before any steps were taken by government to remove the Indians, or extinguish their right to the soil. When the donation act was passed, Congress must have known that many of the early settlers of Oregon had married Indian women; and if it was not intended to place men so married upon the same footing with other married men, why did not Congress say so, instead of using language, by the terms of which they were clearly embraced? Much is said about the advantages

to the country of a decision against the right of Indian wives to hold under the donation act. Doubtless it would be better if land so held belonged to white men; so it would be better if the lands of the indolent were in the hands of the industrious; but such considerations, if worthy of notice at all, cannot weight against the plain meaning and effect of the statutes. These views, it is believed, comport with those taken of this question by the land department of the government.

Established constructions of the donation act, under which persons in good faith have acquired rights, ought not to be suddenly changed to the destruction of such rights, unless for more important reasons than appear in this case. Indian women, as the wives of white men, and the offspring of such marriages, are unavoidably a part of our people, and it is better that they should have property and homes, than that they should be worthless and wandering vagabonds in the country.

Reference is made to the provision for "American half-breed Indians," as showing an exclusion of all other Indians from the benefit of said act. No other Indians, it is true, can take as settlers, under said act; but married women, let it be remembered, take as "wives" and not as "settlers." Some doubt remains as to whether the south half of plaintiff's claim has been set apart to his wife or not; but, in any event, plaintiff is entitled to the possession and use of said lands. It is therefore ordered, that the injunction heretofore granted in this case be made perpetual, and that defendant be forever restrained from committing waste or trespassing upon the land described in plaintiff's petition.

**Judgment for plaintiff.**

PHILESTER LEE, Plaintiff, v. DANIEL SIMONDS  
Defendant.

*Action of Right.—Adjourned into Supreme Court from the  
District Court of Linn.*

1. Residence must be determined from all the facts and circumstances in each particular case.
2. Courts have jurisdiction where one seeks to maintain and defend the possession of a claim against another; and, in such a case, the objection that plaintiff's claim is not in a "compact form," will not be entertained.

THIS suit is brought to recover possession of a certain tract of land in Linn County. The facts material to a decision of the case are as follows: Simonds took the claim in dispute in the fall of 1849; lived on it the ensuing winter; started for Illinois in the spring of 1850; said he was going after his family; would bring one of his sons if his wife did not come; would return if he lived; left the claim in dispute in possession of Carroll as his agent; small field on east side of it; promised to write Carroll every opportunity, directing him how to manage claim; told him not to sell it under two years; if sold, proceeds to be applied to the support of schools. Simonds also left another claim, or parcel of land, in the possession of Peterson. Carroll heard that Simonds, on his way to Illinois, left Portland sick; heard that he died in California; took the claim as his own; took it because he was told, and believed, he could not hold it for another; people threatened to jump it; took it to keep it from being jumped; worked on it; did not live on it; sold it to Lee in the fall of 1850; nothing said to him about Simonds: sold it as his own; sold it for \$700; Lee paid him. Lee went on; has resided on and cultivated it ever since. Simonds came back in the fall of 1851, put up his tent on the claim, went into it, put up a house afterwards on claim; lived in that; has attempted to hold possession since. Somers claims land

between Lee's house and the tract in dispute. Suit between Somers and Lee about the possession of that land decided for Lee.

*Harding & Grover*, for plaintiff.

*Thornton*, for defendant.

WILLIAMS, C. J. These facts show that Lee took possession of the land in dispute in the fall of 1850; but Simonds says that he was then "residing upon and cultivating" said land, and, therefore, Lee's possession was wrongful as against him. Was Simonds residing upon and cultivating the land in dispute in the fall of 1850 within the meaning of the donation act? If he was there, his claim is prior in time and paramount in right to the claim of Lee, but if he was not, then Lee's possession, commencing in 1850 must be preferred to the possession of Simonds, commencing in 1851. Simonds and his family were in the State of Illinois in the fall of 1850. Admitting that Simonds might be with his family in Illinois, and at the same time residing upon a claim in Oregon, yet considerable evidence is necessary to overcome the presumption that a man's residence, at any given time, is where he and his family are actually living at that time. Confessedly, the family of Simonds were residing in Illinois in 1850, and had never been in Oregon; and, as a general rule, the residence or home of a man is where his family resides—though this is not always the case. Simonds tries to establish his residence upon this claim in the fall of 1850, upon the naked fact that he lived there through the winter of '49 and '50; but if that fact of itself proves that he resided there at that time, then the fact that he was in Illinois through the winter of 1850 and '51, proves that he resided there at that time. "Personal presence in a place," says Chief-Justice Shaw, in *Sears v. Boston*, 1 Met. 250, "is one circumstance to determine the domicile, or the fact of being an inhabitant, but it is far from being conclusive." Simonds, it is true, said, when start-

ing for the States that he was going after his family, and intended to return, if he lived; but if this goes far enough to prove a residence in Oregon, it falls far short of proving a residence upon the particular land in question.

There is no evidence in this case to show that Simonds said at any time that his residence was upon the land in dispute; that he ever declared or intended to put his family on it when they came to Oregon; that he ever made any improvements on it, or did any thing to make it a comfortable or permanent home for himself and family. When the claim came into the hands of Lee, there was a small field on it, but when or by whom made does not appear; it is probable that Simonds had a tent, cabin, or house on the claim to live in through the winter of 1849 and '50, but there is no direct evidence to this point. Doubtless Simonds was anxious to hold the claim until he returned from Illinois, but whether as a place of residence, or for purposes of speculation, cannot be determined from the testimony. Nothing in the case enables us to say whether Simonds, after his return from Illinois, intended to leave his residence upon the claim in dispute, or upon the one left in Peterson's hands. Chief-Justice Shaw, in *Thorn-dyke v. Boston*, 1 Met. 242, very properly says: "No exact definition of domicil can be given; it depends upon no one fact, or combination of circumstances, but from the whole taken together it must be determined in each particular case." Whether a man resides upon a claim or not, at a particular time, is a question of fact to be decided from declarations, acts and circumstances of the person concerned, made and existing prior to, and at the time the controversy about his residence originates. Temporary absence by a settler from a claim, upon which he has established his residence, does not necessarily change or affect that residence, if it is in point of fact the home of the settler while away, and he looks to it, and treats it as his actual permanent home. Simonds, it is conceived, never had an actual home upon the claim in question. Lee's right, as against Simonds, is quite as good, if not better, than it would have been if Simonds, when he went to



Illinois, had not left the claim in the possession of Carroll. No one, by proxy, can make or continue such a residence upon the public lands of Oregon as the donation act contemplates, and therefore the possession of Carroll could have been of no avail to Simonds, as against third persons. Notwithstanding Carroll obtained the possession of this claim as agent, he could not hold it in that capacity, so as to make his possession in law answer for the possession of Simonds. Carroll's possession was his own to all intents and purposes, or it was no possession at all. Simonds transferred the possession of the land in question to Carroll in the spring of 1850. In the fall of the same year, Carroll sold and transferred the possession to Lee, so that Lee was not a disseizor, but a regular successor to Simonds in possession of the premises; but it is said that Carroll was guilty of a breach of trust in selling the claim to Lee. Whether this be so or not, Lee, it seems, found Carroll in the actual possession of the claim, and for aught that appears, purchased it in good faith; and having so purchased, he took the possession which Carroll received from Simonds, and holds it unaffected by any dispute between the two, as to their duties and obligations to each other.

Objection is made to the jurisdiction of the court in this matter, on the ground that it is a case of conflict of boundaries, and, pursuant to section six of the donation act, should be determined by the surveyor-general. One illustration will suffice to show the correct view of this question: A. and B. have adjoining claims, and a dispute as to the boundary line between them. Proceedings for the sole purpose of settling this dispute, while the land claimed by both is in common, must be had before the surveyor-general, and are not cognizable in the first instance by the courts. But if A. attempts to appropriate the disputed tract to his own exclusive use by enclosure, or otherwise, then B. may invoke the aid of the courts to maintain and defend his possession, and in the same way A. may protect himself against B. Such a procedure may incidentally involve a decision as to boundary; but the courts, from the necessity of the case, must have this

power, otherwise the occupant of a claim might run his pretended boundaries around a neighbor's land, and thus obtain its use for years. This point is more fully discussed in the case of *Woodsides v. Rickey*, decided at this term.

Objection is also made to Lee's right of recovery, on the ground that his claim is not a "compact form." Courts will not undertake to say whether a claim is in a compact form, or not, so as to change, or curtail possession, but leave that question to the exclusive jurisdiction of the land office. Compact form is a relative, and not an absolute requirement, for a claim taken under certain circumstances might be compact in form, and be entirely different in shape from a claim taken under other and different circumstances. Courts will not anticipate the government in deciding a question of this kind. Somers, it appears, claims the land lying between the house of Lee and the tract in dispute, and that contest, it is said, is still pending before the surveyor-general. Somers tried to dispossess Lee of the said lands by an action of forcible entry and detainer, and was defeated, and the record of that suit is in evidence here; so that thus far it seems Lee is in possession of the land in dispute between him and Somers, and has a right to the exclusive possession of the land in dispute between him and Simonds.

**Judgment for plaintiff.**

CASES  
ARGUED AND DETERMINED  
IN THE  
Supreme Court of the United States  
FOR THE  
TERRITORY OF OREGON.  
JUNE TERM, A. D. 1855.

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GEORGE H. WILLIAMS, *Chief Justice.*  
CYRUS OLNEY AND } *Associate Justices.*  
M. P. DEADY,        }  
J. G. WILSON, *Clerk.*

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WILLIAM T. NEWBY, et al., Plaintiffs in Error, v.  
TERRITORY OF OREGON, Defendant in Error.

*Error to Yamhill, and Petition for New Trial.*

1. A party cannot apply for a new trial in the District Court, and, being there denied, apply, on the same grounds, to the Supreme Court therefor.
2. What constitutes an unlawful assemblage under the statute.

OLNEY, J. The petitioners having been convicted, in the District Court of Yamhill County, of the crime of riot, have applied to this court, in pursuance of the statute, for a new trial.

They allege that the jury misunderstood the instructions of the court, and they produce the affidavits of several of the jurors of that fact. If jurors could be allowed to impeach their verdict by such affidavits, and if this jury mistook their instructions, and even if the instructions were erroneous, still

we are satisfied that the verdict is correct upon the evidence, and ought not, therefore, to be set aside.

The record does not show the objection that a new trial was applied for in the District Court.

We are not prepared to say that a second application could not be made under proper circumstances; but the two courts have concurrent jurisdiction to grant new trials; and a party cannot be allowed to experiment first in the one court and then in the other, for the same cause, or for any cause of which he might, by due diligence, have availed himself on the first application.

We shall not, at this time, establish the rule, that under no circumstances will such affidavits, as are offered in support of this petition, be received. They have been received in some courts, and rejected in others; and a majority of this court would reject them, as at present advised, were it not that the case can be disposed of on other grounds, in which all of us fully concur.

Petition denied.

*Kelly & Chinn*, for plaintiffs in error.

*N. Huber*, for defendant in error.

WILLIAMS, C. J. Plaintiffs in error, who were convicted in the court below of a riot, or unlawful assembly, in whipping one Miller, make a question here as to the correctness of the following instructions, given to the jury by the judge presiding at the trial:

"That if the defendants, or any of them, and others to the number of three or more, assembled with an intent to whip Miller, or have it done by the company, so many of the defendants as were there, consenting to it, were guilty." Objection is made to this exposition of the law, because it is too broad and general in its terms, and might involve the casual spectator of an affray in punishment with those perpetrating the crime. There seems to be no force in the

argument, for the question of intent was fairly submitted to the jury by the District Court; and the evidence must have satisfied them, that the persons convicted assembled not from curiosity, or by accident, but with the "intent" to do the unlawful act. Now, if plaintiffs in error, or any of them, assembled to whip Miller, or to have it done, they were guilty, though some other person may have inflicted the blows; for their object, at least, was to aid and abet in the commission of the offense.

Few riots occur in which all concerned do acts of violence, for, while some perform the work, others keep company to assist if necessary, and by their presence deter opposition; thus directly co-operating in the consummation of the crime.

We see no danger to the innocent from the operation of the law, as laid down by the court below, for it would be impossible for one person to meet others under the circumstances, and with the *intent* specified in the instructions, and, at the same time, be innocent.

Several sections of the act under which plaintiffs in error were indicted, (*Statutes of Oregon, page 204,*) describe the duties and powers of peace officers in case of a riot; and it has been contended that a proclamation by such an officer to such an assemblage of persons to disperse, must be made before such assemblage would become unlawful or riotous.

Section first of the act provides, that "If any persons, to the number of three or more, whether armed or not, shall be unlawfully, riotously, or tumultuously assembled in any city, town or county, it shall be the duty of the mayor, sheriffs and constables," &c. Sections 234-5-6 consist of directions to these officers. Section 7, provides, that "If any of the persons so unlawfully assembled shall demolish, destroy, &c., or do any other unlawful act, he shall," &c. Now, we think that section seven, in speaking of persons "so unlawfully assembled," refers to section one, which clearly contemplates the assemblage as "unlawful," before any steps by the conservators of the peace to disperse it. Surely it would subject the laws to very great and just reproach if its eyes were closed

to the outrageous deeds of a riot, because a peace officer was not present, or, if present, was not willing to command the rioters to disperse. Plaintiffs in error contend, that if the doing of an "unlawful act" by three or more persons, assembled for that purpose, will constitute a riot, then a company of gamblers would be guilty, for gambling is an unlawful act; but it is perfectly apparent from the whole statute, that the act indicated therein to be riotous must amount to a breach of the peace. Section seven, we think, should be taken as if it read, "Any other unlawful act against the peace," for the construction clearly comports with the spirit, and fully carries out the purposes of the act, which points exclusively, by its title, and all its provisions, to offences against the public peace.

Judgment affirmed.

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JOHN T. FORD, by his GUARDIAN, JOHN THORP,  
Plaintiff, v. MORDECAI KENNEDY, DANIEL  
CHANDLER and D. H. HUNTINGTON, Defendants.

*Action to recover possession of real estate.—Adjourned from  
Polk Co.*

Heirs of settlers, in Oregon, who died prior to 27th September, 1850,  
cannot inherit or hold land by virtue of residence and cultivation  
of their ancestors.

*Logan & Pratt, counsel for plaintiff.*

*Boise & Grover, counsel for defendants.*

WILLIAMS, C. J. Plaintiff avers that he is entitled to the land described in his complaint, by virtue of the act of Congress of September 27th, A. D. 1850, making donations to settlers in Oregon, as the only heir at law of his father and mother, Marcus and Amanda Ford.

Defendants deny the right of plaintiff, on the ground that the said Marcus and Amanda died before the passage of the said act of Congress.

Plaintiff demurs to this answer, and presents the question, as to whether the heirs of persons who settled and died in Oregon prior to September 27, 1850, can inherit or hold the lands claimed and occupied by such decedents.

Reliance for a recovery in this case is placed upon that clause of section four of said act, which says, "In all cases when such married persons have complied with the provisions of this act, so as to entitle them to the grant as above provided, whether under the late provisional government of Oregon or since, and either shall have died before patent issues, the heirs shall be entitled," &c.

Marcus and Amanda Ford, it is said, were married persons, and complied with the provisions of the donation act under the provisional government of Oregon; and having died before patent issued, plaintiff, as their son and heir, is entitled to hold what his parents would have held if living at the present time.

Notice must be taken of that part of the above quoted clause, which describes the married persons whose heirs may take; for it does not say "all" married persons, but "such" married persons, evidently referring to a class of married persons antecedently described. Looking at the preceding part of section four, we find that the right to take donations under that section is restricted to persons "now residing in said territory, or who shall become residents thereof on or before the first day of December, 1850." "Such," then, in that clause of the act first cited, relates to the foregoing as well as to other qualifications of grantees under that section, and makes said clause mean as if it read, "In all cases, married persons now residing in, or who shall become residents," &c. When the donation act passed, in no sense could it be said of plaintiff's parents that they were then residing in, or ever afterwards became residents of Oregon; and manifestly, therefore, they did not fall within that class of persons entitled to

the benefit of the fourth section. Marcus and Amanda Ford, then, having acquired no rights under said act of Congress, could, of course, transmit none to plaintiff, as "heirs of the deceased;" nor can he take by purchase, as has been contended, for he has not complied, and his parents did not and could not comply with the conditions of a purchase, so as to vest the title in either. Some effort has been made to argue that the words, "shall have died before patent issues," in the clause first quoted, indicates persons dying before, as well as subsequent, to the passage of the act; but these words are in that form of expression usually employed to signify the happening of some future event, upon some other contingency in the future; and in any view, the contest, as has been shown, is conclusive against the argument.

To construe the donation act so as to invest persons, dead before its passage, with an inheritable interest in the public lands of this territory, would be not only to give the said act a retrospective operation, contrary to a sound construction of the statutes, but to open a Pandora box of evils upon the community; for the heirs of those early settlers, who died before 1850, would rise up with their unknown and undiscoverable titles to supplant others who found the land thus claimed vacant, and took it, in good faith, as a part of the public domain. Something has been said about the right of the plaintiff to hold under the eighth section of said act; but to give that section any other than a prospective operation is to do violence to language; and the mischief resulting from giving it a retro-active effect, would be infinitely greater than would follow from a like construction of section four. By an amendment of the donation act, appeared July 17th, 1854, Congress has given a legislative construction of said act, which accords with the one here given, and, at the same time, has made provisions for plaintiff and persons in his condition.

**Judgment for defendants.**



WILLAMETTE FALLS TRANSPORTATION AND  
MILLING COMPANY, Plaintiffs in Error, v. SAMUEL  
K. REMICK, Defendant in Error.

*Error to Clackamas.*

1. A mechanic, who acts as overseer while performing manual labor, is entitled to a lien for all his services.
2. A mechanic, who bestows labor upon a breakwater and dam attached to a saw-mill, is entitled to a lien upon the mill for such labor.
3. Claims for any thing but labor or materials are *non-lienable*.

*Pratt & Wait*, for plaintiffs in error.

*Kelly and Holbrook*, for defendant in error.

WILLIAMS, C. J. Remick brought this action to enforce a lien for work and labor performed upon the buildings of said Falls Company, and after a trial upon the merits in the District Court, obtained a verdict for \$3,340.70, and a judgment thereon for a lien against said buildings. This judgment is now assailed, because Remick, while in the employ of said company, acted as overseer and assistant superintendent, for which services, it is said, the statute gives him no right of lien. No decision of the precise question here presented is necessary, for the record shows that Remick not only acted as overseer and assistant superintendent, but that he performed manual labor upon the works and buildings of said company. Section 1st of the statute of 1851, (*General Laws of Oregon*, page 167,) which governs this case, provides, "that all persons performing labor for the construction of any building, shall have a lien thereon," &c.

Remick certainly performed "labor for the construction" of the company's buildings, and is clearly entitled to a lien for a part if not for the whole of such labor; and as his services were inseparably rendered and received by the com-

pany, we think he should have a lien for his entire compensation. When time and skill are employed to supervise and direct in the construction of a building, a lien is as much deserved and required as in any other case, and beyond question it should be allowed, if actual labor is added to the other grounds of right. There is doubt as to whether an architect, or person performing labor of like nature, can hold a lien; but it is clear that for work of any kind *upon* the building in its construction, the statute gives a remedy. Much of Remick's labor was expended upon a dam or breakwater attached to, and for the use of the company's mills, and it is contended that for such labor he is not entitled to a lien upon said mills. This view of the statute seems to be both unreasonable and unequal, for a mill made to run by hydraulic power would be worthless without the structures necessary to secure and obtain water; and the labor bestowed upon such structures is of the same utility and importance to the owner of the mill as the labor put upon the mere building. Whatever enters into, or is connected with a mill, essential to its use, ought to be treated, under the statute, as a part of said mill; so that all who contribute their toil to make it valuable, may have an equal chance to obtain compensation for their labor. Remick filed with his complaint an account containing items of charge for ferriage, postage, &c., as well as for labor, and a question is made, as to his right to recover for any thing but labor in this case. Claims for any thing but labor or materials are evidently *non-lienable*, and cannot, therefore, be embraced in a judgment for a lien. Nothing appears upon the record as to the ruling of the District Court upon this point, and we must presume, therefore, that it was correct; but, for the sake of certainty a deduction may be made of the trifling sums charged for postage, &c., and a judgment in favor of Remick entered for the balance.

**Judgment accordingly.**

WILLAMETTE FALLS TRANSPORTATION AND  
MILLING COMPANY, Plaintiffs in Error, v. THOMAS  
V. SMITH, Defendant in Error.

*Error to Clackamas.*

A complaint to enforce a mechanic's lien must state *where*, and *when*, the labor was performed.

*Pratt & Campbell*, for plaintiffs in error.

*A. Holbrook*, for defendant in error.

WILLIAMS, C. J. This suit was brought to enforce a mechanic's lien, and judgment by default, obtained in the court below; which judgment, it is now said by plaintiff in error, ought to be reversed, because the complaint does not show at what time the labor was performed, or materials furnished, for which a lien is claimed.

With reference to this point, the complaint says: "that defendants in the court below employed plaintiff to furnish materials, labor, &c., for their buildings;" and then states, "that there is now due the said plaintiff for the same the following sums, to wit, the sum of four hundred and eighty-four dollars and seventy-two cents, as per bill rendered, and interest thereon at the rate of two and a half per centum per month, from the 14th of August, A. D. 1854, as per agreement with C. C. Baker, agent of said defendants; and the additional sum of two hundred and seventy-eight dollars and ninety cents, balance of account accrued since the above, as per schedule hereto annexed."

Subjoined to the complaint is an account, as follows:

*"Oregon City, October 27th, 1854.*

"Willamette Falls Co.

"To Thomas V. Smith, Dr.

"Aug. 17th. To 11 1-2 lbs. cast steel, \$4.31."

And so on, with various items, running through the months of August and September.

Now it is utterly impossible to tell from the complaint when or in what year the account, amounting to the first-named sum of four hundred and eighty-four dollars and seventy-two cents, accrued, or even to make a plausible conjecture upon the subject. Plaintiff below does not state when he was employed, gives no bill of particulars, or copy of the account rendered, and makes no allusion to dates in connection with the sum first named, other than to state that the said sum was to draw interest from the 14th of August, 1854, as per agreement with Baker; but nothing can be inferred from this statement except that there was an indebtedness existing at that time.

Relative to the two hundred and seventy-eight dollars and ninety-eight cents, the complaint is quite as defective, for while the information is given as to the months, in which the demand was created, imagination is left to fix the year. Plaintiff below contends that, because the statement of the account annexed to his complaint is dated Oct. 27th, 1854, it must be presumed that the account accrued in the August and September of that year; but it may have accrued in the August and September of 1853; and it is idle to pretend that the mere drawing off of an account indicates any thing as to the time when such account originated. This suit was commenced on the 23d of February, 1855; and if the materials mentioned in the complaint were furnished in 1853, then this action cannot be maintained, for the statute in force at that time (*Gen. Laws of Oregon, page 168,*) requires the suit to enforce the lien to be brought within one year from the time the materials are furnished. Where materials are furnished, or work done, since May 1st, 1854, a suit to enforce a lien therefor may be brought within one year from the completion of the building; and if we could find from the complaint that such were the facts of this case, the objection of plaintiffs in error would be overruled.

Again, it is indispensably necessary for the court to be

informed and know whether the materials were furnished in 1853 or in 1854, for if, in the first-named year, the defendants below are entitled to judgment that the property which the lien holds shall be sold on a credit not exceeding six months; but if said materials were furnished in 1854, then plaintiff must have judgment for an absolute sale.

We cannot determine, from the record before us, whether the plaintiff is entitled to recover or not; or, in case of a recovery, whether the judgment should be for a sale upon credit or otherwise; and, for these reasons, the judgment of the court below must be reversed.

Judgment for reversal.

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YAMHILL BRIDGE COMPANY, Plaintiffs in Error, v.  
WILLIAM T. NEWBY, Defendant in Error.

*Error to Yamhill.*

One tenant in common may sue another, who sells or destroys the common goods.

*Pratt & Campbell*, for plaintiffs in error.

*Kelly & Chinn*, for defendant in error.

WILLIAMS, C. J. The declaration in this case contains two special counts, upon an order drawn in favor of Newby upon the said Bridge Company, and on the common counts. The jury found a verdict for \$979, under the third count, which is for "goods bargained and sold." Evidence was given by the respective parties to prove and disprove all the counts; but that which was adduced in support of the common counts is in substance as follows:

The company entered into a contract with Webber & Wren, by which the latter were to build a bridge for the

company, and be paid by instalments as the work progressed. When the bridge was partly built, and materials for its completion were on the ground, the contractors, having received all but the last instalment under their contract, failed, and made a conveyance to their mechanics and material men of the bridge and materials on hand. Newby was one of these grantees; being a creditor of Webber & Wren, for materials, to the amount of \$820, the said conveyance was acknowledged and recorded. Endorsed thereon was a conveyance by all the grantees therein, except Newby, of all their rights thereunder to the said company. The company used the said materials for the completion of their bridge. Several reasons are now urged by the company for reversing the judgment of the District Court; one of which is, that plaintiff and defendant were tenants in common in the bridge and materials, and therefore the company had a right to use the common property for the common good of the parties. We do not think that Webber & Wren conveyed any property in the bridge to Newby and his co-grantees. They had nothing to convey. They had been fully paid for what they had done. When they quit work, the bridge, which they left partly erected, attached to the freehold, and became the exclusive property of the company. Newby and the company owned the materials in common. This common property the company took and converted to their own use, by incorporating it into their bridge. They changed what was the personalty of Newby into their own exclusive realty. When one tenant in common sells or destroys the common goods it is well-settled that he may be sued by a co-tenant for such co-tenant's share; and, upon this principle, we think that Newby can maintain an action against the company for his part of said materials, by them taken and used up in the completion of their bridge. (*Brown v. Hedges*, 1 Sack. 290; *Heath v. Hubbard*, 4 East, 110; *Fennings v. Granville*, 1 Taunt. 241.)

Plaintiffs in error argued, in the second place that the bill of exceptions undertakes to state all the evidence in support

of the common counts, and does not show any thing about the damages, and, therefore the judgment below cannot be sustained. Though the bill of exceptions says, "the evidence in support of the common counts was as follows," yet it clearly appears elsewhere in said bill that other evidence than that stated was submitted to the jury; and more than this, the bill simply sets forth certain facts proven, and does not, in truth, detail the evidence as it professes. Manifestly there was a question made in the District Court as to the right of Newby to recover at all under the third count, and the bill saves all the facts pertinent to that question; but evidence as to the amount of damages, in no way concerns the right of recovery, and was, therefore, very properly omitted. Newby was entitled to recover nominal damages at any rate, and we cannot say that a verdict for more was found by the jury without, or contrary to evidence. No evidence, it is said, was given to the jury, that Newby ever accepted the conveyance to him and others by Webber & Wren, and therefore he ought not to have obtained judgment. Taking the facts, that Webber & Wren had failed; that the conveyance was made to pay debts; that it was recorded; that it was actually accepted by the other grantees, and that this suit was brought in affirmance of it; we think the jury were warranted in finding that it had been accepted by Newby.

**Judgment is affirmed.**

WILLIAM BALDRO, Plaintiff, v. WILLIAM F. TOL-  
MIE et al., Defendants.

*Reserved from Multnomah.*

1. Assumpsit is an action upon the case.
2. When the statute of limitations has become a perfect bar to a cause of action, the repeal of the statute does not destroy the bar.
3. Laws of the provisional government were in force prior to August 14, 1848.

This action was brought to recover damages for the violation of a contract, alleged to have been made in 1841, by the parties, for the purpose of prosecuting certain farming operations at Puget Sound, in the now territory of Washington. To the complaint, which avers a breach of said contract in 1842, the defendants make answer, and, among other things, say, that plaintiff's "supposed cause of action did not accrue to him at any time within six years next before the commencement of the suit," and to this answer the plaintiff demurs.

*A. Campbell, for plaintiff.*

*Pratt & Holbrook, for defendants.*

WILLIAMS, C. J. Various statutes of limitation have been enacted in this territory, but the particular one, upon which defendants rely, is the Iowa statute of 1839, adopted here in 1844, and which provides, among other things, that "actions upon the case" shall be barred in five years. Plaintiff, however, contends that this statute can be no bar to the present suit, for the reason that the cause of action, set forth in his complaint, is not embraced within that class described by said statute. Under the old form of proceedings, this would



have been an action of *assumpsit*, and the doctrine is laid down that *assumpsit* is "an action upon the case." (*Bacon's Abr. vol. 1, p. 395; 2 Blackstone's R. p. 850.*)

In the case of *Maltby & Bolls v. Cooper, Morris' Rep. p. 59*, the Supreme Court of Iowa expressly decides that the statute in question may be pleaded in bar to an action of *assumpsit*. To conclude that the legislature, in providing a limitation to all the different kinds of actions mentioned in the statute, intended to omit the most common kind of all, would be to form an opinion not very creditable to its judgment. No effect can be given to this statute, it is said, because it was repealed in 1849, and cannot, therefore, be set up as a bar to an action brought after its repeal. When a statute of limitations, which has run so long against a cause of action, as to become a perfect bar, is repealed, such bar is not thereby destroyed. (*Blackford's Reports.*)

Another ground taken in support of the demurrer, is that the answer avers *non accruit infra lex annos*, instead of "five years," as provided by statute. Doubts may well exist as to whether this answer would not be exceptionable under the old practice, though there are conflicting authorities upon the point; but under our present system, where informalities in pleading are not regarded, the objection is untenable, for it is demonstrably true that if plaintiff's cause of action did not accrue within six years, it did not within five years next before the suit. This statute, it is finally argued by plaintiff is a law of the provisional government, and therefore had no force, until, with acts of a like origin, it was recognised by Congress on the 14th of August, 1848, in the act to establish the territorial government of Oregon. Confessedly, the provisional government of this territory was a government *de facto*, and if it be admitted that governments derive their "just powers from the consent of the governed," then it was a government *de jure*. Emigrants who first settled Oregon, upon their arrival here, were without any political organization to protect themselves from foes without, or to preserve peace within; and, therefore, self-preservation constrained

them to establish a system of self-government. Congress, knowing their necessities, and withholding the customary provisions for such a case, tacitly acquiesced in the action of the people, and, on the 14th of August, 1848, expressly recognised its correctness and validity, by declaring that "the existing laws now in force in the territory of Oregon, under the authority of the provisional government, established by the people thereof, shall continue to be valid and operative therein," &c. Congress, it will be perceived, treats these laws as "now in force," and simply provides that they shall have the same effect under the government created by Congress, as they had under the government formed by the people. Doubtless, any act of the provisional government, inconsistent with the constitution or laws of the United States, would have been void; but, certainly, the statute in controversy is not obnoxious to any such charge. No reason can be imagined for holding that the people of Oregon, in 1844, had no right to make such laws as their wants required; for, where the functions of government have not been assumed or exercised by any other competent authority, it cannot be denied that such a power is inherent in the inhabitants of any country, isolated and separated as Oregon was from all other communities of civilized men. Some effort has been made to assimilate the laws in question to mere neighborhood agreements; but the argument seems to apply with equal force to the acts of all governments established by the people. Free government always results from an agreement among free men, and when put in operation, the acts of such a government are legitimate and binding upon all within its jurisdiction. Suppose the provisional government had been organized in rebellion, and afterwards the sovereignty of Oregon had been acknowledged at Washington, so far as the people here are concerned, the laws of such provisional government would date their validity from the time of their enactment, and not from the time of their recognition by the parent country. For a much greater reason would such be the case where, instead of rebellion, there was the exercise of

legislative power, with the tacit consent and future ratification of the general government. To admit even that the provisional government was a mere usurpation, would not be to decide that the statute in dispute did not take effect from its passage, for the courts of that government could not decide against its power to make the law, without in the same breath deciding against their own existence.

During thirteen years plaintiff has been sleeping under the shadow of judicial tribunals, competent at all times to do him justice, and now he comes forward claiming large damages for the violation of a parol contract, alleged to contain a multitude of provisions and conditions; thus showing the necessity of a law, which requires men to prosecute their suits while witnesses are possibly within reach of all parties, and before time and change have blotted out reliable proof from the frail records of human memory.

Holding, then, that the statute of limitations, of 1844, was valid in its inception, and became a complete bar to plaintiff's action before its repeal, we conclude that defendants are entitled to judgments on the demurrer.

Judgment for defendants.

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## IN THE MATTER OF JAMES M. MOORE.

*Motion to set aside Executions in Lake et al. v. Willamette Falls Co.—Clackamas.*

Apportionment of moneys under the boat lien law.

MOORE and Ferguson move to set aside certain executions, upon the following state of facts: Lake and others recovered judgments in the District Court of Clackamas County against the steamer *Gazelle*, which were made liens under the act

"to enforce liens on boats and vessels." (*Statutes of Oregon*, p. 151.) These judgments were taken to the Supreme Court by writ of error, and Ferguson and Moore were the sureties in the bond for that purpose. The judgments were affirmed against the boat and sureties. Executions were issued thereon and the boat sold for enough to satisfy the judgments of Lake and others. Before the money was paid over, persons having similar judgments in the District Court of Clackamas County obtained an order from said court upon the sheriff to make a *pro rata* distribution of the proceeds of said sale between them and the plaintiffs in said executions. The judgments in the District Court were for claims of a class higher than, or equal to, those on which judgments in the Supreme Court were rendered. After distribution, pursuant to the order, there was a part of the Supreme Court judgments left unsatisfied, and to collect that balance the executions in question were issued against Moore and Ferguson. We do not see any grounds upon which the motion can be sustained. Section fifteen of said act provides, that "in the distribution of the proceeds of sale, claims of a prior class shall be paid entire before any payment shall be made upon claims of a subsequent class; and when the money to be applied to any class shall be insufficient to pay all the claims of that class, it shall be apportioned ratably among the claims of such class."

Here the money for which the boat sold was insufficient to pay the claims of the first class, if apportioned ratably among such claims.

Some objections have been made to the proceedings by which the order of distribution was obtained, but as the payment of the money was in accordance with the statute, it is unnecessary to examine the means by which such payment was effected.

**Motion denied.**

*Pratt & Wait*, on the motion.

*J. K. Kelly*, contra.

WILLAMETTE FALLS, &c., COMPANY, Plaintiffs in  
Error, v. DAVID SMITH et al., Defendants in error.

*Error to Clackamas County.—Action to enforce a Mechanics'  
Lien.*

Judgment by default against a party, while the record shows a demurrer to the complaint undisposed of, is error.

*Pratt & Campbell*, for plaintiffs in error.

*Elliott*, for defendants in error.

WILLIAMS, C. J. Plaintiffs in error seek to have the judgment reversed, on the ground that, after a demurrer was duly filed to the complaint in the court below, the said court rendered a judgment by default against them, before any disposition whatever was made of the said demurrer. Referring to the record, we find nothing there inconsistent with the above statement of facts, and must, therefore, concur in the correctness of plaintiffs' position.

Defendants in error have produced what purports to be the copy of an entry by the district judge, in his docket, to the effect that the demurrer was overruled; but such entry, though useful at the proper time for purposes of amendment, cannot be taken and treated as part of the record. (*Statutes of Oregon*, page 121.)

Taking the record as it stands, there was undoubted error by the District Court in rendering a judgment by default against plaintiffs, while their demurrer was not disposed of; and for that reason, the judgment must be reversed.

Judgment reversed.

WILLAMETTE FALLS TRANSPORTATION, &c., CO.,  
Plaintiffs in Error, v. MARSHAL K. PERRIN, De-  
fendant in error.

*Error to Clackamas.*

Suit for materials, furnished under the mechanics' lien law of 1851,  
must be brought within one year.

*Pratt & Campbell*, for plaintiffs in error.

*J. K. Kelly*, for defendant in error.

WILLIAMS, C. J. This suit was brought on the 20th day of February, 1855, to enforce a lien for materials alleged to have been furnished in May or June, 1853, but which, in fact, were furnished in April of that year, as appears from the verdict of a jury, taken and made part of the record by the plaintiff below. By the statutes in force at that time, persons claiming liens, as in this case, when no credit was given, were required to bring suit for their enforcement within one year from the time when the materials were furnished. Without alleging that credit was given to defendant below, the plaintiff there shows affirmatively that nearly two years expired from the time the materials were furnished to the commencement of this suit. Plaintiff below suffered his right of lien to become extinct under the statute operating in 1853; for more than one year elapsed between the time the cause of action accrued in this case and the repeal of said statute. There was a judgment by default against the defendants in the District Court, for the debt and lien, as prayed for in the complaint; but because said court awarded a lien for materials furnished in 1853 more than a year before suit therefor was commenced, the said judgment must be reversed.

Judgment reversed.

WILLAMETTE FALLS TRANSPORTATION and  
MILLING COMPANY, Plaintiffs in Error, v. JO-  
SEPH B. RILEY, Defendant in Error.

*Error to Olackamas.*

1. An action for a mechanics' lien—what is a sufficient summons.
2. What is a sufficient complaint and verification.
3. What is a sufficient notice to be filed with the recorder.
4. Effect of repealing mechanics' lien law.
5. When the lien attaches.
6. Interest may be allowed on a lienable item.

*Pratt & Campbell*, for plaintiffs in error.

*J. K. Kelly*, for defendant in error.

WILLIAMS, C. J. Riley sued the "Falls Company" for work and labor done upon their buildings, and obtained a judgment by default, in the District Court, for the sum of \$779.30, and a lien therefor on said buildings.

Among various other objections made to the proceedings of the court below, it is contended, in the first place, that the notice in the summons is insufficient to entitle Riley to the judgment in this case. Section 27, page 68, of the Statutes of Oregon, is as follows: "There also shall be inserted in the summons a notice, in substance as follows: In an action arising on contract, for money, or damages only, that the plaintiff will take judgment for a sum specified therein, if the defendant fail to answer the complaint.

In other actions, that "if the defendant fail to answer the complaint, the plaintiff will apply to the court for the relief demanded therein." The motion in this case is, "that the plaintiff will take judgment for a sum specified therein, if the defendant fail to answer the complaint." This notice, it is

said, is defective, because it does not also state that judgment will be taken for a lien; but this objection we think not well-founded, for the statute classifies actions, and provides that, "in the class of actions arising on contract for the recovery of money or damages only," there shall be such a notice as was given in this case. Manifestly, then, the notice was right, for this is an "action arising on contract for the recovery of money only," though the court is empowered, under certain circumstances, to order that the judgment, instead of being a general lien upon the real estate of the defendant therein, shall be a lien upon a specific part of such estate. This order relates, however, to the execution, rather than the recovery of the judgment, and is not obtained without the service upon defendant of a copy of the complaint in which it is claimed. The verification to the complaint, it is said, in the second place, is insufficient to entitle Riley to his judgment for a lien. Kelly, attorney for plaintiff below, makes affidavit to the complaint, and states his belief of its truth, on the ground "that the promissory note upon which the action is founded is in his possession, and that he presented the same to Daniel H. Ferguson, the acting agent of the defendants, who did not deny the correctness of the same."

*Sec. 54, page 74, Statutes of Oregon*, provides, "that in the absence of the party the pleadings may be verified by any person having a knowledge of the facts; and when the affidavit shall be made by any other person than the party, he shall set forth in it his knowledge, or the grounds of his belief, on the subject." Now, the promissory note referred to is a mere promise to pay for value received, and evidence, therefore, of nothing but indebtedness, so that as to the other allegations in the complaint, upon which the right of lien depends, the attorney professes to have no knowledge or grounds of belief. Those averments, then, showing the existence of a lien, are in effect not verified at all, so that the court below adjudged to the plaintiff there a specific lien upon the buildings of the defendant, with no other evidence before it except the unverified statements of said plaintiff's attorney.



We think that the letter and reason of the statute have been overlooked in this verification, for it is evident that any stranger seeing the note referred to, without any knowledge as to the alleged contract for work and labor, might make an affidavit just as good as the one attached to the complaint in this case.

Plaintiffs in error have urged, with great earnestness, that Riley acquired no lien for his work and labor upon their buildings, and therefore the judgment of the District Court should be reversed. They argue that Riley commenced work in June, 1853, under a contract of that date, and continued so to work until the 10th of September, 1854; that on the first of May, 1854, the statute of 1851, under which said contract was made, was repealed without any saving clause, and that by virtue of such repeal, the growing, but not then perfect right of lien, was destroyed and that no lien was obtained under the act of 1854 for that only applies to work done after its passage. When Riley commenced labor upon the buildings of said company, the law, to secure the payment of his wages, gave him a lien therefor upon said buildings, and required him, within sixty days from their completion, to file a notice of his intention to hold such lien; but before said buildings were completed, the law was repealed, and another enacted at the same time, which allowed him three months in which to file, and in which he did file, said notice. Now, as one statute ceased to exist, and the other was created *uno flatu*, we think that the act of 1854 may be regarded as a continuation of the act of 1851, so that the laborer may have that security for his hire which the law promised when he commenced work; the labor, in question, must be regarded as an entirety, and the rights of the party to the whole job be determined in accordance with the law in force at the time the contract was made, or in accordance with the law in force at the time the work was finished. Assuming that the parties are to be treated as though the work was performed on the day when it was completed, and beyond question there was a lien acquired under the act of 1854; but

assuming that the parties are to be treated as though the work was performed at the time the contract was made, and the lien was perfect, and vested under the act of 1851. Taking either view of the case, there was a lien; but we consider it to be entirely consonant with principle and justice to hold that the rights of the parties are to be ascertained and fixed by the law in force when the contract was made; but such rights may be established and enforced by the law existing at the bringing of the suit.

Plaintiff avers in his complaint that he "filed, &c., a notice of his intention to hold a lien against the said buildings," and does not show that any amount of indebtedness is specified in such notice. Section two of the act concerning liens, page 149, Statutes of Oregon, provides, that persons wishing to avail themselves of the provisions of that act, shall file a notice of their intentions to hold a lien upon the buildings for the amount due or to become due, specifically setting forth such amount, "so that the notice described in the complaint was not such an one as the statute required, and, for not setting forth any amount, was obviously insufficient." Notice must be alleged in the complaint; (*5th Blackford's R. page 329; 8th Ib. 252;*) and, of course, if it is necessary to show that a notice was filed, it is necessary to show that it was a legal notice, and in some way designated the amount for which, and the premises upon which the lien is claimed. The objection made to the claim upon this ground must be sustained. Our attention has been directed by the argument to the question, as to whether a mechanic's lien relates to the time when he commenced work, or to the commencement of the building. Section seven of the chapter on liens, page 150, Statutes of Oregon, enacts that "the liens created in pursuance of the provisions of this chapter shall have precedence over all other liens after the commencement of the building." This language, taken in its ordinary acceptation, as it ought to be, admits of no doubt; but, independent of any express provision, we understand the legislation upon the subject to imply, as a general rule, (subject, doubtless, to

some exception,) that the liens of different mechanics, engaged in the construction of a building, shall stand upon an equal footing, and relate alike to the commencement of such building. Inconvenience, it is said, will result from this construction of the statutes, for years might elapse between the beginning and completion of a building, but such is not usually the case; and a general rule, reasonable and just in a large majority of cases, ought not to be rejected, because an extreme case of hardship in its operation can be imagined. Objection is further made to the proceedings in this case, because the interest accruing on the demand of plaintiff below was embraced in the judgment, and it is said that interest is a non-lienable item of account. Claims for which mechanics may have liens are certainly as much entitled to draw interest, after they become due, as any other; and we cannot think that for the recovery of such interest it would be necessary to bring a separate suit, or take a separate judgment, but conclude that interest may be computed on a lienable demand, and a lien awarded for the entire amount. Judgment was rendered in this case, not only against the buildings of the "company," but against the lot on which they stand. And this is said to be erroneous, because the complaint does not aver that the "company" were, at any time, the owners of said lot of ground. Section eight of the lien act, page 150, of the Statutes of Oregon, provides, "that liens against any building shall also extend to the lot of ground upon which such building is erected. not exceeding one-half of an acre in extent, if the land shall have been, at the time of erecting such building, the property of the person who shall have caused the same to be erected." There was nothing to show that the defendants below ever had any right to the land upon which their said buildings were erected, and, therefore, the District Court could not rightfully condemn such land to be sold to satisfy said company's debt, but should have confined the lien to the buildings described in the complaint.

**Plaintiffs in error are right in respect to this point. Sec-**

tion twelve of the act of 1851, General Laws of Oregon, page 169, declares, that in a case of this kind, the judgment of the court shall direct the property to be sold on a "credit not exceeding six months;" but the act of 1854 contains no such provisions. Some difficulty has occurred in determining under which of said acts the judgment in this case should be rendered; but presuming that the parties relied upon the law in force when the contract was made, we have concluded that it is the right of the defendants below to have the judgment made with an order for sale on credit, in conformity to the act of 1851. Objections have also been made to the complaint, because the contract between the parties, and the buildings of the company, were not described with sufficient particularity. We consider the complaint carelessly drawn in these respects, but full enough to support the judgment, were it otherwise sufficient; for, according to section forty-five, page seventy-two, Statutes of Oregon, the default below waives all objections, except to the jurisdiction of the court, and "that the complaint does not state facts sufficient to constitute a cause of action."

Judgment is reversed.

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**\*JOHN MONROE, Plaintiff in Error, v. HUSSEY & BURBANK, Defendants in Error.**

*Error to Yamhill.*

An absolute bill of sale, unaccompanied with delivery of the property, is void as against the creditors of the vendor at common law.

THIS cause was adjourned into this court from Yamhill County, for a decision upon the following special verdict:

"On the 9th day of March, 1854, Charles W. Savage,

\*See 75 Am. Dec. 552.

being indebted to the plaintiff, mortgaged to the plaintiff, in writing, the property mentioned in the complaint, retaining the possession, by plaintiff's consent, which mortgage was never acknowledged, or recorded, or filed in a public office. On the 30th day of October, 1854, the defendants, without knowledge of the mortgage, caused the property to be taken by attachment at this suit, as the property of Savage, for a debt contracted after the giving of the mortgage. The defendants afterwards had notice of that mortgage, and that the plaintiff claimed the property; and after that notice, having obtained a judgment in that suit against Savage, they indemnified the officer; caused the property to be seized in execution, and sold to satisfy their judgment, and became themselves the purchasers of that property at that sale, and converted the same to their own use."

*N. Huber*, for plaintiff in error.

*M. Chinn*, for defendants in error.

WILLIAMS, C. J. Is the law for the plaintiff, or the defendants, upon these facts? When the said mortgage, or bill of sale, for it purports to be an absolute bill of sale, was made, the act of 1853 (*Session Laws of 1852-3, page 65*) was in force, which provides that "no bill of sale for the transfer of personal property shall be valid as against existing creditors, or innocent purchasers, where the property is left in the possession of the vendor, unless the bill of sale be recorded in the auditor's office of the county in which the property is situated, within ten days after such sale shall be made." Defendants, it is said, are not protected by this statute, because they were not "existing creditors" when the bill of sale was made. Admitting that defendants are beyond the purview of said statute, which is not entirely clear, then, without doubt, their rights are to be ascertained and determined by the common law. Chief-Justice Marshall, in the case of *Hamilton v. Russell*, 1 *Cond. R.* 318, says, "in some cases a

sale of a chattel, unaccompanied by a delivery of possession, appears to have been considered as an evidence or badge of fraud, to be submitted to the jury under the direction of the court, and not as constituting in itself, in point of law, an actual fraud, which rendered the transaction, as to creditors, entirely void. Modern decisions have taken this question up upon principle, and have determined that an unconditional sale, where the possession does not accompany and follow the deed, is, with respect to creditors, on the sound construction of the *Statute of Elizabeth*, 13, *chapter* 27, a fraud, and should be so determined by the court. He adds, that the said statutes "are only declaratory of the principles of the common law. Justice Story, in the case of *Meeker et al. v. Wilson*, 1 *Gallison's R.* 424, says, that "by the common law, a grant or assignment of goods and chattels is valid between the parties, without actual delivery thereof, and the property passes immediately upon the execution of the deed; but as to creditors, the title is not considered as perfect, unless possession accompanies and follows the deed. The want of possession is considered in some of the authorities as an evidence or badge of fraud to be submitted to the jury; but the more modern authorities hold it as constituting in itself, in point of law, an actual fraud, which renders the transaction, as to creditors, void."

Judge Story, after stating that it is now fully settled that the said statutes of Elizabeth are only in affirmance of the common law, adds that, upon principle, independent of all authority, it would seem that substantial justice requires that a party, who has a secret transfer of property left in the possession of the original owner, should be held to waive his rights in favor of creditors and public officers, even if the case were not held infected with fraud. "*Vigilantibus non dormientibus leges subservient.*" Here was an unconditional sale by Savage to plaintiff, unaccompanied by possession, and, therefore, we must conclude that it was not good as against defendants, who are attaching creditors. (8 *Co.* 80; 2 *T. R.* 587; *Hare & Wallace Amer. Leading Cases*, vol.

1, page 1.) Notice of plaintiff's bill of sale to defendants after the attachment was levied, avails nothing, for their rights relate to, and take effect from, the levy of the attachment.

Judgment for defendants.

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\*TERRITORY OF OREGON, Plaintiff, v. NATHAN G. COLEMAN, Defendant.

*Reserved from Lanc.*

One who sells liquors to Indians may be punished for the same act under the law of the territory and the law of the United States.

THE indictment in this case was found under the act of the Legislative Assembly, passed January 23d, 1854, entitled "An act to prevent the sale of ardent spirits to Indians." Defendant denies the validity of this law, on the ground that the act of Congress, passed June 30th, 1834, entitled "An act to regulate trade and intercourse with the Indians," is applicable to and in force in this territory; and that the sale of liquor to Indians is prohibited by that act.

*R. P. Boise*, for plaintiff.

*D. Logan*, for defendant.

WILLIAMS, C. J. No power, it is argued, existed in the Territorial Assembly to enact a law of this kind; as Congress had legislated upon the subject; and if the defendant is convicted and punished under the territorial law, he may also be convicted and punished for the same act under the law of Congress, and thus be twice punished for the same offence. This express question has been decided by the Supreme Court of the United States. Justice Grier, in the case of *Moore v. The State of Illinois*, *Howard's R.* vol. 14, page 13, says, "See 75 Am. Dec. 554.

"An offence, in its legal signification, means the transgression of a law. A man may be compelled to make reparation in damages to the injured party, and be liable also to punishment for a breach of the public peace, in consequence of the same act; and may be said, in common parlance, to be twice punished for the same offence. Every citizen of the United States is also a citizen of the State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both. Thus, an assault upon the marshal of the United States, and hindering him in the execution of legal process, is a high offence against the United States, for which the perpetrator is liable to punishment; and the same act may also be a gross breach of the peace of the State, a riot, an assault, or a murder, and subject the same person to a punishment under the State laws for a misdemeanor or felony. That either, or both, may (if they see fit) punish such an offence, cannot be doubted. Yet, it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for either of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other; consequently, this court has decided, in the case of *Fox v. The State of Ohio*, 5 How. 432, that a State may punish the offence of uttering or passing false coin as a cheat, or fraud, practiced upon its citizens; and in the case of *the United States v. Marigold*, 9 How. 560, that Congress, in the proper exercise of its authority, may punish the same act as an offence against the United States." This case clearly falls within the rule here laid down, and, therefore the territory is entitled to a judgment.

**Judgment for plaintiff.**



ARTHUR, Plaintiff in Error, v. SIDNEY W. MOSS, Defendant in Error.

*Error to Clackamas.*

When the vendor of personal property is sued for a failure of title, the measure of damages is the price paid by the plaintiff.

ARTHUR sold a horse to Moss for 150 dollars. Moss afterward sold the same horse to Souchu for 200 dollars. Replevin by Rossi against Souchu, in which it was determined that the horse belonged to Rossi. Moss refunded to Souchu the 200 dollars, and then brought this suit against Arthur, and claimed to recover that amount. Judgment in the District Court in favor of Moss, for the 200 dollars, with his expenses and costs. Arthur now complains of error in that judgment, because Moss was allowed to recover therein the amount for which he sold the horse, instead of the sum which he had paid for it.

*M. Elliott*, for plaintiff in error.

*A. E. Wait*, for defendant in error.

WILLIAMS, C. J. Where the purchaser of personal property sues his vendor upon an implied warranty of title, we think that the measure of damages in that case should be the price paid for the property, and not any sum for which such purchaser may have sold it; otherwise the vendor of personal property might be subjected to great loss and injury by means of the collusive sales and speculative schemes of a purchaser. The object of the law in a suit of this kind is to save the vendor from loss, and restore him to that ground on which he stood before the purchase; and not to provide means for one man to make money out of the misfortunes of another. Moss

was entitled to recover in this suit the amount which he paid for the horse, with interest, and those expenses and costs which had necessarily been incurred in defending the title derived from Arthur; and for the error of the court below in permitting him to recover more, the judgment must be reversed. (*Armstrong v. Percy*, 5 Wend. 535.)

Judgment reversed.

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JOHN CAROTHERS, Appellant, v. J. M. WHEELER,  
Appellee.

*Appeal from the Commissioners' Court of Clackamas County.*

1. When, in a contest about a ferry, the county commissioners decide against the right of the owner of the land, he may appeal to the District Court.
2. Time and mode of taking such appeal.

CAROTHERS made application to the board of county commissioners in Clackamas County, for a license to keep a ferry across the Willamette River at Portland. Wheeler, at the time of such application, appeared before said board, claiming that he was the owner of the land where Carothers wished to establish his ferry; and insisted, that if a ferry at such place was adjudged necessary, the license therefor should issue to him instead of Carothers. License, however, was granted to Carothers. Wheeler appealed to the District Court, where the decision of the county commissioners was reversed. Carothers now brings the case here, and alleges that the judgment of the court below was erroneous, because Wheeler had no right to take, and the court below had no right to hear his appeal.

*Stark & Logan*, for Carothers.

*A. Campbell*, for Wheeler.

WILLIAMS, C. J. Section twenty-two, page 384, Statutes of Oregon, provides, that "any person may appeal from the decision of the board of commissioners to the next term of the District Court of the same county. Such appeal shall be taken within twenty days after such decision, and the party appealing shall notify the commissioners that the appeal is taken at least ten days before the first day of the next term of the court appealed to." Wheeler took his appeal in the manner prescribed by statute, but no notice was served on Carothers, nor did he appear in the District Court. Whether "any person," in the broad language of the statute, whose personal or private interests are not affected by the decision of a county board, can appeal therefrom, may admit of doubt; but we think it is clear that any person, whose existing rights are cut off or destroyed by such a decision, may have his appeal to the District Court. Admitting that Wheeler was the owner of the land, as he claimed, and was found to be by the District Court, then the effect of the decision by the county commissioners was to deprive him of the use and occupation of such land; and, certainly, before a man's property is wrested from him, he should have a right to be heard before some tribunal other than a board of county commissioners. When county commissioners acquire jurisdiction of a controversy about a ferry, and adjudgethe license therefor, away from him, on whose soil it is to be located, if there is no appeal from such decision, the right of the owner to the use of his land, for the duration of such license, would seem to be irrecoverably gone. Section forty-five, page 458, Statutes of Oregon, declares that "no ferry license shall be granted to any person, other than the owner of the land, unless such owner shall have notice," &c. Now, the manifest object of the notice here required, is to enable the said owner to appear and claim the license to be granted; but if his claim, when he appears, can be arbitrarily and irremediably rejected, such notice is very much like mockery. Had the decision of the county commissioners been adverse to Carothers, it is conceded he might have appealed; but the reasons are obviously as strong for allowing the same right to

Wheeler. Notice of the appeal was not served on Carothers, but this was the fault of the law and not of the appellant, who took all the steps required to perfect his appeal, and was, therefore, entitled to be heard. Notice was served on the county commissioners, as provided by the statute, which seems to go upon the presumption that they, as guardians of the public weal, will attend to the matter before the District Court, and see that justice is done to all concerned. On the 28th of August the commissioners made their decision. Notice and bond for an appeal were filed with their clerk on the 18th of the ensuing September. These dates, it is said, show that the appeal was not taken in twenty days, as required by statute. Reckoning from the 28th of August exclusive, to the 17th of September inclusive, there will be twenty days, but the said 17th was Sunday, so that service on the 18th was right; for, we hold, upon authority, as well as in accordance with the rule laid down in our statute, that the time within which an act is to be done shall be computed by excluding the first day and including the last, and if the last be Sunday, it shall be excluded. (*Section 13, page 123, Statutes of Oregon*; 1st *Pick.* 485; *Arnold v. U. S.* 9 *Cond.* 104; *Cock v. Bunn*, 6 *John R.* 326.) Carothers further objects and argues, that it does not appear that the notice and bond for an appeal were properly filed, as the endorsements thereon only show that they were filed with "F. S. Holland, clerk," and do not show that he was clerk of the board of county commissioners.

We learn from the record that Holland was clerk for the county commissioners, and also of the District Court; but without this knowledge it would be presumed, from the endorsement, that the said bond and notice were filed in the court from which the appeal was to be taken. Wheeler, it appears, delivered the bond and notice to the proper person, at the proper time; thereby his right to an appeal became perfect; so that any irregular or informal endorsement afterwards made on such papers, by him with whom they were deposited, could not defeat or affect that right.

Judgment affirmed.

EDWIN P. DREW, Complainant, v. LEVI GANT, Defendant.

*Chancery.—Appeal from Umpqua.*

1. The board of commissioners of Umpqua County organized in December, 1851, previous to the designation of a *house* for the holding of courts—*Held*, it was a sufficient compliance with the statute, for application for ferry licenses, to post notices in four of the most public places in said county.
2. Facts constituting a right to a ferry.

THIS is a case in chancery; and the question submitted is, whether Drew, who keeps what is called the Trenton Ferry, on the Umpqua River, is entitled to an injunction to restrain Gant from keeping one at the same place. The bill shows that Ferguson and Woodward, in May, 1851, occupied the land—the one on the north, the other on the south side of the river—where said ferry is situated. That Drew, by an arrangement with said occupants, procured a boat, tackle &c., and set up the business of ferrying at said point. That on the 6th day of May, 1851, he posted up eight notices of his intention to apply for a license, &c. That on the 10th of June, of the same year, Gant took possession of the land at the northern terminus of said ferry. That on the third of December, 1851, after four weeks notice duly given by Drew, it was ordered by the commissioners of Umpqua County that he should be licensed to keep the Trenton Ferry, upon his paying \$3 to the county treasurer of said county. That on the 8th of April, 1852, he gave a bond, and paid \$25 for said ferry. That the \$3, mentioned in the order of 1851, he paid on the 10th of September, 1853; since which time, defendant has kept a ferry at the same place, &c.

*L. F. Grover*, for plaintiff.

*W. W. Chapman*, for defendant.

WILLIAMS, C. J. Gant controverts the right of Drew to an injunction, upon the following grounds:

*First.*—Because Drew did not give the notice required by law, of his intention to apply for a license to keep said ferry. Section 1 of the act regulating ferries, page 153, *General Laws of Oregon*, provides, that an application for a ferry license shall not avail a person, unless “his intention in relation thereto shall have been previously given, by publishing in some newspaper printed in this territory, or advertised on the door of the court-house, or at the door of the house where courts are usually held, and in three of the most public places in the county in which such ferry is proposed to be established, for four weeks successively next preceding the sitting of the court at which the same shall be made.”

Umpqua County was organized in 1851, and the Trenton Ferry was established on the application of Drew, at the first session of the board of county commissioners in that county. There was therefore no “court-house,” or house where the courts were “usually held,” on which Drew could advertise, and the most that he could do was to put up notices at four of the most public places in the county. We learn from the testimony, that the commissioners held their December term in 1851 at the residence of one Levins, in Elkton, who does not remember to have seen on his house, prior to that time, one of Drew’s notices. There is nothing to show, and it is not at all probable, that this house was designated as the place for holding the commissioners’ court before the day on which the court commenced. Gant does not deny that Drew advertised in four of the most public places in the county, for four weeks next preceding the court; but denies that he advertised on the court-house, or in the newspaper, as specified in the statute. Chadwick testifies that he saw Drew’s advertisements in five or six different public places in the county; that he saw one on “the big tree in Elkton, near Levin’s house;” that he saw them frequently through the summer, from as early as June or July till October and November,

1851. Levins also says he saw one in the spring of 1851. Two witnesses state that they did not see these notices, but such testimony is obviously entitled to little or no weight. From the evidence, it is clear that the people of Umpqua County were as fully advised of Drew's intended application for a ferry license, as if a notice to that effect had been put up on the door of Levin's house; and in view of the difficulties under which he labored, we hold that there was on his part a compliance with the substance and spirit of the statute. True, it does not appear that he made publication in a newspaper of the territory; but he had a right to adopt the less expensive, and, at that time, far more suitable way of advertising in the county, and this mode he did adopt, and followed as far as possible. Counsel for plaintiff have contended that proper notice by Drew ought to be presumed from the allowance to him of the license by the board of county commissioners, but, without determining this point, we place our decision upon the ground that necessary notice had been proven.

Gant alleges, in the second place, that no bond was given by Drew, as required by statute.

Huntington testifies that he was clerk of the board of county commissioners at the April term, 1852, and understood that the bond then made by Drew was given under a license issued to him at that time to keep the Trenton Ferry for the ensuing year. The bond is before us, and is not conditioned to keep said ferry "one year," but is conditioned "to well and truly keep said ferry," without any limitation as to time. Again, this bond was given as soon as it could be after the establishment of the ferry, for it had to be "approved by the court," and there was no court to approve it till April, 1852. If there was an order in 1852, as Huntington testifies, allowing Drew to keep said ferry for one year, it amounted to nothing, for, in the first place, the commissioners had no power to make such an order; (*Cason v. Stone, Oregon Reports*, 1853, pages 4 and 5;) and, in the second place, Drew was entitled to the ferry by virtue of the order made in De-

ember, 1851, and this bond is in all respects applicable to, and in accordance with, that order.

Gant objects to the injunction, in the third place, because the \$3, mentioned in the order of 1851, was not sooner paid. There was no treasurer of Umpqua County at the time the said order was made; and Huntington testifies that Drew tendered the said \$3 to him, but he refused to receive it. On the 8th of April, 1852, Drew paid to Huntington, then acting treasurer of said county, \$25 for a year's license; but as such license was a nullity, the \$3 may be regarded as paid at that time, and then it will follow that it was paid as soon as any one was authorized to receive it.

Independent, however, of this consideration, on the 10th of September, 1853, Drew paid to the treasurer of Umpqua County the \$3, pursuant to the order of 1851, so that, at any rate, his right from that time became indisputable. Drew may have delayed the payment of the \$3 at his peril; but as no valid license was granted to any other person during such delay, his right, after he did make said payment, was not thereby impaired. These facts, we think, warrant the conclusion that Drew has an exclusive right to the "Trenton Ferry," and is, therefore, entitled to an injunction against Gant, who does not pretend, in this case, to have any license to use, or in any manner to interfere with such ferry.

**Injunction granted.**



ISAAC MOORE, Complainant, v. JOHN THOMAS et al.,  
Defendants.

*Reserved from Benton.*

1. A deed unacknowledged and unrecorded is good between the parties.
2. A mortgage attested by one witness will be upheld in chancery.
3. Without acknowledgment, a married woman does not relinquish her dower by signing and sealing her husband's deed.
4. A recorded conveyance of real estate, not vitiated by fraud, will have priority in all cases over a conveyance not recorded.

MOORE seeks, in this case, to foreclose certain mortgages, executed to him by Thomas and wife, and dated in May and June of 1853, with the exception of one, which bears date the 25th of May, 1854. Avery and Prescott are made defendants on the ground, as the bill alleges, that on the 9th of December, 1853, they obtained a mortgage from Thomas and wife, for the same property described in, and with full knowledge of the existence and contents of plaintiff's three preceding mortgages. Thomas demurs to the bill, and for cause, states that so far as plaintiff's said mortgages of 1853 are concerned, they were never acknowledged by him, and are therefore void; and as to the mortgage made by plaintiff in 1854, it is invalid, because it has but one subscribing witness. Said mortgages of 1853 were recorded soon after their execution, but without proof or acknowledgment, and so remained till 1855, when they were proven by subscribing witnesses.

*D. Logan, for plaintiff.*

*O. O. Pratt, for defendants.*

WILLIAMS, C. J. Assuming, as we must, that these mortgages are unacknowledged and unrecorded in law, we think they are valid as between the parties thereto, and may be

enforced by this proceeding against Thomas. True, the invalidity of said mortgages seems to be a legitimate deduction from some of the provisions of the act of 1849, under which they were made; but when we consider the whole of said act, we think our conclusion is well founded, and fully effectuates the object of such legislation.

When said mortgages were signed, sealed and delivered by Thomas to Moore, they were certainly good at common law, and there is no reason to suppose that the design of the registry act was to prevent the operation of a deed so made, or to protect the parties thereto as against each other; but the manifest and exclusive object of such act was to protect third persons from fraud or injury by means of prior secret conveyances. This view corresponds with the judicial construction of the same statute in Iowa, from which this was taken, and is amply sustained by other authorities. (*Lessee of Sicord v. Davis et al.* 6 *Peters*, 124; *Clark et al. v. White*, *Ib.* 178; *Wood v. Owing & Smith*, 1 *Cranch*, 229; *Kent's Com.* vol. 4, p. 456.)

Plaintiff's mortgage, dated in 1854, and having but one subscribing witness, was not properly attested; for, by statute, "it should have been executed in the presence of two witnesses, who should have subscribed their names thereto as such." And in the case of *Clark et al. v. Graham*, 5 *Cond. R.* 192, it was held by the Supreme Court of the United States, under a statute of Ohio, similar to ours, that a deed so imperfectly executed was void. If this be true of a deed in an action at law, still, we think, that a mortgage, subject to a like defect, may be upheld and enforced in chancery; for equity can impose such conditions, and grant such relief, as the circumstances of the respective parties may require. (*Hunt v. Rousmaniera, Adm'r*, 1 *Peters*, 1.)

Mrs. Thomas has also demurred to the bill, because she never acknowledged said mortgages or relinquished her right of dower to the real estate therein described. This demurrer is well taken, and the reason therefor well assigned, as appears by the record.

Plaintiff's object, in making Mrs. Thomas a party, must be to cut off any future claim by her for dower; but it is clear, that the mere signing and sealing, by an unmarried woman, of her husband's deed without any acknowledgment, as provided by statute, will not support such claim. (*Elliot et al. v. Piersol et al.*, 1 *Peters*, 328; *Hepburn v. Dubois' Lessee*, 12 *Peters*, 345.)

Avery and Prescott demur, and take the ground that their mortgage is entitled to priority over all the mortgages of plaintiff. This position is correct, unless they are affected and postponed by the notice alleged in the bill, for it is well settled that registration and proof, such as plaintiff shows in this case for his mortgage, amount to nothing and bind nobody. To record a deed without proof or acknowledgment is a void act. (*Kern v. Swope*, 2 *Watts*, 75; *Heister v. Fortner*, 2 *Binn.* 40; *Frost v. Beekman*, 1 *Johns. Ch. R.* 300; *Carter v. Champion*, 8 *Conn.* 549.)

Though plaintiff's mortgages were not legally recorded before the act of 1849 was repealed, yet, if prior to the date of Avery and Prescott's mortgage, those of plaintiff had been duly acknowledged and recorded in accordance with the act of 1854, they must have been preferred; for, it is not correct, as assumed by counsel, that an unrecorded mortgage, dated prior to the passage of the act of 1854, cannot be properly recorded in conformity therewith, after said act takes effect. Section 26, page 479, *Oregon Statutes*, provides that, "any conveyance of real property hereafter made, which shall not be recorded, as provided in this chapter, within thirty days thereafter, shall be void against any subsequent purchaser in good faith, and for a valuable consideration of the same real property, or any portion thereof, whose conveyance shall be first duly recorded." This section allows thirty days in which to record conveyances *thereafter* made, before they shall become void, &c.; but, as to conveyances *heretofore* made, no time is given, and, if not first recorded, they are void as against subsequent purchasers, &c., as above provided. Avery and Prescott's mortgage was first recorded,

and if they are "subsequent purchasers in good faith," they must be preferred; if not, then plaintiff has a right to have the property first applied to the payment of his debts.

Avery and Prescott took their mortgage, and put it on record with a full knowledge of Moore's, which were never recorded. We hold that Avery and Prescott were "subsequent purchasers in good faith." Their object was to secure the payment of their debt, not to injure or defraud Moore. Knowing that the property of Thomas was mortgaged to Moore, they certainly had a right to take another mortgage upon the same property, so as to secure for their debt what might remain after the payment of Moore's. And if, upon a comparison of mortgages, Moore's, for any reason, was found to be insufficient to hold, Avery and Prescott might avail themselves of that insufficiency for the collection of their debt, without being chargeable with fraud. Moore is trying to collect his debts, and Avery and Prescott are trying to collect theirs. Here is a race for priority between creditors, and the law rather favors than condemns diligence in such a race. Avery and Prescott have been more diligent than Moore, and must, therefore, be preferred. When a second purchaser takes a conveyance, and puts it upon record with an *intent* to defraud the grantee in a prior unrecorded conveyance, such second purchaser will not be regarded as acting in "good faith;" but before the prior unrecorded conveyance can take precedence of the subsequent one recorded, the grantee in the second must be convicted of *fraud*, as against the grantee in the first deed. (*Hine v. Dodd*, 2 Atk. 275; *Tollin v. Stainbridge*, 8 Ves. 578; *McMeichen v. Griffing*, 3 Pick. 148; *Jackson v. Sharp*, 9 John. 163; *Corligs v. Corligs*, 8 Verm. 878; *Rogers v. Jones*, 8 N. Hamp. 264; *Porter v. Cole*, 4 Greenl. 20; *Beers v. Hawley*, 2 Conn. 469.)

The Supreme Court of the United States say, in the case of *Conrad v. Nickoll*, 4 Peters, 295, that "to constitute actual fraud between two or more persons to the prejudice of a third person, contrivance and design to injure such third person must be shown." And also, "if the motive and design of an

act may be traced to an honest and legitimate source, equally as to a corrupt one, the former ought to be preferred." Lord Hardwick says, in the case of *Hine v. Dodd*, above cited, that the "meaning of the registry act was to prevent parol proofs of notice, or not notice." Effect ought to be given to this "meaning," as far as practicable, so that the titles to real estate in the country may be matters of public record, and not "be, or cease to be," as shall happen by the testimony of forgetful or false witnesses. Where all conveyances of real estate are recorded, persons know where to look for information as to titles, and upon what to depend; and we are disposed, at this early day, so far as our statute will warrant, to install this system of safety and certainty, and to hold that a recorded conveyance of real estate, not vitiated by fraud, shall in all cases have priority over a conveyance not recorded. Registry acts impose no hardships; operate alike upon all; make titles secure and prevent litigation. Their rigid enforcement is for the public good.

**Demurrer of Thomas overruled.**

**Demurrer of Mrs. Thomas sustained.**

**Demurrer of Avery and Prescott sustained.**



**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**Supreme Court of the United States**  
**FOR THE**  
**TERRITORY OF OREGON.**

**DECEMBER TERM, A. D. 1855.**

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GEORGE H. WILLIAMS, *Chief Justice.*  
CYRUS OLNEY AND } *Associate Justices.*  
M. P. DEADY,        }  
J. G. WILSON, *Clerk.*

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**\*A. N. ARMSTRONG et al v. ESTATE OF P. M.  
ARMSTRONG.**

*Adjourned from Yamhill.*

A law, passed after the death of an intestate, but before distribution of his estate, controls such distribution.

PLEASANT M. ARMSTRONG died in 1853, leaving a large amount of personal property, a widow, and no children. A. N. Armstrong and others, brothers and sisters of the deceased, claimed equal shares with the widow in said property; but the Probate Court of Yamhill County, upon the final settlement of the estate, awarded all that remained, after the payment of debts and expenses, to the widow, Jane Armstrong. A. N. Armstrong, for himself and other claimants, appealed from this decree to the District Court of said county, and the cause has been adjourned into this court for final adjudication.

\*See 75 Am. Dec. 555.

*Pratt & Logan*, for appellants.

*Campbell & Grover*, for appellee.

WILLIAMS, C. J. Chapter twelve, page 382, of the *Oregon Statutes*, provides, in effect, "that when a married man shall die intestate, and without issue, his widow shall be entitled to all the personal estate that remains, after the payment of debts and expenses, as prescribed by law." Section three of said chapter is as follows: "When, as doubts have arisen as to what has been the law in relation to the distribution of the personal estate in this territory, the rule of distribution established by this chapter is hereby declared to have been the law of the land since the first session of the Legislative Assembly of this territory, begun and held at Oregon City, on the 16th day of July, A. D. 1849: *Provided*, nothing in this section contained shall be so construed as to disturb the settlement of any estate whereof administration is complete and distribution made."

All of said chapter took effect on the 1st day of May, 1854; and although it undertakes to declare what the law had been prior to that date, it only amounts to a rule for the distribution of the estates to be settled and distributed after the enactment of the statute. No settlement or distribution of the estate in question took place till December, 1854; and the only question, therefore, to be decided in this case is, whether such estate should have been distributed in accordance with the act of 1854, above cited, as contended by the widow, or, whether it should have been distributed in accordance with the law in force at the time of Armstrong's death, as contended by appellants.

All parties agree, that at the time of Armstrong's death there was no legislative enactment for the distribution of estates in this territory, and much confusion has consequently arisen as to the common law rights of the parties; but as we feel bound to apply the statute of 1854 to the estate in suit, any opinion as to the state of the law prior to that time will



be unnecessary, and out of the case. We hold that after the payment of the debts and expenses, as provided by law, Mrs. Armstrong is entitled to all that remains of the personal estate of her deceased husband, and this judgment, we think, is supported by principle as well as authority. Independent of any rule of law, or regulation of society upon the subject, there seems to be no good reason why an intestate's effects should be taken from the widow and given to the brothers and sisters of the deceased. Nothing but the naked ties of consanguinity can be urged in favor of their right. None of the estate is inherited from or through them. None of it is accumulated by their diligence or labor. Mere relationship, however, is not generally the only ground of a widow's claim. Marriage not only makes the parties thereto one in name, but creates a community of duties and interests, so that the estate of a married man deceased is oftener than otherwise the joint fruit of the united industry and care of both husband and wife. Natural equity, therefore, acting upon a general rule in the distribution of an estate, would not prefer the collateral relations by blood to the widow of the deceased; from which it will follow, that all pretence of right by appellants to the property in dispute is derived from, and dependent upon, the will of the law-making power. Manifestly, the law-giver may change or make his legislative will at any time before it takes effect, or becomes executed, and of course any right, growing out of it, and dependent upon such will for its existence, must be correspondingly changed or revoked. Now, it would seem obvious to any one, that the will of the law-maker, relative to the distribution of the property, does not take effect until the distribution is made; and, upon this ground, it may be safely affirmed, that the law of 1854, before quoted, though enacted after Armstrong's death, was applicable to the distribution of his estate made after its enactment. Appellants, however, contend, that the title to a portion of their deceased brother's estate vested in them at the time of his death, so that the legislature had no power, by subsequent act, to divert any and give it to another. Now, if it be true that said property did

vest as claimed, then it is also true that said statute cannot operate so as to give it to the widow, for the organic act provides that no man shall be arbitrarily deprived of his property. But it is not true that the title to any part of Armstrong's estate vested in the appellants at the time of his death; and, therefore, it is not exempt from the operation of the said statute upon that ground. Appellants cannot show one of the ordinary marks or signs of title to any part of this estate. They have no right of possession—no interest that can be taken for their debts—nothing that can be applied to their use. They may have an expectancy dependent upon a contingency, but this is far from title. All the personal property of an estate is vested in the administrator. He is entitled to its possession as against all other persons, and may sell it, and convey a perfect title; no one else is recognised as owner by the law. But it is said the administrator holds the estate in trust, and this position is correct, but of no avail to appellants. When a man dies intestate, the supreme authority of the law takes his personal estate, and gives it away according to its absolute will and pleasure. It may give all to the father, brother, widow, or any other relative of the deceased, or may make division among any or all of them. Its high behests upon the subject it can make or unmake, as its views of policy and right may change; and no one can defeat the constitutional exercise of this arbitrary power. But the law must of necessity have an agent to execute its will. Its agent as to the effects of the deceased persons is an administrator. He holds the estate in trust, not for any particular person or persons, but to be disposed of as the law shall direct, and is made responsible for what he may receive in his fiduciary capacity to those whom the law authorizes to call him to account. Now, when an administrator goes to distribute an estate, he must look exclusively to the law for directions, not those directions which it gave before his appointment, or at any prior time, but to such directions as it gives when the distribution is made. Admitting, what is a matter of doubt, that the law at the death of Armstrong promised to give a portion of his estate to ap-

pellants, the right of the law to make that promise before distribution is clear, upon the well-known principle that the mere promise to give a thing does not, before delivery, bind the promissor, or confer any right upon the promisee.

But it is argued and not denied, that the law cannot be so changed after a man's death, as to exempt his estate from the payment of those debts created in his lifetime; and some effort has been made to apply that doctrine to this case. Appellants, however, cannot place themselves on the same footing with creditors. When two men make a contract, it is implied, if not expressed, that not only they, but their respective estates, shall be bound for its fulfilment. Creditors claim upon this ground, and any law, therefore, declaring that a decedent's estate shall not be liable for his debts, is a law impairing the obligation of contracts, and void. (*Statutes of Oregon*, p. 25, *Organic Act*.)

Appellants do not pretend to claim any part of the estate, in question, by virtue of a contract. They claim by operation of law; but before their claim could be allowed, the law had ceased to operate in their favor. Appellants, we think, had no vested rights in the estate of their deceased brother, according to the authorities. Williams, in his work on *Executors*, p. 790, says, that "an executor or administrator has the same property in the personal effects of an estate as the deceased had when living, and has the same power to bring actions in reference thereto."

"On the death of the testator or intestate, his executors or administrators, in point of law, are the owners of the goods which belonged to him, and may declare for them as their own, when damaged by another." (*Hollis v. Smith*, 10 *East*. 295.)

"It is a general rule of law and equity, that an executor or administrator has an absolute power of disposal over the whole personal effects of his testator or intestate, and that they cannot be followed by creditors or legatees into the hands of the alienee." (*Whale v. Booth*, 4 *T. R.* 625; *Nugent v. Gifford*, 1 *Atk.* 463.)

"After the death of the deceased his personal property may be considered in abeyance until administration is granted; and is then vested in the administrator, by relation, to the time of the death." (*Jewel v. Smith*, 12 Mass. 309; *Lawrence v. Wright*, 23 Pick. 128.) In the case of *Carpenter v. Commonwealth of Pennsylvania*, 17 How. 456, the Supreme Court of the United States assert the doctrine here maintained. In 1826 the State of Pennsylvania passed a law by which, under certain circumstances, "all inheritance, being within that commonwealth," should be subject to a tax. William Short, a citizen of Pennsylvania, died in 1849, leaving certain personal property in New-York to citizens in that State. In 1850 the legislature of Pennsylvania passed an act, declaring that the prior act of 1826 "should be so construed as to relate to all persons who have been, at the time of their decease, or now may be, domiciled within this commonwealth, as well as to estates." The Supreme Court held, that the title to the property in New-York did not vest in the devisees there in 1849, but belonged to the executor in Pennsylvania till distribution made, and was, therefore, taxable by virtue of the act of 1850. If personal effects do not vest in devisees under a will upon the death of a testator, they certainly cannot vest in heirs upon the death of an intestate. We conclude, in every point of view, that the act of our Assembly, of 1854, before cited, was and is applicable to the distribution of all estates since its passage, without regard to the time of the intestate's decease, and therefore affirm the judgment of the Probate Court.

Judgment affirmed.

OLNEY, J., did not sit in this case.

CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of the United States

FOR THE

TERRITORY OF OREGON.

JUNE TERM, A. D. 1856, AT PORTLAND.

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GEORGE H. WILLIAMS, *Chief Justice.*  
CYRUS OLNEY AND } *Associate Justices.*  
M. P. DEADY,         } *J. G. WILSON, Clerk.*

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JOAQUIM YOUNG v. TERRITORY OF OREGON.

*Petition for a Mandamus.*

The act of Assembly, suspending payment of the claim in question, held  
valid.

*Pratt & Campbell*, for plaintiff.

*Sheil & Grover*, for defendant.

DEADY, J. Upon the admitted facts in this record, and the law arising thereon, the court have concluded that the writ of mandamus should be denied, and so decide. This decision is placed upon the following grounds, without intending in any manner to conclude any other questions that may have been raised in the course of the argument, that is to say: that whether the act of the Provisional Government

of December, 1844, be a contract supported by a legal consideration, or is an *ex parte* promise, resting upon mere moral considerations, and the continuing good-will and ability of the promissor; in either view it was, from the beginning, without a legal remedy for its violation or suspension, and its obligations in legal contemplation, incapable of being enforced. The act of January, 1855, allowing the suit by the plaintiff in the Supreme Court, gave him the privilege or opportunity to establish his legitimacy, his identity, and the amount claimed. The same thing might have been done under the now and then existing laws, before the auditor of the territory, together with a certificate of the latter of the result, to be laid before the Assembly for further action. At this point of time, the Assembly repealed so much of the act of January, 1855, as directed the auditor to issue his warrant for, and the treasurer to pay, the amount of the judgment, thereby indefinitely suspending the payment of the claim. Whatever may have been the policy or necessity of this legislation is not for this court to inquire. We think and decide, that the Assembly had the power so to legislate, that, by so doing, the plaintiff was only restored to his original situation. The original obligation was in no way impaired, and now, as then, the plaintiff's claim, whether founded upon legal or moral considerations, still exists, dependent upon the will of the Assembly for an appropriation of the public money for its payment, or other action equivalent thereto.

**Mandamus denied.**

BENJAMIN F. GOODWIN, Plaintiff, v. WILLIAM H.  
BARNHART, Defendant.

*Reserved from Multnomah.*

When and how the effect of a guaranty may be averred.

CRANE, ROGERS & Co. drew their bill on Adams & Co., of San Francisco, in favor of Cole, for \$1089.43. In the margin of the bill the sum was stated in figures, \$1,989.43." Cole endorsed upon the bill a request upon Adams & Co., of Portland, to pay to Barnhart the amount stated in the margin. The Portland house gave to Barnhart the marginal sum, on his agreement to refund it "in case the full amount is not paid on presentation." The house of Adams & Co., at San Francisco, becoming insolvent, the house at Portland failed to realize any thing on the bill, and their effects having passed into the hands of Goodwin, as receiver, this suit is brought on Barnhart's guaranty to recover the amount of the bill. The answer, among other defences, sets up, that Adams & Co., at both places, were one firm, and that it was the agreement, and the true intent and meaning of the guaranty, that \$1,989.43 was the sum intended to be expressed in the bill. The identity of the two houses is traversed by the replication, and the averment of what the agreement was is demurred to.

*A. Campbell*, for plaintiff.

*A. E. Wait*, for defendant.

OLNEY, J. The defence, which the pleader had in view, if true in fact, would bar the action. At the common law, a general denial would put in issue the legal effect of the con-

tract; and the circumstances under which it was made would be admissible to explain its meaning. Perhaps, under the Code, the defendant might have denied this contract, as it is stated in the complaint; but being required to swear to his answer, and not being able to deny the *words* of the contract, as there stated, he has adopted the more prudent course of setting out the facts, which show that the plaintiff has misconstrued it. If the jury should find the fact to be true, that the two houses were one firm, or that the defendant had a right to treat them as one, they would conclude that no such agreement, in legal effect, was made; for one would not take a guaranty that he would pay to himself a sum of money. But to authorize the jury to find that *such* a contract was not made, there must be a denial of it in the answer. The averments in this answer do not amount to such denial, for the agreement may have been what the defendant says, and as much more as the plaintiff claims.

The defendant, after stating the facts, ought to have averred, in substance, that he made the written agreement in order to indemnify Adams & Co. from loss by over-payment of the bill, *and not otherwise*.

The demurrer is sustained, and the cause remanded, with leave to amend the answer.

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THOMAS NAYLOR, Plaintiff, v. S. J. N. BEEKS,  
Defendant.

*Adjourned from Washington.*

1. A recorded plat of a highway is not evidence of the existence of a road; it is evidence only of its precise locality.
2. Under the act of 1854, a recorded plat of a survey of a road is necessary before the same could be opened; unless the road is laid upon a government public survey.

THE special verdict finds that the commissioners of Washington County, after the proper preliminary steps, passed an



order, establishing a county road from "Hillsborough to Forest Grove, upon the base line of the government land surveys; thence by a street to a given point, and thence to Smith's lane;" which road was not surveyed, platted and recorded as required by the act of 1854; the plaintiff, as supervisor, notified the defendant to appear, at a designated time and place, to perform his road labor at the opening of this road, which the defendant refused to do, on the ground that it was not a public highway; and this action was brought to recover the penalty for such refusal.

*P. Marquam*, for plaintiff.

*D. Logan*, for the defendant.

OLNEY, J. The statute declares that, from the time of recording the plat, the road shall be considered a public highway. But a recorded plat is not evidence of the existence of a road; it is only evidence of its precise locality. Its existence as a legal highway is to be learned from, and proven by, the order for its establishment. If an inspection of that order gives all the information that could be derived from a recorded plat, then the object of that salutary requirement is fully accomplished, and a literal compliance becomes an useless expense. Every person is a party to the public surveys, and is presumed to know the existence and precise locality of the *base-line*, as fully as he could learn it from a recorded plat. That line is, therefore, the centre thread of a legal public highway, from Hillsborough to Forest Grove; but, from that point, where the road leaves the base line, a recorded plat of an actual survey was necessary before it could lawfully be opened. If the defendant was directed by the supervisor to enter upon the lands of others in order to open that part of the road, the question would be whether he could lawfully refuse; and this might depend on the right of the supervisor, and those acting under him, to shield themselves behind the order of the commissioners directing it to

be opened. But the verdict does not find whether the defendant was directed to work on the base-line, or on this unsurveyed portion of the road; and a new trial will be necessary to determine that point, before judgment can be given between the parties.

Cause is, therefore, remanded for a new trial.

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THE CITY OF PORTLAND, Plaintiff, v. JAMES  
O'NEILL, Defendant.

*Adjourned from Multnomah—Action to recover penalty for  
Violation of City Ordinance.*

1. The charter of the City of Portland provides, "that the Mayor and Common Council shall have power to license, tax and regulate brokers, pawnbrokers and money-changers." *Held*, that they have no power to regulate or license "the sale of bills of exchange," when the business is transacted by persons on their own account, and with their own funds.
2. Defendant, being a salaried agent, and not acting for a fee, or rate per cent., for others, is not a broker.

HOLMES, city marshal, complained of defendant as follows: "that said O'Neill is engaged in the business of money brokerage, or sale of bills of exchange, within the limits of said city, and has failed to take out a license therefor," &c. Defendant was found guilty by the recorder of the city under this charge, and fined \$100. He appealed to the District Court, and the case has been adjourned for the decision of this court. Defendant, as it appears from the evidence, is the salaried agent of Wells, Fargo & Co., and, without license, is engaged in the business of buying bills of exchange with their funds, and selling bills drawn by them upon their houses in the States.

*D. Logan*, for plaintiff.

*A. Campbell*, for defendant.

WILLIAMS, C. J. Beyond dispute, defendant has violated the ordinance as charged, for that prohibits the sale of "bills of exchange" without a license. Defendant, however, denies the validity of the ordinance. The city charter provides that the mayor and common council shall have power, among other things, "to license, tax and regulate brokers, pawn-brokers and money-changers." Now, unless the business of defendant is that of a "broker," it is not pretended that the city authorities, under the charter, have any power to prohibit or license it. Webster defines a "broker" to be "an agent or negotiator, who is employed by merchants to make and conclude bargains for them for a fee, or rate per cent." Exchange brokers, he further says, are those "who make and conclude bargains for others in matters of money or merchandise; learn the rate of exchange, and notify their employers." Defendant, then, is not a broker according to this authority, for he does not make bargains for "others," but buys and sells on his own account, and with his own funds, or on the account and with the funds of his principals, which is the same thing; as he is a salaried agent, and does not act for "a fee, or rate per cent." Bouvier says, (*vol. 1, page 209,*) that brokers "are those who are engaged for others in the negotiation of contracts relative to property, with the custody of which they have no concern."

We conclude, then, that the mayor and common council of Portland have no power to regulate, or license "the sale of bills of exchange," when the business is transacted by persons on their own account, and with their own funds.

Wherefore the judgment of the recorder must be reversed.

**Judgment reversed.**

LEANDER HOLMES, Plaintiff, v. DANIEL H.  
FERGUSON et al. Defendants.

*Bill to Foreclose Mortgage.—Adjourned from Clackamas.*

1. Where credit is given on account of an interest in certain premises, the party giving such credit is bound to know the extent of that interest.
2. Defendants held by a deed, which recited the existence of a mortgage, and they are estopped from denying such mortgage.
3. Parties and privies are bound by the recitals of a deed through which they claim title.

On the 1st day of December, A. D. 1852, Moore conveyed to Ferguson certain real estate in Linn City, in said county, for 50,000 dollars; and at the same time took a mortgage for 45,000 dollars of the purchase money, payable in ten years, with interest at the rate of six per cent per annum, payable annually. On the 19th day of March, A. D. 1853, Ferguson conveyed the same premises to the "Willamette Falls Canal, Milling and Transportation Company," by deed containing the following recital: "It is expressly understood, however, that the said premises are encumbered with a mortgage, made by said Ferguson, to secure the said Moore the sum of 45,000 dollars, which mortgage bears date on or about the 1st day of December, 1852, and is at the rate of six per cent. per annum, and the said company hereby assumes the payment," &c. The deed from Moore to Ferguson was filed for record on the 9th day of May, 1853; and the deed from Ferguson to the "Falls Co." was filed for record upon the 24th day of March, 1854. The said mortgage was filed for record on the 14th day of April, 1854.

*Pratt & Campbell, for plaintiff.*

*Kelly & Holbrook, for defendants.*

WILLIAMS, C. J. Plaintiff avers that the said mortgage was duly assigned to O. C. Pratt, and by said Pratt to him, and asks to have it foreclosed, because the sum of \$5,400 interest is now due thereon and unpaid. Many of the defendants are judgment creditors of the said "company," with mechanics' liens; and they aver that, in the month of May, 1853, said "company" commenced the erection of a warehouse and saw-mill upon said premises; and that thereafter, but before plaintiff's mortgage was filed for record, they were employed by said "company" to furnish materials for, and perform labor upon, said buildings; wherefore, they say, that their liens are paramount, and ought to be preferred to the lien of said mortgage. This position is clearly untenable, upon principle and authority.

If defendants gave credit to the "company," on account of their interest in the said premises, or looked to a lien thereon as security for their demands, then they must have known, or were bound to know, what that interest or right was upon which they placed such reliance. Reference to the books of registration showed the title to be in Ferguson; so that defendants were not misled, and induced to give credit to the "company," because the public records indicated that they were the owners, and entitled to encumber or dispose of the property. Defendants, then could only learn the rights of the "company" in the land, by looking at the title-deed; and by this they were fully advised of the existence of this mortgage, and that any encumbrance which the "company" could create must be in subordination to it.

According to well-established principles of law, defendants cannot be permitted to say, in court, that they had no knowledge of plaintiff's mortgage. Ferguson's deed to the "company" fully recites the mortgage; and, by such recitals, the "company" is estopped to say there is no such mortgage. (*Croke, Eli. 756; 1 Roll. 872-3; 2 Smith's Leading Cases, 435; 4 Peters, 85.*)

Defendants derive all the right which they claim through the deed from Ferguson to the "company," and they are,

therefore, as well as said "company," estopped to contradict the solemn admissions and recitals of said deed.

Lane, J., in the case of *Douglas v. Scott*, 5 *Ohio R.* 195, lays down the law as follows: "The obligation created by estoppel not only binds the party making it, but all persons privy to him, the legal representatives of the party; those who stand in his situation by act of law, and all who take his estate by contract, stand in his stead, and are subjected to all the consequences which accrue to him. It adheres to the land; is transmitted with the estate; it becomes a muniment of title; and all who afterward acquire the title take it subject to the burden which the existence of the fact imposes on it. To the same effect are all the authorities. (*Crane v. Morris*, 6 *Peters*, 611; 4 *Kent's Com.* 261; 1 *Greenleaf's Ev.* 28.)

Defendants further allege, that Moore and Pratt, while they claimed said mortgage, respectively advised defendants to go on with their work, and that they would be paid; but we do not think, in view of all the facts, that any thing was said or done, by either one, amounting to a waiver of their legal rights, or that justifies a preference of the judgments to the mortgage. Plaintiff's claim is prior in time, and, by uncontradictable implication of law, if not in point of fact, is prior in right. He must, therefore, have judgment.

**Judgment for plaintiff.**

JOHN WOOD, Plaintiff in Error, ads. TERRITORY OF  
OREGON, Defendant in Error.

*Washington Co.*

The statute provides, "If any person or persons shall barter, sell, or dispose of, in any manner, any spirituous liquor," &c.

1. *Held*—It was error to instruct the jury, "If the liquor was given gratuitously, it would sustain the indictment equally as if it had been sold and paid for."
2. *Held*—It was error to refuse the instruction, "that if the liquor was gratuitously given, without consideration, the defendant could not be convicted."
3. The statute was intended to regulate the *traffic* in spirituous liquor, for a consideration, or motive of gain.
4. A conviction for *giving* cannot stand under an indictment for *selling* liquor.

WOOD was indicted for selling liquor without license. Section six of the act relating to the granting of licenses to sell spirituous liquor, provides, that "if any person or persons shall barter, sell, or dispose of, in any manner, any spirituous liquor, without first having obtained a license, &c., shall be fined," &c. Exception is taken to the instructions of the court below.

*D. Logan*, for plaintiff.

*P. Marquam*, for defendant.

WILLIAMS, C. J. Plaintiff in error asked the court to instruct the jury, "that if the liquor was gratuitously given, without consideration, the defendant could not be convicted;" which instruction the court declined to give, but instructed them, "if the liquor was given gratuitously, it would sustain the indictment equally as if it had been sold and paid for." We think there was error in the refusal of the court to instruct the jury as asked, and, also, in the instruction given.

The statute was intended to regulate the *traffic* in spirituous liquors. To dispose of liquor in any manner might, unqualified by any thing else, mean the giving of it away; but in view of the whole statute, we think it means to part with it for some consideration, or with some motive of gain. Clearer and stronger language is necessary to make it a crime for one man to give another a glass of spirituous liquor. Where it is intended to prohibit the giving of a thing as well as the selling, the word "give," or some equivalent term, is employed, as in the statute, to prevent Indians from obtaining guns, ammunition and ardent spirits from white men. The expression, "to dispose of in any manner," seems intended to reach those cases where persons, by some artifice or indirection, attempt to cover up a sale, and so evade the penalties of the law. Furthermore, a conviction for *giving*, under an indictment for *selling*, cannot be allowed to stand.

Judgment is reversed.

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AIKIN & FLAVEL, Plaintiffs in Error, v. LEONARD & GREEN, Defendants in Error.

*Error to Clatsop.*

1. When a witness is allowed to give his understanding of a conversation, and his other testimony shows that his understanding was correct and true, the judgment will not be reversed on that ground, though it is error.
2. A judgment will not be reversed for an error in the court below, when it affirmatively appears that such error has worked no injury to the parties.

THE bill of exceptions, in this case, sets out the testimony of one Seymour, a witness for plaintiffs, from which it appears, that the parties to this suit had an interview in reference to certain debts, due from defendants to plaintiffs, one book ac-



count, one to witness, one to McConnell, and that an arrangement was made by which plaintiffs assumed the debts due witness and McConnell, and that certain papers were executed, among which was a bill of sale from defendants to plaintiffs. Witness then stated that plaintiff, Green, took the bill of sale in his hands, and said, "Now, this is all right; this will apply on these debts, or is to secure these debts." Plaintiff then asked witness "what debts he understood Mr. Green to refer to?" To which question defendants objected; but the court overruled the objection, and the witness answered, "that he understood Mr. Green to mean the book account, and the debts due to witness and McConnell."

*A. Campbell*, for plaintiffs in error.

*D. Logan*, for defendants in error.

WILLIAMS, C. J. We assent to the proposition that there was error in this decision of the court below, but cannot, therefore, conclude to reverse the judgment. Plaintiffs in error were in no way prejudiced by the answer of the witness, for his statement was an inevitable conclusion from the preceding parts of his testimony.

He states particularly what was said and done about the book account, and the debts due witness and McConnell, and while these were fully talked over and arranged, no allusion was made to any other claim or debt.

Generally a witness should not give his understanding of an interview between the parties, but state what they said or did; but if he does declare his understanding, and his other testimony manifestly shows that it was correct and true, a judgment will not be reversed on that ground. The doctrine is well settled, that a judgment will not be reversed for an error in the court below, where it affirmatively appears that such error has worked no injury to the parties. (*Osborn v. the State*, 7 Ohio, 212; *Harman v. Kelly et al.* 14 Ohio, 502.)

Judgment affirmed.

ELIAS J. CRANDALL, Plaintiff in Error, v. J. B. P. PIETTE and GREEN C. DAVIDSON, Defendants in Error.

*Error to Yamhill.*

Where there is judgment by default in a lower court, it is wholly a matter of discretion for the appellate court to permit, or refuse, the filing of an answer, or making defence.

THIS suit was commenced before a justice of the peace, and judgment taken by default. Plaintiff in error appealed to the District Court, and when this case was called up for trial, applied for leave to file the following answer: "That on the 23d day of January, 1854, before E. D. Harris, a justice of the peace in and for the county of Yamhill, a trial was had and judgment rendered in favor of the said defendants, on the same cause of action upon which the present action was brought."

Objection was made by the plaintiffs, and the court refused the leave as prayed for, but granted leave to the defendant to answer to the merits. The refusal of the court to allow the said answer to be filed is the alleged error.

*D. Logan*, for plaintiff in error.

*N. Huber*, for defendants in error.

WILLIAMS, C. J. Defendant allowed judgment to go against him by default before the justice, and could not, for that reason, afterwards appear and defend as a matter of right; his application, therefore, for leave to answer, was addressed to the discretion of the District Court. That court, in the exercise of such discretion, might allow, or refuse altogether the application, or might grant it, upon such terms as in its judgment were just under the circumstances. We cannot,

as a general practice, overrule the exercise of discretion by the District Court, and if we could, there is no very apparent error in refusing to remove a legal bar to plaintiff's defence, simply to enable him to interpose a legal bar to the plaintiff's right of recovery.

Judgment affirmed.

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WILLIAM BAKER, Plaintiff in Error, v. JOSEPH  
STOUGHTON, Defendant in Error.

*Error to Columbia.*

Suit cannot be maintained upon an obligation to deliver round or hewed timber, as the *obligee* might choose, and of such size and length as he might direct, without showing that defendant (*obligor*) had been directed as to the timber to be delivered.

THIS suit is brought upon the following instrument in writing:

"\$425. Milton, Nov. 28, 1850. On or before the first day of February next, I promise to pay L. G. Whipple, or bearer, the sum of four hundred and twenty-five dollars, in round or hewed timber, as he may choose, and such size and length as he may direct; said timber to be delivered at Milton, at the usual place for vessels to take in the same, for value received; timber to be at the highest market price.

JOSEPH STOUGHTON."

The plaintiff avers, in his complaint, "that all and every the conditions or condition precedent, necessary to be done or performed by the obligee in the above obligation, were duly performed by the obligee, but that defendant has failed to pay," &c.

Defendant, in his answer, denies that he is indebted, and "denies that the condition or conditions precedent, necessary to be done or performed by the obligee, in the said obligation, have been performed."

The verdict of the jury was, that the holder of the said promissory note did not perform the condition precedent, necessary to be by him performed, as the plaintiff has alleged. Plaintiff made a motion for a new trial, which was overruled, and judgment given for defendant.

*D. Logan*, for plaintiff in error.

*A. Campbell*, for defendant in error.

WILLIAMS, C. J. Plaintiff complains of this decision of the District Court, and says that he was entitled to a judgment in this case for the amount claimed, without showing that he, or the payee of said note, ever gave to defendant any directions as to the kind or size of the timber to be delivered thereon. We consider this position untenable. We see no reason why the clear and express understanding of the parties should not be carried into effect. Defendant promised to pay the amount of the note in such timber as the holder thereof might call for; and it is impossible to say, with truth, that he has violated that promise, until it appears that he has been called upon, as stipulated in the contract.

Plaintiff does not deny that defendant had a right to wait for directions until a reasonable time before the note became due; but that then it was his right and duty to elect as to the sort of timber in which he would make payment.

Perhaps this might be true, if defendant was to pay, at a certain time and place, in timber of a certain kind and dimension, or upon such other terms as the plaintiff might prescribe; but in this case there was no alternative. There was no other way for defendant to determine as to the dimensions of the timber, except from the directions of plaintiff. But it is said that defendant was bound to pay in merchantable timber, without any directions. This assumption imposes upon defendant a responsibility which he had no reason to anticipate from the contract. According to the express agreement of the parties, plaintiff, and not defendant,

was to decide as to the kinds of lumber to be delivered. To construe the contract as contended for by plaintiff, would be to open the door to litigations. Parties would differ as to what was a reasonable time before the note became due, and as to what was merchantable timber, and other matters that were supposed to be settled in the agreement.

The doctrine here laid down is recognized in 2 *Watts' R.* page 139. In that case, H. promised to pay a widow \$133 per year—a part in cash, and the residue in trade, according to her wants, to wit: grain, meat, hay, &c., at market prices. The only question in the case was, whether the plaintiff could recover the value of the specific articles without proof of a demand before suit brought. The court say: "In the case at bar, if a demand be necessary, no difficulty exists as to the place, as it is evident, from the contract, that both parties had reference to the farm on which they resided as the place where the articles were to be demanded and delivered. The contract is for the delivery of the grain, hay, meat, &c., of a stipulated value, as they may be wanted, for the support of the widow. She may elect what part she will receive in grain, what in meat, what in hay, or whether she will receive the whole in one or the other article, or in any other commodity, the product of the farm. It cannot be the duty of H. to make a tender; for, until she makes a demand, it is impossible for him to know what to tender, or in what quantities, or at what time."

So, in this case, it could not be the duty of defendant to tender timber; for, until plaintiff gave directions, it was impossible for him to know what the kind, size and length of the timber should be.

In *Roberts v. Beatty*, 2 *Penn. R.* 63, it is said, that it is not the duty of the obligor to pay or deliver the specific articles mentioned in the obligation, when the time of delivery, the nature and quality of the article, depend upon the election of the obligee. (*See, also*, 20th *Wendell*, 198; 5th *Cowen*, 516.)

Judgment affirmed.

JOSEPH PIN et al., Plaintiffs in Error, v. JAMES  
MORRIS, Defendant in Error.

*Error to Yamhill.*

One in possession of land, claiming under the donation act, cannot be dispossessed, by action at law, before the completion of his four years' residence, when the contest between the parties has been determined in favor of the occupant by the surveyor-general.

PLAINTIFFS claim the land described in the complaint, as heirs of Joseph and Margaret Pin, deceased, under the fourth section of the donation act.

Defendant, among other things, says, in his answer, that he is informed and believes that one Joseph B. Rogers, as guardian of the minor children of said Joseph Pin and Margaret, his alleged wife, claimed to be deceased, filed a notification with the said surveyor-general on the 25th day of March, 1853, claiming said tract of land on behalf of said alleged minor children and others, through alleged residence and cultivation of said land by the said Joseph Pin, senior; and that afterwards, on the 12th day of June, 1855, and on testimony and certain proofs and documents, filed with said surveyor-general, had a hearing and determination by and before said officer, touching the said claim so made, and supported as aforesaid. That this defendant was notified of said claim and hearing, attended thereon, and had his rights to the premises considered by said officer; which said hearing was had, and said premises adjudged in his favor as settler, and against said minor heirs and alleged legal representatives of said Joseph Pin, deceased.

Plaintiffs demur to the portion of the answer above set forth, and say that it constitutes no bar to their right of recovery.

*M. Elliott*, for plaintiffs in error.

*Campbell & Pratt*, for defendant in error.

WILLIAMS, C. J. Defendant, as the pleadings show, went into possession of the land in dispute in January, 1852, and this action was commenced in August, 1855, so that plaintiffs brought suit before defendant had resided upon and cultivated said land for four consecutive years, as required by the act of 27th September, 1850, under which he holds and claims possession. When a person in possession of public land, in a controversy with another claimant before the surveyor-general, is adjudged by such officer to be the rightful occupant, we hold that the courts of the territory cannot reverse such decision so as to disturb the possession of the party, in whose favor it was made, until the expiration of his four years' residence. Congress has organized a land department of the government, whose business it is made to determine those questions which arise out of the disposal of the public lands, and the courts of the country cannot interfere to regulate or control that business, without introducing uncertainty and confusion into the whole system. Take this case as an illustration: Suppose the courts dispossess defendant, and so prevent his compliance with the donation act, and the land department adheres to its decision against the rights of plaintiffs. To whom will the patent for the land be issued? We intimate no opinion as to what the courts of the territory would do in case defendant's residence and cultivation were complete, or he held the patent; but upon the state of facts presented here, we hold the answer to be good, and overrule the demurrer.

**Judgment for defendant.**





**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**Supreme Court of the United States**  
**FOR THE**  
**TERRITORY OF OREGON.**  
**DECEMBER TERM, A. D. 1856.**

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**GEORGE H. WILLIAMS, Chief Justice.**  
**CYRUS OLNEY AND** } *Associate Justices.*  
**M. P. DEADY,** }  
**J. G. WILSON, Clerk.**

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**DECEMBER TERM, A. D. 1856,**  
*Supreme Court of the U. S. for the Territory of Oregon.* }

*Ordered,*—That terms of the District Courts be held in the city of Salem, in the county of Marion, on the first Mondays in April and September, and on the fourth Mondays in May and October, annually, until otherwise ordered. And in the city of Portland, in the county of Multnomah, on the fifth Monday in December, 1856; and thereafter, on the first Mondays in May and October, and the third Mondays in June and November, annually, until otherwise ordered. And in the village of Roseburg, in the county of Douglas, on the first Mondays in March, May, September and November, annually, until otherwise ordered, and do limit the duration of said term to six days each.

POSEY WILLIAMS, Plaintiff in Error, v. HENRY M.  
KNIGHTON, Defendant in Error.

*Error to Columbia.*

A complaint upon a promissory note, which omits to state that the note was then due, is insufficient.

KNIGHTON took judgment by default against Williams in the District Court, upon a complaint which states, "that he has a cause of action against the defendant, and expects to recover judgment for five hundred dollars, with interest, &c., as per a certain promissory note, which he holds against him, for five hundred dollars, bearing interest, &c., dated February 25th, 1855."

*D. Logan*, for plaintiff in error.

*R. P. Boise*, for defendant in error.

OLNEY, J. Waiving all other questions, it does not appear that the note was due. This cannot be implied from the allegations that he has a cause of action against the defendant. That is a conclusion of law. The pleader should state the facts which he thinks gives a right of action, and not keep back those facts, and offer the court his opinion. If one fact, necessary to a right of action, be omitted, all others might as well, and the complaint might be reduced to this, "that the plaintiff has a cause of action against the defendant for five hundred dollars, for which he asks judgment."

The complaint is insufficient, and the judgment *must be reversed*.

**CASES**

**ARGUED AND DETERMINED**

**IN THE**

**Supreme Court of the United States**

**FOR THE**

**TERRITORY OF OREGON.**

**AUGUST TERM, A. D. 1857.**

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GEORGE H. WILLIAMS, *Chief Justice.*  
CYRUS OLNEY AND { *Associate Justices.*  
M. P. DEADY, J. G. WILSON, *Clerk.*

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**AUGUST TERM, 1857,**

*Supreme Court of the U. S. for the Territory of Oregon. }*

*Ordered,*—That a term of the District Court be held at the city of Salem, in the county of Marion, on the third Monday in September, instead of the first Monday in September; and on the third Monday in November, instead of the fourth Monday in October. And in the village of Roseburg, in the county of Douglas, on the second Monday in October, instead of the first Monday in September; and on the third Monday in November, instead of the first Monday in November, for the year 1857.

STEPHEN COFFIN, Plaintiff in Error, v. HANNER,  
JENNINGS & CO., Defendants in Error.

*Error to Clackamas.*

Upon motion for affirmance of judgment below, with an allowance of ten per cent. damages, as provided by statute, when it is uncertain whether the writ of error was taken in good faith or not, damages were not allowed.

*A. E. Wait*, for defendants in error.

OLNEY, J. The plaintiff fails to prosecute his writ of error, and it is suggested that his attorney is detained away from this court by sickness. The Chief-Justice who tried this cause, reports that the claim was a very old one; and the evidence was such as to leave it doubtful whether the verdict is or is not in accordance with truth. It being uncertain whether the writ of error was not taken in good faith, the Chief-Justice hesitates, in a case of uncertain merits, to impose a discretionary penalty, and I am willing to defer to his opinion.

Judgment affirmed without penalty.

DEADY, J., dissents as follows: Judgment affirmed without argument. On motion of defendants' counsel, the court refuses to assess ten per cent damages. From this judgment I dissent; because, it is manifest that the cause was brought to this court for delay; the plaintiff in error having only availed himself of the forms of law to bring this cause into this court, and thereby retain the amount of the judgment in his own hands, instead of paying the same to the defendants, according to the determination of the said judgment.

The plaintiff, having chosen to retain the money, as he might do under the law, it is the duty of the court to give the defendants that compensation which the statute has intended they should receive in such cases.

Nor do I think the court is at liberty to consider the merits of the judgment, or the hardship, real or fancied, which it may impose on the plaintiff. Such questions are, of course, merged in the judgment itself.

**AUGUST TERM, A. D. 1858,**  
***Supreme Court of the U. S. for the Territory of Oregon. }***

*Ordered*, That terms of the District Court be held in the city of Salem, in the county of Marion, on the first Mondays in April and September, and the fourth Monday in May, and the first Monday in November, annually, until otherwise ordered. And in the city of Portland, in the county of Multnomah, on the first Mondays in May and October, and the third Mondays in June and November, annually, until otherwise ordered. And in the village of Roseburg, in the county of Douglas, on the first Mondays in March, May, September and November, annually, until otherwise ordered, and limit the duration of each term to six days.

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No written opinions were given at the August Term, 1858.

# JUDGES

OF THE

## Supreme Court of the State of Oregon

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AARON E. WAIT, elected 1859, *Chief Justice*, resigned May 1, 1862.

MATTHEW P. DEADY, elected 1859, resigned.

REUBEN P. BOISE, elected 1859, *Chief Justice*, May 1st, 1862.

RILEY E. STRATTON, elected 1859.

PAINE P. PRIM, appointed 1859, (*vice DEADY*.)

PAINE P. PRIM, elected 1860.

WILLIAM W. PAGE, appointed 1862, (*vice WAIT*.)

Salary—\$2,000.

J. G. WILSON, *Clerk, Fees*.

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### *Constitutional provision in reference to the Supreme Court of Oregon; article 7th, section 2d.*

"THE Supreme Court shall consist of four justices, to be chosen in districts, by the electors thereof, who shall be citizens of the United States, and who shall have resided in the State at least three years next preceding their election, and after their election to reside in their respective districts. The number of justices and districts may be increased, but shall not exceed five, until the white population of the State shall amount to one hundred thousand; and shall never exceed seven," &c.

SECTION 3. The judges first chosen under this constitution  
[1 Oregon] ( 239 )

shall allot among themselves their terms of office, so that the term of one of them shall expire in two years, one in four years, and two in six years; and thereafter, one or more shall be chosen every two years, to serve for the term of six years.

SECTION 4. Every vacancy in the office of judge of the Supreme Court shall be filled by election for the remainder of the vacant term, unless it would expire at the next election; and until so filled, or when it would so expire, the governor shall fill the vacancy by appointment.

SECTION 5. The judge who has the shortest term to serve, or the oldest of several having such shortest term, and not holding by appointment, shall be Chief-Justice.

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*"An Act to fix the times and places of holding the Terms of the Supreme and Circuit Courts," passed June 3d, 1859.*

SECTION 1. *Be it enacted by the Legislative Assembly of the State of Oregon,* That a term of the Supreme Court shall be held at the seat of government, on the first Monday of December next, and thereafter, at the seat of government, on the second Monday in December; and at Portland, in the county of Multnomah, on the second Monday in July, annually.



CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of the State of Oregon

DECEMBER TERM, A. D. 1859.

---

AARON E. WAIT, *Chief Justice.*

REUBEN P. BOISE,

RILEY E. STRATTON,

PAINE P. PRIM,

} *Associate Justices.*

J. G. WILSON, *Clerk.*

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DECEMBER TERM, 1859,

*Supreme Court of the State of Oregon.* }

*Ordered*,—that the clerk be authorized to tax, as a part of the costs against the losing party, the sum of three dollars in each cause, as fees for recording the opinion of the court therein.

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PLEASANT HOWELL, Plaintiff in Error, v. STATE OF OREGON, Defendant in Error.

*Error to Marion.*

1. Under the statute, it is not necessary for the jury to assess, in their verdict the value of the property stolen, when the property is alleged to be of a specific value.
2. Under the statute, "in every case in which punishment in the penitentiary is awarded, &c., the form of the sentence shall be, that

[1 Oregon] ( 241 )

he be punished by confinement at hard labor; and he may, also, be sentenced to solitary confinement for such term as the court shall direct, not exceeding twenty days at one time," &c. A sentence of "one year's solitary confinement, and kept at hard labor," &c., is *unauthorized*, and is *error*.

3. The court below might amend the record during the term, and make it responsive to the facts.
4. In criminal causes, this court may affirm or reverse the judgment below; but cannot modify it.

At the September term, A. D. 1859, of the Circuit Court for the county of Marion, Pleasant Howell was tried and convicted, upon an indictment for larceny, for having feloniously taken and carried away sixty-one dollars, to wit; three twenty-dollar pieces of gold coin, and two half-dollar pieces of silver coin, lawful money of the United States, the personal property of Daniel Brock." The verdict of the jury was as follows, to wit:

"STATE OF OREGON V. PLEASANT HOWELL.

We, the jury in the above cause, find the defendant guilty.  
JOHN Q. WILSON, *Foreman*."

Upon which verdict, the said Howell was "sentenced to one year's solitary confinement, and kept at hard labor in the penitentiary of this State."

Of the errors assigned, those mainly relied upon for the reversal of the judgment are as follows:

"3. The value or amount of the property stolen is not stated in the verdict.

"4. The sentence of the court is without authority of law.

"5. The sentence is not in the form and manner as prescribed by statute."

*G. H. Williams*, for plaintiff in error.

*J. G. Wilson*, prosecuting attorney, for defendant in error.

Per WAIT, C. J. Upon trial for stealing property of a specified value, it is not necessary, under our statute, that the

jury should return in their verdict the value of the property stolen. If, as in some States, the owner of stolen property would be entitled to recover double or other multiplied value of the property stolen, then here, as there, a reason would exist for a finding and return by verdict of the value of the property stolen. The verdict in this case implies that the defendant is guilty as charged.

There is nothing in our statute which requires that the value of the property stolen should be returned in the verdict, and we have no law by which any person would be benefited or injured by such a return. The law does not require the doing of an unnecessary thing, and as such a return was unnecessary, it was properly omitted.

The 4th and 5th points assigned are substantially the same and will be considered together. Was the sentence such as was authorized by law?

No authorities have been cited upon this question. By our general laws providing for indictments in criminal cases, it is provided, that "in every case in which punishment in the penitentiary is awarded against any convict, the form of the sentence shall be, that he be punished by confinement at hard labor; and he may also be sentenced to solitary confinement for such term as the court shall direct, not exceeding twenty days at one time; and in execution of such punishment, the solitary imprisonment shall precede the punishment by hard labor, unless the court shall otherwise order." (*Statutes of Oregon, sec. 5, page 274.*)

As far as this provision of law is concerned, it is entirely clear that the court below was authorized to sentence the defendant to "solitary imprisonment, not to exceed twenty days at one time;" and that it had no power to sentence him to "one year's solitary confinement."

But it is insisted by counsel for State, that the act, entitled "An act to provide for the election, and to define the duties of a superintendent of the penitentiary," passed January 28, 1857, abolishes solitary imprisonment. That act repeals all laws, and parts of laws in conflict therewith, and provides

that "it shall be lawful, and is hereby made the duty of said superintendent and keeper, to employ all convicts in the penitentiary, so far as they may deem practicable, in labor in and upon the penitentiary buildings and grounds, or in mechanical pursuits, within the penitentiary, if deemed practicable."

It is by no means clear that this provision of law does abolish solitary imprisonment. Before the enactment of that law, confinement at hard labor was, as it is now, a necessary part of every sentence of imprisonment in the penitentiary. That act does not specifically abolish "solitary imprisonment, nor does it originate the punishment of hard labor;" but it does direct *when* and in *what* such labor shall be employed; as "in and upon the penitentiary buildings and grounds, or in mechanical pursuits within the penitentiary, if deemed practicable." But, suppose it is true that solitary imprisonment is abolished, and that our courts have no authority to punish by solitary confinement for "twenty days," does it, therefore, follow, that the defendant was lawfully sentenced to "one year's solitary confinement?" We think not. It is said that the sentence of the learned judge in the court below, as orally announced, was not as it is recorded, and that the word "solitary" was inserted by the clerk, under the supposition that it was his duty to do so; but the record, as signed by the judge, and as it comes before this court, shows that the defendant was and is "sentenced to one year's solitary confinement." No application is made to amend the record, and it is not claimed that this court has the power to do so. In a civil case, this court has the power to modify a judgment of the Circuit Court; but in a criminal case, the judgment of the Circuit Court must be either affirmed or reversed. During the term, the court below might have amended the record according to the fact. The judge was the *living* record of his court during the term, and possessed the power to so amend or modify it, as to make it conform to law.

Section 13, page 256, of the statutes, provides, that "no

indictment shall be decreed insufficient, nor shall the trial judgment, or other proceedings thereon, be affected by reason of a defect or imperfection in matter of form, which does not tend to the prejudice of the substantial rights of the defendant, upon the merits." It is insisted that this provision of law authorizes this court to overlook the errors in the record under consideration; but this provision of law only applies to the "insufficiency" of the indictment, and to a "trial, judgment, or other proceeding" under an insufficient indictment. The *sufficiency* of the indictment, in the case at bar, is not questioned. The spirit and reasonable intendment of this provision of law is, that if an indictment is defective, or imperfect, in matter of form, and trial, judgment, or other proceeding is had upon it such proceeding will not be affected by reason of such defect or imperfection; but it has no possible application to an unauthorized judgment rendered under a sufficient indictment. This court, then, must take the judgment of the court below as it is. We have no power to take from, add to, or modify it. It must speak for itself, and stand or fall as in law it is authorized or unauthorized. The record, as it comes and remains before us, shows that the defendant was "sentenced to one year's solitary confinement, and kept at hard labor in the penitentiary of this State."

If this sentence was authorized by law, the judgment should be affirmed; if not authorized by law, it should not be affirmed as law, but should be reversed.

We think that the sentence was unauthorized by law, and hence, that the judgment of the court below should be reversed, and a new trial granted.

Judgment reversed and a new trial granted.

STRATTON, J., not concurring.

JOHN B. JACKSON, Plaintiff in Error, v. JOSEPH SHARFF and ALMORAN HILL, Defendants in Error.

*Error to Washington.*

1. Upon an allegation in a complaint for the delivery of wheat, that "heretofore, to-wit, about and previous to the first day of October, A. D. 1857;" it is not error for the court to allow evidence of the "delivery of wheat in April, 1857."
2. The rejection of testimony, cumulative in its character, and no reasonable ground existing to believe its introduction would change the verdict, is not error for which judgment should be reversed.

BEFORE the June term, 1859, of the Circuit Court for Washington County, Sharff and Hill instituted suit against Jackson, defendant, for the recovery of damages on breach of a wheat and flour contract.

The complaint alleges that the contract was entered into, "heretofore, to wit, about and previous to the first day of October, A. D. 1857." The defendant denies the contract as stated by the plaintiffs, and alleged a different one; he also denied all indebtedness to them, and alleged, that on the 15th of March, 1858, a settlement was made between the parties, and a due bill for \$50 executed by him to them for the balance due, which due bill had been since paid. The plaintiffs, in reply, denied the contract as alleged by the defendant and admitted that the note specified by him was given but that it was given upon a horse trade and, not in settlement, and that no settlement had taken place. Upon the trial the plaintiffs offered to prove the delivery of wheat in defendant's mill in April, 1857, which was objected to by the defendant, but allowed by the court, and excepted to. The defendant, upon the trial, after having proved that a due bill, dated March 15, 1858, for fifty dollars, executed by him to plaintiffs, had been paid, taken up, and his name torn off, offered such due bill in evidence; which was overruled by the court, and excepted

to. The rulings of the court, and the exceptions thereto, appear in the bill of exceptions.

*Williams*, for plaintiff in error.

*Logan*, for defendants in error.

WATT, C. J. The only questions for the consideration of the court, are, whether the court below erred, either in allowing proof of the delivery of wheat in April, 1858, or in refusing to permit the introduction of the due bill in evidence.

The complaint, in alleging the contract to have been entered into "heretofore, to wit, about and previous to the first day of October, A. D. 1857," is singularly indefinite; but we know of no rule of law which makes it error in a court to permit the introduction of such evidence as is pertinent to the issue, even under indefinite pleadings.

The admission of evidence of the delivery of wheat in April, 1857, that being "previous to the first day of October, A. D. 1857," cannot be regarded as error. If a party goes to trial upon an issue, he cannot exclude evidence pertinent thereto.

In refusing to prevent the introduction of the due bill in evidence, the court, at most, but excluded evidence, cumulative in its character, to establish a fact substantively admitted in the pleadings.

If this court had reasonable grounds for believing that the admission of the evidence would have changed the verdict, then the ruling of the court below would be regarded in a different light; but nothing appears inducing that belief.

We think that there was no error in the court below for which its judgment should be reversed.

**Judgment affirmed.**

HENRY M. FRISBIE, Plaintiff in Error, v. STATE OF  
OREGON, Defendant in Error.

*Error to Polk.*

1. The State need do no more than to prove the substantive offence charged.
2. Under an allegation of the sale of a particular kind of spirituous liquor, the proof of selling any kind of spirituous liquor would support the indictment.
3. The allegation of the kind of liquor being under a "*videlicet*," would excuse the State from strict proof, unless the matter would be essentially descriptive.

At the November term of the Circuit Court of Polk County, 1859, the plaintiff in error was convicted of selling spirituous liquors in quantity less than one quart, without license, to wit, one gill of whiskey, &c.

*G. H. Williams*, for plaintiff in error.

*J. G. Wilson*, prosecuting attorney.

STRATTON, J. So much of the indictment as is necessary to be set out in this case, is in the following words: "The said Henry M. Frisbie, on the first day of November, A. D. 1859, at, &c., unlawfully did sell to one Stephen Waymire spirituous liquor, in quantity less than one quart, to wit, one gill of whiskey." On the trial the prosecutor did not prove distinctly that the liquor was whiskey, as stated under the *videlicet*; thereupon the defendant below asked the court to instruct the jury, "that they must be satisfied from the evidence that the liquor sold was whiskey," which instruction the court refused to give; but the court did instruct the jury, that if they were satisfied that the liquor sold was spirituous liquor, that was sufficient to warrant a conviction. To the refusal, and to the charge as given, exceptions were taken by



the defendant below, and they are now assigned as errors, and present the only points for the consideration of this court.

The general rule is, that the indictment must disclose upon its face a crime, charged in apt and proper words, and the prosecution is bound to do no more than prove the substantive offence charged. All unnecessary words may, on the trial, or in arrest of judgment, be rejected as surplusage, if the indictment would be good were they omitted. (*Wharton Cr. Law*, 228; *1st Archibold's Cr. Pl.* 94; *17 Wendell*, 478.)

Under the Statutes of Oregon, the offence is fully committed, when any person shall sell, &c., spirituous liquors without license, in less measure than one quart; and it was not essential that the prosecution should allege the kind of liquor sold. (*33 New-Hampshire Rep.* 388.)

But, it is said, that having alleged the sale of a particular kind of liquor, the State is held to the proof of that particular kind. This is not conceded. On the contrary, we think the proof of any kind, and any quantity less than one quart of spirituous liquors, would have supported this indictment. (*Wharton Am. Cr. Law*, 715; *Brook v. Commonwealth*, 6 Leigh, 634.)

It may be further remarked, that the allegation of the kind of liquor is placed under a *videlicet*. This would have excused the State from strict proof, unless such matter became essentially descriptive of the offence. (*1 Greenleaf Ev. sec.* 61.)

There is no pretence that such is the case here.

We think there is no error in the record, and the judgment must be affirmed.

THE STATE, on the relation of DEAN BLANCHARD,  
Plaintiff in Error, v. THOMAS H. SMITH, Defendant in Error.

*Error to Columbia.*

1. Under the statute, a county clerk has not only ministerial, but quasi-judicial powers and duties.
2. The appointment by him of a deputy, clothed with such powers, &c., must be expressly authorized by statute.

THIS action was brought in the court below to oust the defendant in error from the office of clerk of Columbia County, held, as he claims, by virtue of an election to said office on the — day of June, A. D. 1859. The plaintiff claims under the election of June, 1858; and at the time of the alleged usurpation of defendant, his term of office had not expired.

There was a trial, and verdict for the defendant.

*Kelly*, for plaintiff in error.

*Page*, for defendant in error.

STRATTON, J. This cause is here upon exceptions taken at the trial to the charge of the court. Several questions are raised in the record, but as one, and really the only one relied upon by the plaintiff will decide the matter in controversy, that alone may be considered.

It was not seriously contended that Blanchard was always so present at his office, and ready to discharge his duties in person, as to save it from being declared vacant by the proper authorities; but it is alleged that he had a legally appointed deputy. The court was asked to instruct the jury, that "Dean Blanchard, the clerk, being a ministerial officer, had power to appoint a deputy, and the acts of the deputy are valid." This instruction the court refused to give, which refusal was

excepted to, and is now assigned as error. Can a county clerk, under the Statutes of Oregon, appoint a deputy? At common law it is not doubted that an officer, whose duties are purely ministerial, could appoint a deputy; but it is conceived that county clerks, under the statutes of this State, are clothed with powers and duties not only ministerial, but quasi-judicial—such as administering oaths, taking depositions, acknowledging deeds, &c. To delegate such powers he must be expressly authorized by statute. It is enough to say that there is no such express power conferred by law upon our county clerks.

Judgment is affirmed.

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OBADIAH D. HOXIE, Plaintiff in Error, v. WILLIAM  
HODGES, Defendant in Error.

*Error to Jackson.*

1. Parol contemporaneous testimony is inadmissible to contradict or vary the terms of a valid written instrument.
2. This court must be guided by what appears on the face of the record.
3. A consideration being good as to one joint obligor, is good as to the others, and cannot be severed.

DEFENDANT in error, the plaintiff below, brought suit on the following note:

"For value received, I promise to pay to William Hodges the sum of six hundred and thirty dollars, twelve months from date.

(Signed,) O. D. HOXIE,  
October 25th, 1856. GEO. W. HOXIE."

G. W. Hoxie made no defence, and judgment was rendered against him by default. O. D. Hoxie answered, and in sub-

stance alleged that he did not sign the note at the time of its execution and delivery by G. W. Hoxie, but some months afterwards, and then not as a principal but as a witness. To this answer there was a demurrer, and demurrer being overruled *pro forma*, the defendant in error, the plaintiff below, replied, traversing the allegation that the note was signed as a witness, and not as a principal. In this state of the pleadings the case was submitted to the court sitting as a jury. The plaintiff below offered the note in evidence and rested.

The defendant then offered the deposition of Charles S. Jones, to show that the note was signed as a witness and not as a maker. The note offered by the plaintiff being regular and fair upon its face, this evidence was rejected, on the ground that it would be admitting parol evidence to contradict a written instrument. There was a finding for the plaintiff below, and judgment thereon.

*Dowell*, for plaintiff in error.

*Reed*, for defendant in error.

STRATTON, J. Exception was taken to the rejection of the above deposition, and that is now assigned as the first error, and presents the main question in the case.

There is no principle of law better established, than that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument. (1*Greenleaf Ev.* 275.) It is not that an unwritten contract is less binding upon parties to it, in a legal point of view, than one which is reduced to writing; but such is the frailty of the memory of men—so liable are they to misapprehension, or honest mistake, without regarding the temptation to corrupt misstatements, where there is but a narrow chance of detection—the law gives preference to written instruments, as the better evidence of the intention and understanding of the parties.

All experience teaches, that when a contract is carefully

and deliberately reduced to writing, it forms the safest and best standard from which to judge of the intention of the parties. The general rule was not questioned on the argument, but it is said that this case does not fall within the rule.

Something has been said between counsel as to the actual appearance of the original note, and the position of the names thereto; but it is conceived that this court is to be guided only by what appears on the face of the records. A copy of the note is there set out, and it must be taken to be a true copy, in matter and form, for the purposes of our inquiry. The instrument upon its face is, in all respects, perfectly regular and fair; and it is admitted by Hoxie that he signed the note, not as a maker, but to attest the genuineness of the paper.

What would be the effect of the testimony if admitted? Not to deny the execution and delivery of the note at the time when, by its date, it purports to have been given; nor to impeach the original consideration; or to show a failure of consideration; or to taint the transaction with fraud in any manner. Either of these facts, if they existed, would have been a good defence. It is not to be doubted, that to admit this testimony would be to change wholly the character of this instrument, and the legal obligations of one of the parties thereto, while there is no ambiguity, nor room for doubt.

It is conceded, that this case is fully within the principle laid down in *Hunt v. Adams*, 7 Mass. 518; *Stackpole v. Arnold*, 11 Mass. 27; *Dale v. Pope*, 4 Littell, 167; and *Cram, Rogers & Co. v. Wadsworth et al.*, decided at the last term of the Supreme Court of the late territory. But it is said there was no consideration as to O. D. Hoxie. To this it may be answered, that the obligation was joint as well as several and if the consideration was good as to one obligor it would be good as to the other. Admitting O. D. Hoxie to be a joint maker, and he must be so regarded, the consideration and obligation cannot be severed.

An objection is also taken to the finding of the court, and

it is said that it is informal and insufficient. There was but one issue in the case: Did the plaintiff in error sign the note as principal or as a witness? The court answered, by the verdict, "that he did not sign the note as a witness;" therefore, he must have signed as maker; and judgment was entered accordingly. The verdict is sufficient.

Judgment is affirmed.

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RICHARD WHITE and ELIZABETH, his Wife, Plaintiffs in Error, v. JOSEPH DELSCHNEIDER, ABSALOM B. HALLOCK, WILLIAM McMILLEN, JOHN L. STARKEY and MOSES ABRAMS, Defendants in Error.

*Error to Multnomah.*

1. Demurrer will lie for misjoinder of parties defendant.
2. If the court can make a decree, not prejudicial to the interests of parties, the objection to the misjoinder of parties will not prevail.
3. Multifariousness is a subject for demurrer.
4. A bill is multifarious, unless the parties defendant have a community of interest in at least some one material subject-matter of the suit.

In vacation, before the May term, A. D. 1858, of the late District Court for the county of Multnomah, Richard White and wife filed in said court a petition, duly verified, of which the following is a copy, to wit:

"To the Judge of the Second Judicial District:

"Your petitioners, Richard White and Elizabeth White, show unto your honor, that about the year 1852, Orange S. Hall, late of Washington County, Oregon, departed this life, leaving petitioner his widow—who has since intermarried with petitioner, White—and Mary Hall, an infant, his only

child and heir. That during the lifetime of said deceased, and during the coverture of deceased and petitioner, Elizabeth, deceased was seised in fee, as petitioners are informed and believe, of the following described real estate, to wit: lots Nos. four (4) and five (5) in block number twenty-six, (26,) and lots numbered four (4) and five (5) in block numbered twenty-seven, (27,) according to the plot of the city of Portland, Multnomah County, Territory of Oregon.

"Petitioners show, that J. S. Delschneider claims an interest in lot five, (5,) block 26; and William McMillen and A. B. Hallock claim an interest in lot 4, same block. J. L. Starkey and Moses Abrams claim an interest in parts of lots 4 and 5, block 27.

"Petitioners show, that said Elizabeth hath not in anywise disposed of, assigned, or otherwise relinquished her dower interest, or right of dower, in any of the lots aforesaid; and petitioners show, that Dewitt C. Coleman was appointed, and is administrator *de bonis non* of the estate of said deceased.

"Your petitioners make J. S. Delschneider, Wm. McMillen, Absalom B. Hallock, Moses Abrams, J. L. Starkey, Dewitt C. Coleman and Mary Hall, aforesaid, defendants to this petition.

"Petitioners ask that the dower interest of petitioner, Elizabeth White, may, by decree of this court, be assigned and set apart unto her, out of the lots aforesaid."

The petition was demurred to by all the defendants, for the following causes:

1st. That there is a defect of parties plaintiff, inasmuch as Richard White is misjoined, as a party plaintiff, with his wife, Elizabeth White, in this suit.

2d. Richard White should be made a party defendant.

3d. There is a misjoinder of parties defendants, in this, that it appears that they have no common interest in the subject-matter of the suit; but their interests in the several pieces of property are distinct and unconnected.

The demurrer also alleges, that the petition is defective in

failing to show whether said property was aliened by said Hall. The demurrer sustained in the court below, and judgment for costs was entered for the defendants.

*Logan*, for plaintiffs in error.

*Williams & Page*, for defendants in error.

Per WALT, C. J. This cause comes up upon writ of error from Multnomah County. The errors assigned are, "that the court below erred in sustaining defendants' demurrer, and in giving judgment for defendants."

No application was made to amend the petition, and hence, if the demurrer was well taken, the judgment for costs rightfully followed the sustaining of the demurrer. From the view taken of this case, it is unnecessary to inquire further, than whether "there is a misjoinder of parties defendant." It is insisted, by counsel for plaintiffs in error, that a demurrer will not lie for a misjoinder of parties defendant; and the case of *Brownson and Wife v. Gifford et al.* is relied upon to sustain the position. The learned judge in that case says, that "a demurrer will undoubtedly lie for the non-joinder of the proper parties defendant, but not for the misjoinder of some, who ought not to have been made defendants, with others who are properly sued." By a careful examination of that case, it will be found that all the defendants therein had a common interest in all the property in question. The law, as applicable to that case, was unquestionably well adjudged; but that such a doctrine is applicable in equity, where the interests of the defendants are wholly distinct and unconnected, and where there is no fraud or combination, cannot be maintained upon principle. Courts of equity, upon the subject of misjoinder of parties, have been governed much by the character of the case under consideration; yet all courts of equity, and all authors upon this branch of jurisprudence, admit multifariousness to be, now as heretofore, in equity pleadings, a shoal to be avoided.



"It is not safe, however, in any case, to rely upon the mere non-joinder, or misjoinder of parties, as an objection at the hearing; for, if the court can make a decree at the hearing, which will do entire justice to all the parties, and not prejudice their rights, notwithstanding the non-joinder or misjoinder, it will not then allow the objection to prevail. The true course, therefore, is to take it by way of demurrer, when it is apparent on the face of the bill, or, if not apparent, by plea, or by answer." (*Story's Eq. Pl. sec. 237.*)

"A bill should not be what is technically termed multifarious; for, if it be so, it is demurrable, and may be dismissed by the court of its own accord, even if not objected to by the defendant. By multifariousness in a bill is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters, perfectly distinct and unconnected, against one defendant; or, the demand of several matters, of a distinct and independent nature, against several defendants in the same bill." (*Story's Eq. Pl. sec. 271; Mitford's Eq. Pl., by Jeremy; 181 Cooper's Eq. Pl. 182.*)

"When the *subjects of the suit* are, in themselves, perfectly distinct, the demurrer will hold; and a plaintiff cannot bring into the compass of one suit such different objects." (6 *Johnson Ch. Rep.* 156.)

In order to entitle a complainant in chancery to join several persons as defendants, it is absolutely necessary that such persons have a community of interest in, at least, some one material subject-matter of the suit. In the subject under consideration, it does not appear that Orange S. Hall, at the time of his decease, possessed any interest in any of the property in which dower is claimed, to pass to the infant, Mary Hall; nor does it anywhere appear, that the infant, Mary Hall, has any interest in such property. Delschneider has an interest in lot five, in block 26, only. McMillen and Hallock have an interest, only, in lot four, in block 26. Starkey and Abrams have an interest in parts, only, of lots four and five, in block 27. Coleman is administrator *de bonis non*

of the estate of Orange S. Hall, deceased; but whether these lots constitute any part of such estate does not appear.

The interests of the defendants, as far as they have any, are distinct and unconnected, and there is no community of interest between them that authorized their being joined as parties defendants.

The judgment of the court below, therefore, should be and is affirmed.

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WILLIAM McMULLAN, Plaintiff in Error, v. JAMES A. ABBOTT, Defendant in Error.

*Error to Josephine.*

A non-negotiable promissory note is not entitled to days of grace.

*Kelsay*, for plaintiff in error.

*Dowell*, for defendant in error.

JUDGMENT was rendered in the court below in favor of James A. Abbott, against William McMullan, upon a promissory note, of which the following is a copy, to wit:

"On or before the 25th day of January, A. D. 1859, I promise to pay A. Delany the sum of one hundred and seventy-five dollars, for value received.

WILLIAM McMULLAN."

Per WARR, C. J. It is insisted by McMullan, that he was entitled to days of grace upon this note, and this is the only question arising in the case. Suit was commenced on "the 26th day of January, A. D. 1859;" and hence, if McMullan

was entitled to days of grace, the demurrer was well taken, for the reason that the suit was prematurely brought.

By the law merchant, if a promissory note was *negotiable* and payable on a day certain in the future, it was entitled to grace; if not negotiable, it was not entitled to grace. (*Edwards on Promissory Notes*, section 3, page 44.)

Our statute is an affirmance of the law merchant in this respect.

The note in question is not a negotiable promissory note, and grace could not be claimed upon it.

The judgment below is affirmed.

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JACOB HUFFMAN, Plaintiff in Error, v. LARKIN McDANIEL, Defendant in Error.

*Error to Jackson.*

1. Error sustaining a demurrer is waived by pleading over.
2. A lease "from ——— day of ——— A. D. 1856, for and during, and until the full end and term of eighteen months," would expire as soon as eighteen months from the last day of the year "1856."

LARKIN McDANIEL, on the 25th day of August, 1858, brought suit in the late District Court, for the county of Jackson, to recover the possession of about two acres of land, upon which is situated a flouring-mill and blacksmith's shop. The premises are a part of the land claim of the plaintiff, and the action is in the nature of an ejectment, and brought under the statute to "Recover the Possession of Real Property."

Huffman, answering, denies the right of the plaintiff to the possession of the premises; and claims a right of possession in himself, under a lease executed to him July 2d, 1856, by the plaintiff and John McDaniel, under their hands and

seals. The lease provides, in substance, that Huffman should take possession of the two acres of land in question, with the saw-mill thereon, and convert such saw-mill into a flouring-mill, and extinguish the claims of Champaign Collier and John L. Badger upon said premises, and hold the same "from — day of ——— A. D. 1856, for and during, and until the full end and term of eighteen months." The lease further provides, that "the party of the first part agrees further with the party of the second part, to reimburse the party of the second part all the expenses that he may be to, to extinguish the said title and interest of the said Collier and Badger to said saw-mill, at the expiration of said lease and demise. Now, if the party of the first part fail to comply with the last condition of this said demise, the party of the second part is to retain possession of said mill until the condition is complied with." The answer of the defendant alleges a general compliance by him of his part of the lease; that he has discharged the claims of Collier and Badger to said premises; and that he has not been reimbursed therefor, by reason of which his right of possession continues. The plaintiff demurred to the defendant's answer, and the court sustained the demurrer, and entered final judgment for the plaintiff. Other questions arose in this case, which sufficiently appear in the opinion of the court.

*B. F. Dowell*, for plaintiff in error.

*Reed & Kelly*, for defendant in error.

Per WAIT, C. J. This cause is brought here by writ of error. The errors assigned are:

1st. "The court erred in sustaining the demurrer of the said Larkin McDaniel to the first answer of the said Huffman; that the date in the contract can be supplied at law."

2d. "The complaint of the said Larkin McDaniel is insufficient in law for him to have and maintain this action against the said Jacob Huffman; that the complaint claims

two thousand dollars damages for the detention of the land described in the complaint, without specifying the time the said Huffman detained the land in dispute, or the value of the rent, or the value of the land."

3d. "The court erred in sustaining the second demurrer of the plaintiff to the second answer of defendant."

It is true that the court below sustained the demurrer to the first answer of the defendant, but any error so committed was waived by the interposition of an amended answer. When an answer is demurred to, and the demurrer sustained, if leave is obtained therefor, and an amended answer is filed, all right to insist upon error in the sustaining of such demurrer is waived. A party may demur to a pleading, and he may stand by his demurrer, and if it is well taken this court will give him whatever he was entitled to receive from the court below; but if he answer over, he waives all benefit of his demurrer; he has his election to stand by his demurrer or to answer over, and, having taken his election, he is bound by it. The second matter assigned as error is sufficiently answered by saying that the record, as it comes before us, does not show that any "damages" are adjudged to the plaintiff. Damages were awarded, but they were afterwards remitted, and the judgment, at the time the writ of error was sued out, permitted no damages to the plaintiff.

The third matter assigned as error presents the main question arising in this case: Did the court err in sustaining the second demurrer of the plaintiff? One point in the demurrer was, "It is not alleged in said answer, that the sums therein pretended to have been expended by the defendant in extinguishing the titles of Badger and Collier were so expended within the time limited by the lease. By giving the utmost latitude of construction which can be claimed as the life of a lease," from ——— day of ——— A. D. 1856, for and during, and until the full end and term of eighteen months from the last day of the year "1856." Suit was instituted in August, 1858, and the answer does not show that the sums, or either of the sums therein alleged to have been paid

in extinguishing the titles of Badger and Collier, were so paid within the eighteen months subsequent to the last day of the year 1856, or at any other particular time. Hence, the demurrer was properly sustained, and the judgment of the court below should be and is affirmed.

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SHELDON B. FARGO, JAMES A. BENNETT, JOHN FOSTER and AARON RICHARDSON, Plaintiffs in Error, v. COUNTY COMMISSIONERS OF BENTON COUNTY, Defendants in Error.

*Error to Benton.*

1. An *uncertified* tax-list is not proof of a certified tax-list.
2. An uncertified tax-list having been permitted by the court below to be read in evidence, "to show any indebtedness of said Fargo to the county, by reason of his having collected any of the taxes in said list," there being no allegation in the pleadings of indebtedness for "moneys had and received," was error.

SUIT was brought in the court below, by the board of the county commissioners of Benton County, against Sheldon B. Fargo, sheriff, and his sureties on sheriff's bond, to recover damages for an alleged breach of the penalty of said bond, in not returning the certified tax-list and warrant to said board, on or before the first day of April, A. D. 1858. The complaint charged that Fargo was elected sheriff; that he took the oath, and gave the bond of office, in which the other defendants are securities; that on the 28th of November, 1857, T. H. B. Odeneal, auditor of Benton County, issued to Fargo as such sheriff, a certified list of the unpaid taxes of said county, amounting to \$3,823.23, with warrant attached; and that he failed to make return, as above stated, and thereby made breach of the condition of the bond.

The answers of the defendants admitted the election, oath,

bond and security, as charged in the complaint; but deny that a certified tax-list was placed in the hands of Fargo, and also deny any indebtedness or liability to the plaintiff.

The answers also alleged that Fargo offered to make return and settlement on the first Monday in April, 1858; that time, from month to month thereafter, was given him by plaintiff for such return and settlement, and that he did return, and the plaintiffs did credit him with \$711.54<sup>2</sup>, delinquent taxes in said list.

The reply denied any offer to make return and settlement; and all those portions of the answer relating to the giving of time, and the crediting of the delinquent taxes, were stricken out, on motion of the plaintiff, and excepted to by the defendants.

Judgment, on verdict for plaintiffs, in \$991.94.

*Thayer & Williams*, for plaintiffs in error.

*J. Kelsay*, for defendant in error.

WART, C. J. Several matters have been assigned in this court as error, for which the judgment in the court below is sought to be reversed.

From the view taken by this court, it will be unnecessary to consider other than the second point assigned as error, viz: the admitting in evidence of the *uncertified* tax-list.

By law, the tax-list should have been certified by the county auditor, before delivery to the sheriff.

The complaint alleges, that the tax-list issued to Fargo was a certified tax-list. It appears, from the bill of exceptions, that upon the trial of the cause, the plaintiffs offered in evidence an uncertified tax-list, which was objected to by the defendants, and permitted by the court to be read in evidence, "to show any indebtedness of said Fargo to the county, by reason of his having collected any of the taxes in said list."

The complaint does not allege a liability by the defendants,

on account of moneys received by Fargo, nor is any issue found by the "answers and reply," to which the testimony would be pertinent; nor could an uncertified tax-list be given in evidence, to prove a breach of a *bond*, for not returning a certified tax-list. An *uncertified* tax-list is not proof of a *certified* tax-list.

The evidence ought not to have been admitted; and, having been objected to, and the ruling of the court excepted to, the judgment should be reversed, and a new trial granted.

Judgment reversed, and a new trial granted.

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HENRY M. FRISBIE, Plaintiff in Error, v. STATE OF OREGON, Defendant in Error.

*Error to Polk.*

1. A pack of playing-cards is a "gambling device" within the meaning of the statute.
2. The terms, "suffering such gambling device to be set up and used," &c., are properly used in charging said offence.

PLAINTIFF in error, at the November term of the Circuit Court of Polk County, 1859, was indicted for suffering a gambling device to be set up and used, in a certain house then occupied by him, for the purpose of gaming.

There was a trial and conviction for the offence as charged.

G. H. Williams, for plaintiff in error.

J. G. Wilson, for State.

STRATTON, J. The instructions of the court upon the trial of this case, to which exceptions were taken, were founded wholly upon the construction of our gaming act; and the question now is, was the interpretation of those statutes given



by the court below correct? The facts, as they appear by the bill of exceptions, are, "that witness and others met at defendant's (below) grocery in the after part of the day; made up a game of what is familiarly known as poker; half a dollar ante; played with common playing-cards on a card table; played all night. Defendant was in the game; he sometimes won and sometimes lost. Used several packs of cards; they were paid for out of the common fund."

The indictment substantially charges the plaintiff in error with suffering a gambling device to be set up and used for the purpose of gaming, &c. With this state of facts, and under the indictment, the counsel for plaintiff in error asked the court to charge, substantially:

1st. That a pack of playing-cards was not a gambling device, as described in the indictment.

2d. That such a pack of cards was not a gambling device within the meaning of the statute.

Several other instructions were asked and refused, as being too general, and not applying to the case.

The court did instruct the jury, that "if they believed from the evidence, that the defendant suffered gambling with cards in his house, it was a sufficient setting up of a gambling device to warrant a conviction. Also, that evidence showing that the defendant engaged in, and suffered gambling with cards in his house, all of one night, it would be a sufficient setting up and using a gambling device, to warrant a conviction."

To the refusal to charge as requested, and to the charge as given, exceptions were taken. Two questions arise in this case:

1st. "Is gaming with cards, in the manner as the evidence here tends to disclose, a gambling device to bring the game within the description of a gambling device, as set forth in the indictment.

2d. "If so, was there sufficient evidence of such a setting up and use, as warranted the judge in charging the jury in manner as set forth in the bill of exceptions."

To both of these questions, we answer in the affirmative. As to the first point, chapter 10, section 1st, of the *Statutes of 1885*, p. 231, enumerates certain games, which are by that act prohibited, closing such enumeration by the words, "or gambling devices whatever," evidently intending to include, in this general term "device," every game that had been specified before, or any modification of them, which by fair interpretation could be brought within these definitions. The act of February 1st, 1858, (*Session Laws of '57 and '58*,) section 1st, amendatory of the above act, is still more explicit, prohibiting "all gambling with cards, and all gambling devices," clearly intending the term "devices" to cover the entire catalogue, against which the statute is framed. It must mean this, or it really means nothing; for it would not be pretended, that the law would be effective to punish for any game not enumerated in the statute. Any other view would make the law insensible; and while the courts are bound to construe criminal statutes strictly, the courts are equally bound to make them effective, when it can be done without infraction of settled principles of interpretation. It is difficult to perceive, in this case, how the legislature could more distinctly have pointed out what was intended by the term "device."

As to the second point. The indictment charges the "setting up and using," in the exact language of the statute, as applicable to this game. The prosecutor might have added the words "played," "dealt" and "practiced," words of the statute, and it is not perceived that the indictment would have been better or worse for such words. Here it was the "user" which was the gist of the offence, and that is alleged definitely enough.

In the argument, much stress was laid on the words "set up," used in the indictment, as applied to a game of cards. This is a phrase of very wide latitude of meaning it is true, but quite capable of being generally understood. It does not necessarily and exclusively apply to the construction or setting up of some physical object or design, as billiard or

roulette tables, as counsel would insist; but it may, and indeed is more frequently used in a figurative sense. Thus, it is said, that a man has "set up" the business of a merchant, or the trade of a carpenter; or, that he has "set up" in life with fair prospects; and in this we think there was good reason of saying, that the plaintiff in error had set up the occupation of a gambler. This form of expression is too common to be misunderstood; and being used in the statute as descriptive of the manner in which such offences are put in practice, is deemed to have been properly used.

Judgment is affirmed.

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**SAMUEL HORNER, Plaintiff in Error, v. STATE OF OREGON, Defendant in Error.**

*Error to Lane.*

1. Under the statute, imposing, in certain offences, a punishment by "imprisonment not more than one year," &c., which is silent as to the place of imprisonment, a sentence, inflicting punishment by "imprisonment in the penitentiary for one year," is error, and must be reversed.
2. Criminal statutes are to be strictly construed; and not beyond their literal and obvious meaning.

THIS was a prosecution for malicious threatening, with intent to extort money, under the 34th section of the third chapter of the statute defining crimes and regulating criminal proceedings. A verdict of guilty was rendered in the court below, and the prisoner sentenced to imprisonment in the penitentiary for one year.

*J. Kelsay*, for plaintiff in error.

*G. H. Williams*, for State.

BOISE, J. The error alleged is, that the Circuit court had no authority to award such a punishment for the offence. It is contended that the prisoner should have been sentenced to imprisonment in the county jail and not in the penitentiary. The statute on which this conviction rests provides, that the person charged shall be punished by "imprisonment not more than one year," &c., but is silent as to the place of imprisonment; and the question in this case is, had the Circuit Court the discretionary power to imprison the convict either in the penitentiary or the county jail? By the statutes of this State, all crimes, punishable by imprisonment in the penitentiary, are declared to be felonies. And if such a punishment can be awarded in this case, then the offence charged in the indictment is a felony; and all the disabilities incident on a conviction of a felony must follow and attach to the convict as a part of the punishment.

If we apply the well-known rule that criminal statutes are strictly construed, and not construed against the accused beyond their literal and obvious meaning, then it would follow, that, as it is as obvious from the language of the statute, that the imprisonment in this case should be in the county jail, as in the penitentiary, (neither place being mentioned,) we think the statute should be construed as only creating a misdemeanor, and not a felony.

For, to give it the other construction, would be construing the statute against the prisoner, beyond its literal meaning; as it would create the offence a felony, which is an offence of a higher grade than a misdemeanor, and inflict upon the convict incurable disabilities, which are not incident to a misdemeanor.

We think that the higher crime should not be presumed by the court, unless clearly defined by the statute.

**Judgment is reversed.**

WILLIAM SHIRLEY, Plaintiff in Error, v. STATE OF  
OREGON, Defendant in Error.

*Error to Lane.*

1. The introduction of a receipt, purporting to extinguish a claim of sixty-five dollars, as evidence in support of an allegation in an indictment for forging a receipt, extinguishing a claim of sixty dollars, is a fatal variance.
2. Allegations of *sums*, names, dates, and the like, must be proven as alleged.

This is a prosecution and conviction for forgery. The instrument, alleged in the indictment to have been forged, was a receipt, which was set out to be in the following words, to wit:

"This is to certify, that William Shirley has this day paid me sixty-five dollars, on order of Starling Willis give me of sixty dollars.

(Signed,)           ANDREW LINEBURGER."

The bill of exceptions shows, that on the trial of this cause, the prosecution offered in evidence the original receipt, alleged to have been forged, which was in the following words: "This is to certify, that William Shirley has this day paid me sixty-five dollars, on a order of Starling Willis give me of sixty-five dollars." To which the counsel for the prisoner objected, on the ground that the receipt offered in evidence varied from the copy set out in the indictment; but the court overruled the objection, and permitted the said receipt to be read to the jury; and to the admission of this evidence the counsel for the prisoner objected.

The question presented to this court is, was there a legal variance between the receipt, as described in the indictment, and the original receipt offered in evidence?

The receipt, as set out in the indictment, purports to have been given to extinguish an order for the sum of sixty dollars.

The receipt offered in evidence purports to have been given to extinguish an order for the sum of sixty-five dollars, which is an order of a different amount and denomination; and if the order for the sum of sixty-five dollars was sued, the receipt set out in the indictment would be no bar to its collection, for it is a well-settled rule, that in construing written instruments, every part operates by way of description of the whole; therefore, allegations of *sums*, names, dates, and the like, must be proven as alleged. (*1st Greenleaf on Ev. section 58.*)

One of the essential features in the description of an order, or note, is the amount. A note for fifty dollars is a different instrument from a note of sixty dollars.

It is as essentially different as a bank bill of the denomination of five dollars is from one of the denomination of ten dollars; and, it is very clear, that a receipt given, declaring the payment and discharge of a note for fifty dollars, would not operate as a discharge of a note for sixty dollars.

We think the variance fatal.

**Judgment reversed.**

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GEORGE M. BOWEN, Plaintiff in Error, v. STATE OF OREGON, Defendant in Error.

*Error to Jackson.*

The overruling of a motion for a new trial, by the court below, cannot be alleged as error.

AN indictment, alleging that on a day certain a mortal wound was inflicted, which did not allege the death upon a particular day, when found and presented, within one year from the time of giving such wound, is sufficiently correct under the statute.

George M. Bowen was convicted of murder in the first degree, at the Circuit Court of Josephine County.

*J. H. Reed*, of counsel for plaintiff in error.

*B. F. Dowell*, of counsel for defendant in error.

BOISE, J. Several grounds of error are relied on by the counsel for the plaintiff to reverse the judgment, which we will consider separately.

"1st. It is urged that the court below erred in overruling the motion for a new trial." As to this point, it is sufficient to say, that it has been judicially decided, by the late Supreme Court of the territory of Oregon, that the overruling of a motion for new trial cannot be alleged as error. It is therefore not now regarded as an open question; but as the reasons for the decision referred to are not recorded, it is deemed expedient to state them at this time.

The decision is based upon the peculiar phraseology of the statute of this State, which provides that every final judgment may be examined upon a writ of error, in the *same court* for error of *fact*, and in the Supreme Court for error in law; thereby leaving the consideration of errors of fact to the final determination of the Circuit Courts.

All these matters which may be urged as grounds for a new trial are matters of fact, which do not appear on the face of the record, except errors in law occurring at the trial, and excepted to by the party making the application for a new trial; which errors in law shall be set forth in a bill of exceptions, which becomes a part of the record, and may be considered on a writ of error in the Supreme Court, the same as any other part of the record; and a bill of exceptions, in order to be considered by the Supreme Court, must conform to the statute on the subject, which provides that an exception shall consist of objections taken at the trial to a decision on matter of law, and must be taken before the verdict is rendered, or decision made determining the rights of the parties in the case; and all objections not so taken are regarded as waived.

The other ground of error alleged is, that the time of the death is not sufficiently alleged in the indictment. The indictment alleges that on a day certain, Bowen inflicted on the deceased a mortal wound, of which he died, without alleging, in the usual form, that, languishing of such wound, he died on a particular day.

The indictment was found within less than one year from the time the wound is alleged to have been given; and this finding by the grand jury of the death of the deceased, within less than one year from the giving of the wound, renders it certain, from the indictment, that the death must have occurred within one year from the time the wound was inflicted, which we think is sufficient under our statute.

Judgment is affirmed.

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AMI P. DENNISON, Plaintiff in Error, v. GEORGE L. STORY, Defendant in Error.

*Error to Multnomah.*

1. This court will, where an officer is known and recognized as having authority, presume that the act was done within his jurisdiction.
2. A deputy, or agent, must transact business in the name of his principal.
3. Service of notice by deputy sheriff, in his own name, insufficient.

W. W. Page, for plaintiff in error.

D. Logan, for defendant in error.

BOISE, J. There are several grounds of error assigned in this case, but only two are insisted upon by the plaintiff in error. The first is, that there is no venue to the affidavit verifying the complaint. It is true, that it should appear in



some way, that the officer administering the oath had authority, by showing that the act was done within his local jurisdiction. And in this case, the question is, does that appear?

It has been a rule of practice in this country, for the courts to take official knowledge of the existence and qualifications of the officers having authority to administer oaths within the particular judicial district in which such officer resided and had authority; and the court are of opinion, that when a verification to a pleading is taken by a known and recognised officer, having authority within the district, in a cause pending in such district, it is to be presumed that such verification was taken within the local jurisdiction of such officer; for otherwise, we must presume that such officer has violated his official obligations by exercising his functions without his jurisdiction. We therefore think the verification sufficient in this particular. The second ground of error insisted upon is, that the service of process was not sufficient to entitle the plaintiff in the court below to a judgment by default.

The return of service is in these words:

*"Dalles, Wasco County:*

"I hereby certify that I served the within complaint, by delivering a copy of the same to A. P. Dennison, defendant, in said county, on the 20th day of May, 1858.

*"A. S. CRABB, Deputy Sheriff."*

It is a general rule of law, that one who acts for and on behalf of another, as agent, or in any delegated capacity, must transact his business in the name of his principal.

This is a principle well settled in the law of agency.

This rule has been judiciously applied to a deputy sheriff. (*Ditch v. Edwards*, 1st Scammon's Rep. 127.) And we think the principle should be applied in this case.

Judgment reversed.

STEAMER SENORITA, Plaintiff in Error v. MONTRAVILLE SIMONDS, ISAAC A. DAVENPORT and NELSON NORTHRUP, Defendants in Error.

*Error to Multnomah.*

1. Where the material allegations in a pleading are within the personal knowledge of an agent, he may verify the pleading, without showing whether the real party is within the county or not.
2. To take advantage of the statutes of limitation, it must be pleaded, and cannot otherwise be taken advantage of upon error.

*W. W. Page*, for plaintiff in error.

BOISE, J. This case is brought on the statute of this State, relating to liens on boats and vessels, and is to enforce a lien for wharfage.

The complaint plainly set out the nature of the plaintiff's claim, and we do not see any force in the first ground of error assigned, "that the complaint does not show enough to warrant the court in taking jurisdiction and giving judgment."

The second ground of error alleged is, that the complaint was not properly verified.

The verification is as follows: "Z. N. Stansbury, being first duly sworn, says, that the foregoing complaint is true of his own knowledge; that all the facts therein alleged he has a personal knowledge of; that he has been and was the agent of said wharf-boat company, and had the management of said business during the time said indebtedness was incurred. (Signed,) Z. N. Stansbury;" and the same was sworn to before James W. Davis, clerk of the District Court. To this verification two objections are taken: 1st. That it should appear by the affidavit that the plaintiffs in the court below were absent from the county in which the suit was brought, at the time of making the affidavit, because it is alleged that if either of the plaintiffs were in the county at the time, then

the statute requires that the verification should have been made by a party, and not by an agent. And section 54, page 91, of the statute, is referred to in support of this proposition. The second clause of this section of the statute provides, that the verification shall be made by a party, if he be within the county in which the action is brought, *unless* the action or defence be founded upon a written instrument for the payment of money only, and such instrument be in the possession of the agent; or, if all the material allegations of the pleadings be within the personal knowledge of the agent, in which case the affidavit may also be made by such agent.

If this clause of the section be construed as standing by itself, and unqualified, then there can be no question but that the verification is good. It is, however, contended by the plaintiff in error, that the third clause of the section qualifies this second clause, and renders it necessary in all cases to allege in the verification that the party is out of the county. But we are of the opinion, that it was the intention of the legislature to provide for another class of cases, in this third clause of the section; and that these separate clauses of the section may be construed separately.

Secondly, it is contended that it does not appear that Stansbury was the agent of the plaintiff in the court below. It is a sufficient reply to this, that he acted as agent in making the affidavit, and is recognised as such by those for whom he then acted; that he transacted the identical business out of which the alleged indebtedness grew, and now brings a suit to close that business. We think, therefore, that from what does appear on the face of the affidavit, his agency is sufficiently manifest.

There is another ground of error assigned, that the court erred in giving judgment for a part of the claim which had accrued more than one year before this suit was prosecuted. This objection, if it could be taken advantage of at all, should have been pleaded, as it is in the nature of a plea of the statute of limitations, and cannot be taken advantage of on error.

Judgment is affirmed.

HENRY M. KNIGHTON, Plaintiff in Error, v. THOMAS  
H. SMITH, Defendant in Error.

*Error to Columbia.*

1. The express provisions of the statutes, affecting the authentication of deeds, must be *strictly* complied with.
2. Where premises are to be conveyed free from incumbrances, it is incumbent on the grantor to record releases of any mortgage, or other lien of record.

THIS was an action for damages, for the non-performance of a contract, by which Knighton agreed to purchase of Smith and wife a tract of land situate in Columbia County. It appears from the record, that the contract sued on was, in substance, as follows: Knighton agreed to purchase a tract of land of Smith and wife, containing about four hundred and ninety acres, provided he (Knighton) could acquire the right of turning the creek on said tract of land to St. Helens, in said county without Squire Bennett, or Francis Perry, having a legal claim on him for damages for diverting said stream from its natural channel. Smith and wife were to execute a conveyance to, and deliver possession of said premises, free from incumbrance, on the 1st of June, 1858. Knighton was to pay for the land the sum of six thousand dollars, in drafts on San Francisco. On the 1st of June, 1858, (the time mentioned in the agreement,) Smith presented to Knighton a deed to the premises, executed by himself and wife, and properly acknowledged before a notary public, in the State of California.

On presentation of the deed and release, Knighton did not object to the sufficiency, and said they were all right; but said he would not accept the conveyance, and pay for the land, according to the agreement, because no release was or could be obtained from Bennett and Perry, allowing him to turn the water of said creek. Plaintiff insisted that, by said

agreement, it was not incumbent on him (plaintiff) to obtain such a release from Bennett and Perry, and brought suit for the breach of said agreement.

On the trial of the cause in the court below, the defendant's counsel requested the court to charge the jury, "that it was the duty of the plaintiff to put on record a valid release or discharge of said mortgage," before he tendered a deed; "and that a release made in California, with an uncertified acknowledgment, was not valid to discharge said mortgage." And also, "that if defendant would be required to do any thing more than put his own deed from plaintiff on record, in order to acquire such a title as is mentioned in the contract, plaintiff could not maintain his action." The court refused to give these instructions, but instructed the jury as follows: that if the jury believe from the evidence that the deed, and release of mortgage given in California, were tendered by plaintiff to defendant, at the proper time, and that defendant knew their contents, and refused to comply with the contract on his part, for the reason that he could not get the consent of Perry and Bennett to turn the water, and not for the want of an informality, or want of record, which could be supplied, then the defendant could not now object to such informality or want of record.

The court also instructed the jury, that the contract did not require the plaintiff to extinguish the right of Perry and Bennett. The court gave some other general instructions, to the effect, that if the plaintiff had complied with the contract, and defendant had broken it, plaintiff could recover.

*A. Holbrook*, for plaintiff in error.

*W. W. Page*, for defendant in error.

**BOISE, J.** As to the first ground of error alleged—that the certificate of acknowledgment to the release was insufficient. We are satisfied that all acknowledgments, taken without this State, unless before a commissioner, appointed by the gov-

error of this State for that purpose, must be supported by a certificate of a clerk, or other certifying officer of a court of record, as provided in section 12, page 520, of the statutes of this State; for, when the statutes make an express provision affecting the authentication of deeds, it must be strictly complied with.

The court is also satisfied that it was incumbent on Smith to record the release of the mortgage, before he could make a valid tender of the deed, which would bind Knighton; for, though the release might be sufficient to extinguish the mortgage, as between Knighton and the mortgagee, still, the record showed a subsisting incumbrance, and a cloud upon the title to be conveyed by the deed, which the imperfect release could not remove, without some further trouble and expense to perfect the same, and make it available. This trouble and expense Knighton was not bound to incur; for, by the agreement, he was to have the premises free from incumbrance.

This seems to have been the view taken by the court below, for as much is intimated in the instructions there given. It appears by the record, in this case, that on the 1st of June, 1858, when Smith presented the deed and this release of the mortgage, Knighton expressed himself satisfied with the release, by saying it was all right. He did not then object on this account, but based his refusal to comply with the contract on another ground, to wit, that Smith had not procured a release from Bennett and Perry, permitting him to turn the water; and alleging that he (Knighton) could not get such a permit from them; and having then declared, that he would not then complete the contract for that reason. Smith had a right to consider the contract as abandoned by Knighton, on the ground which he then assigned, and it was not necessary for Smith to take any further step to fix the liability of Knighton; for, by his own declaration, Knighton waived all other objections except the one relating to the right of Bennett and Perry to the water.

The only remaining question is, did the court err in charg-

ing the jury that it was incumbent on Smith to obtain a relinquishment of Bennett and Perry to the water. This is purely a question of construction of a written instrument; and we think that no fair construction of the language of the contract would make it incumbent on Smith to procure a permit from Bennett and Perry to Knighton to turn the water; so that in case Smith failed, he would be liable to an action for such failure.

Taking the contract in its stringent sense against Smith, it can only be construed to mean that Smith could have no right of action while the right of Bennett and Perry to command the water remained unextinguished; and the issue in the case presented that question to the jury, where, we think, it was properly left by the court.

**Judgment is affirmed.**





CASES  
ARGUED AND DETERMINED  
IN THE  
Supreme Court of the State of Oregon

JULY TERM, A. D. 1860.

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AARON E. WAIT, *Chief Justice.*  
REUBEN P. BOISE, AND  
RILEY E. STRATTON, } *Associate Justices.*  
J. G. WILSON, *Clerk.*

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A. J. REMMINGTON, Plaintiff in Error, v. STATE OF  
OREGON, Defendant in Error.

*Error to Multnomah.*

1. Gambling is not an offence under the statute.
  2. Criminal statutes must be construed in accordance with their natural and grammatical meaning.
- †

THIS is a prosecution for betting on a game of cards. The indictment was found at the November term, A. D. 1859, of the Circuit Court for Multnomah County, and plaintiff in error did not deny the betting, as charged, but pleaded *guilty*, and was fined by the court below. It is now claimed by the plaintiff in error that there is no such offence as that charged in the indictment, which is based upon the third section of the statute, passed February 1st, A. D. 1858; being an act to amend chapter ten of the Oregon Statutes, entitled gaming.

*W. W. Page*, for plaintiff in error.

*D. W. Douthitt*, for defendant in error.

BOISE, J. The question presented by the assignment of errors, in this case, is purely one of the construction of the third section of the act of the 1st of February, 1858; section one of which act prohibits all gambling with cards, but provides no penalty for the violation of such prohibition.

Section two provides for the punishment of persons who shall set up any gambling device; and section three, on which this indictment is founded, *provides*, that "every person who shall bet any money, or other property, &c., at or any other gaming table, bank, or gambling device, shall be punished, &c."

The word "*other*," as here used in this section, by grammatical construction, must refer to some gaming-table, bank, or gambling device, not mentioned in the preceding section of this act, and cannot, therefore, refer to gambling with cards.

It is true, as urged by the prosecution, that this construction of the statute renders it impossible to prevent betting on gambling devices. But we are not at liberty to construe the language of the statute contrary to its natural and grammatical meaning. And if the legislature has failed to accomplish its object by the enactment of this statute, it is to that authority, and not to the courts, that the public must look for a correction of the mistake.

**Judgment below reversed.**

JAMES B. STEPHENS, and WILLIAM H. FRUSH,  
Plaintiffs in Error, v. DAVID POWELL, Defendant  
in Error.

*Error to Multnomah.*

Where a charter for a ferry recites, that it "shall be subject to the same regulations, &c., as other ferries are, or *may hereafter be*, by the laws, &c., fixing the rates of toll," &c., the rates of ferriage are subject to change by future legislation.

THIS action was originally brought before a justice of the peace of Multnomah County, to recover illegal ferriage, demanded and received by plaintiffs in error of Powell, at their ferry, in Multnomah County; and, also to recover the penalty for demanding and receiving such illegal rates of ferriage; which penalty is provided for in section fifty of the act of the legislature, relating to roads and ferries.

*W. L. McEwen*, for plaintiffs in error.

*Williams & Gibbs*, for defendant in error.

BOISE, J. Plaintiffs in error claim their ferry rights under a charter to plaintiff, Stephens, from the legislature, passed January 17th, 1853, and continuing for the term of ten years; and they claim that the county commissioners of the proper county, (who, by the charter, had authority to fix the rates of toll for this ferry,) having exercised the authority, and fixed such rates, under the provisions of the statute of 1854, section fifty, such rates became a vested right in Stephens, which the legislature could not impair during the continuance of the charter.

But the legislature did, by act passed January 17th, A. D. 1857, provide, that "the county commissioners of the several counties be authorized to fix, alter and establish, from time to

time, the rates of ferriage to be levied and collected at all ferries now established, or hereafter to be established by law, within the then "territory of Oregon;" and the commissioners of Multnomah County, in pursuance of this act, proceeded to reduce the rates at the ferry of the plaintiffs in error. But the plaintiffs in error did not recognise any authority to make such reduction, and continued to demand and receive the rates established prior to the passage of the act of the 17th of January, 1857; and the only question presented for the consideration of this court is, had the said commissioners authority to make such reduction?

The charter, under which the plaintiffs in error claim, after making the grant of the ferry privilege, contains a *proviso* in these words, "provided that said ferry, when established, shall be subject to the same regulations, and under the same restrictions, as other ferries are, or *may hereafter be*, by the laws of this territory, fixing the rates of toll, and prescribing the manner in which licensed ferries shall be kept and regulated." It is clearly indicated by this provision of the charter, that the legislature intended that the ferry rates of this ferry should be fixed by the local authorities of the county where it was situated; and the only question is, whether they were to remain subject to future legislation.

If the charter had simply provided that this ferry should be subject to the same regulations, and under the same restrictions, as other ferries are by the laws of this territory, fixing the rates of toll, and prescribing the manner, &c., leaving out the words "or may hereafter be," then the regulations and restrictions referred to, being the then existing laws of the country, would have become a part of the charter, and there being no proviso to alter it, the same would have remained unalterable during the existence of the charter; but the legislature did *provide*, that this ferry should be subject to be affected by any further legislation on the subject of ferries, restricting the matters of toll and otherwise. The words "*or may hereafter be*," refer to future action of the legislature, and are susceptible of no other construction. We conclude, there-

fore, that this ferry became subject to the law of the 17th of January, 1857, and was liable to the action of the county commissioners in reducing the tolls; and that the court below was right in instructing the jury, that the county commissioners had authority to alter the rates of ferriage at this ferry.

Judgment below affirmed.

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MATTHEW KEITH, Plaintiff in Error, v. FRANKLIN CHEENY, Defendant in Error.

*Error to Multnomah.*

1. The issuing to claimants of certificates of donation claims belongs to the register and receiver of the land office; and in Oregon, they are the successors of the surveyor-general in this business.
2. A certificate is evidence of residence, cultivation, and other facts which it recites.
3. The donee of a land claim may maintain an action, under our statute, for the recovery of real property, at least, against one who shows no title except *possession*.

THIS action is to recover the possession of a town or building lot situate in the city of Portland, and county of Multnomah. The cause was tried at the March term, 1860, of the Circuit Court of Multnomah County.

*Williams & Gibbs*, for plaintiff in error.

*Logan & Shattuck*, for defendant in error.

BOISE, J. The plaintiff in the court below declared as tenant in fee; and the defendant, in his answer, also claimed to be tenant in fee.

On the trial, the plaintiff (Cheeny) offered in evidence a

deed to the premises from William W. Chapman and wife, and also three other paper writings; one, a donation certificate issued to said Chapman and wife; one, a certificate stating that said Chapman had paid at the land office one dollar and a quarter per acre for the land described in said donation certificate; the other, a receipt for said money so paid; each of these papers purported to be copies of papers signed by the surveyor-general of Oregon.

These papers were attached together, and upon the back of the first named were the certificates of the register and receiver. The land described in said donation certificate embraces the land in dispute. Defendant objected to the admission of these papers:

1st. Because they did not come from the officer properly having their custody.

2d. That the evidence of residence and cultivation ought to accompany them.

As to the first point: the first amendment to the act of Congress of the 27th of September, 1850, (commonly known as the donation law,) provides for the appointment of a register and receiver for Oregon; and further provides, that the surveyor-general shall perform the duties of such officers, until he shall be superseded in this business by the register and receiver thus provided for.

The business of issuing certificates to settlers properly belongs to the office of register and receiver; and, on the appointment and qualification of such officers in Oregon, they became in this business the successors of the surveyor-general, and their office the proper place of deposit for donation certificates; and this donation certificate, coming, as it does, from that office, was properly admitted, to show that Chapman and wife were possessed of the premises, including the land in dispute. As to the other two papers, mentioned as attached to this donation certificate, we think them improperly admitted, for they were not certified at all, and, for aught that appears, might have been attached without authority. But all these papers were offered together to show possession

by Chapman, and as that was sufficiently shown by the paper that was certified, they were immaterial, and could have worked no injury to the plaintiff in error, for Cheeny having produced a deed from Chapman and wife to himself, and then shown that Chapman and wife were possessed of the premises, was clearly entitled to recover against Keith, who does not pretend to have shown any title at all except possession. We also think it was not necessary for Cheeny to produce, on the trial, the original evidence of residence and cultivation by Chapman and wife, for the certificate recites those facts, and is evidence of the facts which it recites. There is one other point insisted upon by the plaintiff in error, which is, that the act of the legislature of this State, providing for and regulating real actions, does not contemplate any but the recovery of strictly legal titles. This language of the first section of this statute, "that any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action," &c., is very broad, and was intended to embrace in one form all actions for the recovery of the possession of real estate. And in any case, although the legal title is still in the United States, we think the donee of a land claim, having obtained a certificate thereto, or his assignee, may maintain this action against one who shows no color of title.

In this case, the defendant, Keith, did not show any title whatever, except naked possession; and, therefore, is not entitled to hold against the assignee of Chapman, who holds the donation certificate, which, at least, shows that he was in possession under the color of title.

**Judgment below affirmed.**

JOHN B. McCLANE, Plaintiff in Error, v. ANDREW THOMAS, Defendant in Error.

*Error to Douglas.*

A. executed to B. a note for purchase of town lots, which note was sued upon. The issues submitted to the jury were, 1st. Did the plaintiff abandon his land claim? 2. Was the note without consideration? Under that state of the case, the court below PROPERLY refused to give the following instruction, viz.: "That, under the pleadings, it must satisfactorily appear that the defendant demanded a conveyance of the town lots, or the plea of want of consideration does not apply."

SUIT was brought in the late District Court for Douglas County, in April, 1858, by John B. McClane, against Andrew Thomas, upon a negotiable promissory note, executed by Thomas to McClane, January 31st, 1853, payable one day after date. The defendant alleged, by way of defence, that the note was given in payment for two town lots in North Salem, of which the plaintiff claimed to be the owner under an act of Congress, approved September 27th, 1850, making donations to settlers, and for other purposes; that the plaintiff, before perfecting his right to the land upon which said lots were situated, abandoned the same; and that said note was without consideration. The plaintiff replied to the defendant's answer and denied such abandonment and such want of consideration.

The case was submitted to a jury, that, "under the pleadings in this action, it must appear satisfactorily that the defendant demanded a conveyance of the lots, or the plea of want of consideration does not apply." The court declined to instruct as requested, and such ruling was excepted to. The jury found a verdict for the defendant. The plaintiff moved for a new trial, which was denied, and judgment was entered for defendant upon the verdict.



*Williams & Gibbs*, for plaintiff in error.

WAIT, C. J. The question to be determined by this court is, did the court below commit error in refusing to instruct the jury, that, "under the pleadings in this action, it must appear satisfactorily that the defendant demanded a conveyance of the lots, or the plea of want of consideration does not apply?"

No other ruling of the court was excepted to; and the several other matters, not of record, embraced in the motion for a new trial, having been decided in the court below, will not be re-heard here. The issues submitted to the jury were, did the plaintiff abandon his claim, and was the note without consideration?

A demand, by the defendant, of a conveyance of the lots, would not be necessary or material in the determination of these issues.

The jury, in finding a verdict for the defendant, necessarily found one or both of these issues in the defendant's favor. If the note was without consideration, no demand of a conveyance would be necessary; and if the plaintiff had abandoned his claim, and had thereby placed it out of his power to convey the lots, no demand of conveyance would be necessary. We find no error for which the judgment of the court below ought to be reversed.

Judgment below affirmed.

CHANDLER JENNINGS, Plaintiff in Error, v. STATE  
OF OREGON, Defendant in Error.

*Error to Marion.*

Where the record shows that a sentence has been amended by erasing the word "solitary," without showing what position it sustained in the sentence, this court cannot say whether its insertion or erasure would be prejudicial to defendant.

CHANDLER JENNINGS was indicted at the May term of the Circuit Court, 1859, for Marion County, for larceny, instealing divers articles of personal property of the value of more than thirty-five dollars. Upon trial, he was found guilty, as charged in the indictment, and sentenced to imprisonment in the penitentiary for the term of five years. The other facts in the case sufficiently appear in the opinion of the court.

*G. H. Williams*, for plaintiff in error.

*J. G. Wilson*, prosecuting attorney, for defendant in error.

WART, C. J. The matters assigned as error, and relied upon, are as follows:

3d. The sentence of the court is not warranted by law.

4th. The change in the sentence is irregular and void; and it was made without notice to the plaintiff in error, and at a term of court subsequent to the term when the judgment and sentence of the court were entered.

5th. The proceedings are irregular and illegal.

The record of the judgment and sentence of the court below, as it comes before us, is as follows, to wit: "This day came the State of Oregon, by Wilson, prosecuting attorney, and the said defendant, in his own proper person, as well as by Williams, his attorney, and moves for a new trial in this

cause; and the court, after hearing the arguments of counsel, ordered, that said motion be denied, and the said defendant be sentenced to five years' confinement, and kept at hard labor in the penitentiary of this State. The term of this sentence to commence from the date of the expiration of the four years' sentence, on an indictment for receiving and aiding in the concealment of stolen goods, this day entered; and that judgment be entered against said defendant for the costs in this case, accruing to be taxed, and that execution issue therefor."

It appears, also, from the record before us, that at the next regular term, after the conviction and sentence of said Jennings, the judge of said court made an order, of which the following is a copy, to wit:

"STATE OF OREGON	}	<i>Record of Conviction and Judgment, at September Term, 1858, for larceny.</i>
v.		
"CHANDLER JENNINGS.		

"To the Clerk of the Circuit Court:

"Being satisfied, from an examination of the record in this cause, and my own knowledge of the proceedings, that there is a clerical error in the judgment—that is to say, the word *solitary*, which appears in the said record, was not in the original sentence as delivered by the court—you are, therefore, directed to erase said word from said recorded judgment, to make the same conform to the sentence as delivered by the court.

"Given in open court, this 28th day of March, A. D. 1860.

"R. P. BOISE, Judge."

Except from this order, it does not appear, from the record or proceedings before us, that the word "*solitary*" was ever embodied in the sentence of the court below; nor is there any thing before us to show where, in the sentence, the word *solitary* occurred. This court will not pass out of the

record in search of reasons for the reversal of a judgment of an inferior court; and without going out of the record, it is impossible to determine that the rights of the plaintiff in error have been prejudiced, either by the inserting or the erasing of the word *solitary*.

We think, therefore, that the judgment of the court below must be, and it is affirmed.

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WILLIAM R. JOHNSON, Plaintiff in Error, v. JAMES  
McGINNESS, Defendant in Error.

*Error to Yamhill.*

Money paid, without fraud or deceit, under a mistake of the law, cannot be recovered back.

In the year 1845, the defendant, McGinness, being a married man, settled upon a certain section of land in Yamhill County, as a claimant under the act of Congress of September 27th, 1850, known as the donation act. His entire residence was upon the east half of the claim; and his wife died in 1846, without issue. In 1853, McGinness, still residing upon the east half of the section, supposed and represented to Johnson that he, McGinness, was the owner of, and entitled to a patent for, the west half of said section, as survivor of his deceased wife. Johnson, believing the representations of McGinness, purchased the west half of the section, and paid therefor the sum of \$1,200. McGinness executed to Johnson a quit-claim deed of the premises, and bound himself in the deed, and also in a bond, to execute to Johnson a general warrantee deed of the premises, as soon as practicable after obtaining a patent therefor from the United States. Subsequently, Johnson became the grantee of the same land from the United States.

The action in the court below was brought to recover back the money so paid. The judgment of the court below was in favor of the defendant, and this action is brought to reverse that judgment.

*Williams & Gibbs*, for plaintiff in error.

*J. K. Kelly*, for defendant in error.

WAIT, C. J. The act of Congress of September 27th, 1850, known as the donation act, provides "that there shall be and hereby is granted to every white settler or occupant of the public lands, American half-breed Indians included, above the age of eighteen years, being a citizen of the United States, or having made a declaration according to law of his intention to become a citizen, or who shall make such declaration on or before the first day of December, eighteen hundred and fifty-one, now residing in said territory, or who shall become a resident thereof on or before the first day of December, eighteen hundred and fifty, and who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this act, the quantity of one-half section, or three hundred and twenty acres of land if a single man, and if a married man, or if he shall become married within one year from the first day of December, eighteen hundred and fifty, the quantity of one section, or six hundred and forty acres of land; one half to himself, and the other half to his wife, to be held by her in her own right; and the surveyor-general shall designate the part enuring to the husband, and that to the wife, and enter the same in the records of his office; and in all cases where such married persons have complied with the provisions of this act, so as to entitle them to the grant as above provided, whether under the late provisional government or since, and either shall have died before patent issues, the survivor and children, or heirs of the deceased, shall be entitled to the share or interest of the deceased, in equal proportions, except where the deceased

shall otherwise dispose of it by testament, duly and properly executed according to the laws of Oregon." (Section four.)

"That upon the death of any settler before the expiration of the four years' continued possession required by this act, all the rights of the deceased under this act shall descend to the heirs at law of such settler, including the widow, where one is left, in equal parts; and proof of compliance with the conditions of this act, up to the time of the death of such settler, shall be sufficient to entitle them to the patent." (Section eight.)

It is a rule of law that money paid, without fraud, under a mistake of the law, cannot be recovered back. (1 *Peters' Rep.* 15.)

There was no fraud or deceit in the sale by McGinness to Johnson; but there was a material mistake as to whether, in law, McGinness was entitled to the land, as survivor of his wife.

It appears from the plaintiff's showing that McGinness settled upon his land claim in 1845, being a married man, and that his wife died in 1846, without issue; and whether McGinness thereby became entitled to any land as the survivor of his wife, was a question of law.

In relation to the facts, there was no fraud, deceit, misrepresentation, or misunderstanding; but in relation to the law applicable to those facts, the parties were mutually mistaken.

Money, so paid, cannot be recovered back.

The judgment of the court below should be, and is *affirmed*.

WELLS, FARGO & CO., Appellants, v. PATRICK WALL  
Appellee.

*Chancery.—Appeal from Multnomah.*

1. A party being ignorant of an essential fact at the time of trial in the court below, seeks to stay execution, &c. Under the statute, "that the court may, in its discretion, &c., at any time within one year, &c., relieve a party from a judgment, order, or other proceeding taken against him, through his mistake, inadvertence, surprise, or excusable neglect,"—*Held*, that the party had an adequate remedy at law.
2. Party must show due diligence.

THIS is an appeal from an order or decree of WAIT, C. J., dissolving an injunction granted by him at chambers, upon the filing of the complainant's bill, February 23d, 1860. At the March term following of the Circuit Court for Multnomah County, the defendant moved to dissolve the injunction and dismiss the bill, and assigned the following grounds for the allowance of the motion:

- 1st. The court has no jurisdiction.
- 2d. The complainants have an adequate remedy at law.
- 3d. The bill shows that the questions at issue have been tried and determined at law.
- 4th. Bill does not show necessary diligence in preparing for the trial at law of the case of Wall v. Wells, Fargo & Co.
- 5th. Bill prays for injunction, for the purpose only of procuring impeaching and cumulative evidence.
- 6th. None of the exhibits referred to in said bill are attached thereto.
- 7th. There is no equity in the bill.
- 8th. The bill asks for equitable relief. Upon this motion the court dissolved the injunction and dismissed the bill. The complainants bring this appeal.

*G. H. Cartter*, of counsel for appellants.

*A. C. Gibbs*, of counsel for appellee.

STRATTON, J. Lord Coke regarded it as the reproach of his time, and against which he declaimed with a quaint but strong vehemence, that equity was made to invade and overturn the legitimate functions of the common law. The practice of which he complained may, in some sense, be said to be reversed; at least, many of the strong barriers, which separated the two jurisdictions of law and equity, in the march of liberal ideas, have been swept away; and law tribunals are now clothed by statute with many of the powers to grant new trials, and to set aside hard judgments, which formerly belonged to the courts of chancery. At no very remote period, the want of such a power in law courts sent the suitor to another tribunal only to multiply actions and increase his costs.

The first and second points made by defendant, in his motion, may be merged and considered together. It may be premised that courts of equity never did interfere with legal proceedings, while there was a full and adequate remedy at law. Nor will this court interfere with judgments at law, and take jurisdiction, unless it shall appear that the party has used due diligence, exhausted every means, and failed through ignorance of some fact; or was prevented from availing himself of his defence by fraud, accident, or by the act of the opposite party, unmixed with negligence or fault on his part. (*Foster v. Wood*, 6 Johns. Ch. R. 89; *The Marine Ins. Co. of Alexandria v. Hodgson*, 7 Cranch, 332; *Truby v. Wanzer*, 5 How. 141.)

It is not pretended by the bill that the defence was an equitable one, and not available at law; but that the party was in ignorance of an essential fact at the time of the trial; and such fact did not come to complainants' knowledge until it was too late to move for a new trial.

Admitting all this to be true, it is difficult to perceive how it would avail complainants.

The action at law, between these parties, was finally determined at the December term of the Supreme Court, 1859; and this bill was filed February 23d, 1860, with the purpose of staying the execution.



By section 73, page 94, of the statutes of this State, it is provided, "that the court may, in its discretion, &c., at any time within one year, &c., relieve a party from a judgment, order, or other proceeding taken against him, through his mistake, inadvertence, surprise, or excusable neglect."

It was as competent for the Circuit Court to set aside the judgment for any cause here shown, as for this court to do so, had no such act been passed.

This statute might have been, and probably was intended to save litigants the necessity of resorting to a Court of Chancery, to avail themselves of a purely legal defense, justly existing, but not available at the trial, but who had been concluded by the judgment at law. This is a reasonable construction of the statute; and if we are right in giving it this interpretation, it would seem to be conclusive of the merits of this bill.

The third point made in the motion is determined by what has been said above.

None of the exhibits referred to in the bill are annexed thereto; and the consideration of the fourth and fifth points made by the motion, must proceed upon such facts as are disclosed by the statements upon the face of the bill. Placing the most liberal construction upon these, we are of the opinion that no such case is made, as would warrant this court in reversing the decree of the chancellor.

Do complainants show such diligence as entitles them to relief on the ground of surprise or accident?

The key to all the evidence, which is referred to, but omitted to be produced on the trial, was, or ought to have been, in the possession of the complainants.

The principal evidence in the case was the testimony of James O'Neil himself, who issued the certificates, and claimed authority for so doing under his letter of appointment. Wells, Fargo & Co. must have had copies of all such appointments, and of all such instructions to their agents. Why was not a copy of such appointment presented to O'Neil, on his examination as a witness; and thus given the witness the

opportunity of verifying his construction of that instrument; or, on the contrary, to have then laid the foundation for weakening his testimony?

Of the time and place the defendants in the other forum had due and ample notice. If they negligently failed to attend such examination, but relied upon the statements of the witness, or failed to take such steps as their interests demanded, they cannot now be heard to complain.

Again, the bill states explicitly, that the complainants posted and published notices of the fact that their agents were furnished with written instructions of their powers and duties.

What diligence have they shown, when matters of such public notoriety were omitted to be produced upon the trial? They allege that such testimony was of importance to them, and we grant that it was; but we cannot admit that any diligence was used, when it is stated that they could not find a witness, by whom to prove it during the pendency of the suit at law. In "*Sewell v. Treeston*, 1st Chan. Cases, 65, upon a fact somewhat analogous to the one before us, the Court of Chancery refused assistance, where the defendant at law had written a letter, which the plaintiff could not prove at the trial, and which would have discharged him." See, also, *Schroepfel v. Shaw*, 3d Comstock's R. 452; *Marine Ins. Co. of Alexandria v. Hodgson*, 7 Cranch, 332; *Bateman v. Willes*, 1st Sch. & Lefroy, 201; *Floyd v. Jaques*, 6 Johns, C. R. 479; *Earl of Oxford's Case*, 2d Leading Cases in Equity, 97; *American Notes*, *passim*.

Finally, courts of law under the statutes of this State, being clothed with ample powers for granting new trials, or opening judgments, it may well be doubted whether this court ought in any case to enjoin a judgment at law, when the case presents no equitable grounds for setting aside the verdict.

In the case of *Simpson v. Hart*, the court used the following language: "Before courts of law were in the exercise of their present liberal jurisdiction over the subject of new trials, the parties were frequently forced into equity to be re-

lieved from oppressive verdicts." (3 *Black. Com.* 388; *Vaux v. Shelly, Finch*, 472.) Since, however, that jurisdiction has been well established and freely exercised, on equitable as well as legal grounds, the party failing in his application at law for a new trial will not be relieved in equity, at least, upon the same merits already discussed, and fully within the discretion of a court of law. Where courts of law and equity have concurrent jurisdiction over a question, and it receives a decision at law, equity can no more re-examine it, than the courts of law in a similar case could re-examine a decree of the Court of Chancery. Upon examination of the numerous authorities, most of which have been referred to by the counsel in this cause, it will be seen, that as the courts of law have extended their jurisdiction over this subject, the courts of equity have withdrawn their jurisdiction over it; and this is in accordance with the general principle, that "where a court of law can furnish an adequate remedy, the court of equity will not interfere."

There is no pretence that the verdict of the jury in the law case was against the weight of evidence; and the failure of the complainants to attach their exhibits to the bill, if for no other reason, would place the court in great embarrassment as to whether a case had been made out, granting that the court had jurisdiction, and, in a proper case, ought to exercise it.

For these reasons, we think the decree of the chancellor ought to be affirmed.

WILLIAM L. McEWEN et al., Plaintiff in Error, v. CITY.  
OF PORTLAND, Defendant in Error.

*Error to Multnomah.*

1. A. brought suit against B. to recover possession of real property; A claiming title by donation from the proprietors of the city of Portland in 1849, about eight years before the commencement of this action;—*Held*, that it was error to admit evidence of *reputation* to support such title.
2. Rule, admitting hearsay evidence or *repute*, stated and commented upon.

THE city of Portland brought suit under the statute "for the recovery of the possession of real property," against the plaintiffs in error. The complaint of the plaintiff, in the court below, set out "that the said city of Portland is the owner of, and entitled to the possession of that certain lot of land, together with the building thereon, and other appurtenances thereunto belonging, &c.," (particularly describing the premises.) The plaintiff claimed and alleged "that the said city of Portland hath, in its own right, a good and complete *estate in fee simple* in said lot of land, and that the said city was seized and possessed of the said lot, with the tenements and appurtenances, within twenty years now last past, by actual and rightful use, occupation and enjoyment of the same, and ought now to be in the quiet possession of the same."

To this the defendants below answered, denying "that the city of Portland is the owner of the property described," &c., traversing generally the material allegations of the complaint. The defendants, after denying any wrongful entry, or withholding of the property, set up title in fee simple in themselves, and alleged "that they were in actual possession, &c., in their own right." There was a replication and denial of the title of the defendants, a trial and verdict for the plaintiff below, and judgment upon the verdict. Upon the trial, some fifteen special instructions were asked of the court, to be given

to the jury. Some were given and some refused. As no one of these points is reviewed, it is not necessary to set them out.

*Williams & Page*, for plaintiff in error.

*D. W. Douthitt*, for defendant in error.

STRATTON, J. This is a proceeding under title I. of an act to regulate actions relating to real property; and section first provides, "that any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action, &c. This statute was intended to simplify the forms of actions affecting interests in real property, but not to change the rules of evidence in such proceedings.

Section four provides, that the claimant shall not only state that he is entitled to the possession of the property, but shall set out also what interest he claims therein. Accordingly, in the case before us, the plaintiff claimed a fee simple, and the right of immediate possession.

In the argument much was said, and many authorities cited to the point, whether the corporation of the city of Portland could hold land in trust for religious and school purposes. As the verdict must be set aside on another ground, it is not deemed advisable to pass upon that question. The form of action admits the possession of the defendants, which possessory title must prevail until the complainants show a better one. "The law will never construe a possession *tortious*, unless from necessity. On the other hand, it will consider every possession lawful, the commencement or continuation of which is not proven to be wrongful. And this, on the plain principle, that every man shall be presumed to act in obedience to his duty until the contrary appears. When, therefore, a naked possession is in proof, unaccompanied by evidence as to its origin, it will be deemed lawful and co-extensive with the right set up by the party." (*Ricard v. Williams*, 7 *Wheaton*, 59.)

Again, it is a familiar principle of law, applicable to the present and like cases, that the claimant must prevail upon the strength of his own title, and not upon the weakness of his adversary's, unless it should appear that the defendant was a mere naked intruder, or sets up no title in himself. (*Christy v. Scott*, 14 How. 282; *Jackson v. Boston and Worcester Rail-Road*, 1 Cushing, 575.)

The bill of exceptions briefly states the evidence offered by both parties on the trial, but in very general terms. It was not pretended in the argument, nor does the record intimate, that the plaintiff derived title through the ordinary forms of written instruments, but it is said that the original proprietors of Portland donated the lot in question to the citizens of the then town, who erected thereon a house for school and church purposes.

It appears, from the evidence, that this donation was made, if made at all, in 1849, by the proprietors of the town. To support this donation, there was some showing that the donors set apart and designated the lot on a plot of the town. The time when, and by whom this was done, was, certainly, not very clear. Evidence was also offered on the part of the plaintiff, to which the defendants excepted, and admitted by the court, to show that, by public repute, the title to the property was in the plaintiff, and that the city was entitled to the immediate possession. As it is impossible for this court to determine what weight might have been given to this testimony by the jury, if its admission is not reconcilable with well-settled rules of evidence, the judgment must be reversed.

We are of the opinion, that the ruling of the court, in admitting this testimony, is without precedent, and not within any recognized rule of evidence. It is unfortunate that the term "*reputation*," either from long usage or continual necessity, has been, and continues to be, applied to testimony radically different in its character. Reputation, applied to an individual whose character in the community is in question, is established by witnesses who can speak directly as to what they have seen, known, and heard to exist at the moment of

testifying. It is a present fact, evidenced by the concurrent opinion of a certain number of individuals. Such testimony is direct and original, and, in no sense, *hearsay*. Reputation, as applied to questions of pedigree, customs, boundaries, &c., is hearsay evidence, and its admission, in such cases, is said to be an exception to a general rule, as old as the rule itself. The exceptions spring from an obvious necessity, for the exceptions themselves point to a time of which no living witness could speak. Hence, in such cases, recourse must be had to the knowledge and declarations of persons long since dead, who are shown to have been acquainted with the facts about which they spoke. The *antiquity* of the subject-matter to be proved, is the essential element to let in reputation as evidence. (1st *Greenleaf Ev. sec.* 130; 1st *Starkie Ev. sec.* 29, 30; 7 *Peters*, 554.)

Had this fact occurred to the mind of the court below, as a guide in making a proper application of the rule, no such mistake would probably have occurred. Formerly, in controversies of this character, a practice prevailed though now relaxed, requiring the claimant to allege and show acts of enjoyment within a period of living memory, before reputation could be let in as proof; thus indicating that the origin or foundation of the right was at a period antecedent to such time. The pleader, who drew the complaint in the record, must have been aware of the rule, for the allegation is distinctly made, but how is it supported by the proof?

It appears from the evidence, recited in the bill of exceptions, that the plaintiff claims title under a donation from the proprietors of the city of Portland town site, no more remote than 1849. If we have rightly apprehended the only circumstances under which reputation, as evidence, can be admitted to prove any right or privilege, how is it proposed to bring this case within the letter or reason of the rule? In the natural course of human life, three-fourths of the witnesses of a transaction of that date must be still living. Where are they, and why not called to speak of the fact of a conveyance in fee to the plaintiff, if such conveyance was ever made? If

the exceptions to the rule rejecting hearsay evidence were to be enlarged to an extent to cover the present case, titles might be made and unmade with startling facility.

At best, hearsay evidence is weak and unsatisfactory, and always presumes better evidence, at some remote period to have existed, but no longer available from lapse of time. A few isolated and hard cases have demanded, and the courts long since yielded, to an extent which has made the exceptions as clear and well defined as the rule itself. Ought they now to be enlarged? An eminent judge has said, that all questions upon the rules of evidence are of vast importance to all orders and degrees of men; our lives, our liberties, our property, are all concerned in the support of these rules, which have been matured by the wisdom of ages, and are now revered for their antiquity and the good sense in which they are founded." No one rule of evidence has been more uniformly guarded by all the courts, nor with greater strictness, than that admitting hearsay evidence. In the carefully considered case of *Mima Queen v. Hepburn*, 7 *Cranch's R.* 290, which was a suit brought for the freedom of the plaintiff, the court refused to extend the rule to the admission of testimony, showing by reputation, or by declarations of persons since dead, that the ancestor of the plaintiff was a free person. The highest court of appeals of Maryland had, in a like case, admitted the testimony as in favor of human freedom, and the point was pressed upon the federal Supreme Court with much earnestness. A stronger case could not have been put, and so the court admitted; but the evidence was rejected, Marshall, C. J., remarking, "the general rule comprehends the case, and the case is not within any exception heretofore recognized. This court is not inclined to extend the exceptions further than they have already been carried." The same point came under consideration again in the case of *John Davis v. Wood*, 1 *Wheaton's R.* 6, and the court, after stating that the opinion in *Mima Queen v. Hepburn* had been revived, firmly adhered to that decision.

To this point, we have examined the question solely upon



the ground of the admissibility of the testimony, with reference to the time when the right or title had its origin, keeping out of view another important distinction which has arisen in most of the cases involving similar principles to the one before us. Let it be supposed, that the case comprehended the essential ingredient of antiquity, two other questions would at once arise. First, was the matter in controversy of such public and general concern as to bring it within the rule stated by Lord Kenyon, that "evidence of reputation upon general points is receivable, because all mankind, being interested therein, it is natural to suppose that they may be conversant with the subject, and that they should discourse together about them, having all the same means of information." And he immediately puts the question: "How can this apply to private titles, either with regard to particular cases or private prescription?" (1*Starkie's Ev.* 33; 1*Greenleaf's Ev. sec.* 137.) If it were strictly necessary to settle the point, it might be doubtful whether the inhabitants of the city of Portland formed a body of such quasi-public character as to admit this evidence; but, second, it is well settled that reputation is not admissible to prove a particular fact. The reason is obvious. Particular facts, not of a public nature, may, and in the nature of things must, be understood by few, and liable to be misrepresented or misunderstood, and may have been connected with other facts by which their effects would be limited and explained. The city of Portland sets up a title in fee simple, and such a title to a specific piece of property imports a conveyance through some of the forms known to the law. That would seem to be a distinct and isolated fact, which reputation was admitted to prove upon the trial. We think it was clearly transcending the rule. Justice Story has very comprehensively summed up the law on this subject, thus:

"1st. That the fact, to which the reputation or tradition applies, must be of a public nature.

"2d. If the reputation or tradition relates to the exercise of a right or privilege, it must be supported by acts

of enjoyment or privilege within the period of living memory.

"3d. That it must not be reputation or traditionary declarations to a particular fact." (1 *Greenleaf's Ev.* sec. 138; *Elliott v. Pearl*, 10 *Peters' R.* 412; *Mima Queen v. Hepburn*, 7 *Cranch*, 290; *Davis v. Wood*, 1 *Wheaton's R.* 6; *Regina v. The Inhabitants of the County of Bedford*, per Lord Campbell, C. J., 29 *English L. & E. R.* 85.)

For these reasons, we think, there was error in the ruling of the court below.

Judgment reversed, and cause remanded.

CASES  
ARGUED AND DETERMINED  
IN THE  
Supreme Court of the State of Oregon  
DECEMBER TERM, A. D. 1860.

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AARON, E. WATT, *Chief Justice*,  
REUBEN P. BOISE,  
RILEY E. STRATTON AND } *Associate Justices*.  
PAINE P. PRIM,  
J. G. WILSON, *Clerk*.

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DELAVANTIA ROCHESTER, Plaintiff in Error, v.  
JAMES ROCHESTER, Defendant in Error.

*Polk County.*

Statute requires only ten days' service of complaint and notice, in suit for divorce within the State.

THE defendant in error filed his complaint, in the Circuit Court of Polk County, for divorce, on the 23d day of March, 1860, and, at the April term thereafter, obtained a decree against the plaintiff in error by default. Service was had upon plaintiff in error, in the county of Linn, on the 30th day of March, which was more than ten, and less than thirty days, before the first day of the term at which the decree was entered.

*G. H. Williams*, of counsel for plaintiff in error.

*E. M. Barnum*, of counsel for defendant in error.

[1 Oregon]

PRIM, J. Several assignments of error are made in this cause; but the only one relied upon is, "that the service was insufficient to entitle the defendant in error to the decree at that term of the court." The question raised in this cause is, "should the service have been made thirty days before the first day of the term," as is provided for in actions at law, when a suit is commenced in one county, and service is had in another?

We think not, as the statute has clearly provided on the subject of divorce what kind of service is necessary to entitle the plaintiff to have the evidence heard, and the cause decided by the court. Oregon Statutes, page 589, section 6, provides in substance that, when personal service is had ten days before the commencement of the term, the evidence may be heard, and the cause decided at that term, without any reference as to whether the service is made in the county where the action is commenced, or in another. We think there is no error in the proceedings of the court below, for which that judgment should be reversed.

Judgment is therefore affirmed.

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WILLIAM GIRD, Plaintiff in Error, v. STATE OF  
OREGON, Defendant in Error.

*Benton.*

A recognizance to appear at the next term of the District Court for Benton County, taken under the territorial act of December 10th, 1856, entitled "An act to conform the practice of the courts to the act of Congress of August 16, 1858," is good. The sittings therein provided for are District Courts, and the duration of each sitting is a "term."

SUIT was brought in Benton County, by the State against William Gird, upon a recognizance entered into under the

late territorial government, before a justice of the peace of Benton County, on the 6th day of June, A. D. 1858, by said Gird and Moses E. Milner, for the appearance of said Milner at the District Court of Benton County, on the first day of the next term thereof, and answer a charge of an assault with an intent to murder. At the regular term of the District Court, held at Salem, September 7th, 1858, a true bill of indictment was found against said Milner, and at the next "sittings," so called, of the District Court of Benton County, held on the 4th day of October, 1858, the said Milner being called to appear, and failing to do so, the recognizance was forfeited. The defendant below demurred to the complaint, which demurrer was overruled by the court, and judgment rendered for the plaintiff. The plaintiff in error brings suit to reverse that judgment.

*Kelsay & Thayer*, for plaintiff in error.

*G. H. Williams*, for defendant in error.

WAIT C. J. From the points raised in this case, it becomes necessary to consider two questions:

1st. Whether the recognizance is such that it justifies a recovery against a surety; and,

2d. Whether the recognizance could be forfeited at the sittings of the District Court for Benton County.

The plaintiff in error insists, that the District Court of the first judicial district of the territory of Oregon, of which the county of Benton was a part, was held at Salem, in Marion County; and that the act of Congress of August 16th, 1856, and the act of our own territorial legislature of December 10th, 1856, forbids the holding of a District Court, except at one place in a judicial district; and hence that this recognizance to appear at the District Court for Benton County, especially as against a surety, was void, and that the forfeiture of the recognizance in Benton County was unauthorized.

The act of Congress, we think, did not forbid the holding of territorial courts, for the enforcement of territorial laws, at the expense of the territories.

The reason of the enactment of this law of Congress was, that in one of the territories very heavy expenses had been incurred, attendant upon the holding of District Courts.

Whether intended by Congress or not, a practice had prevailed of holding District Courts, by the United States territorial judges, in all the counties where the wants of the people and territorial enactments required it. Much expense and time would be saved to the people by the holding of courts in their respective counties; and if the United States territorial judges were willing, as ours were, without increase of pay or neglect of United States business, and without any increase of the expense to the United States, to hold District Courts at more than one place in a judicial district, no reason is discovered why Congress should confine the holding of District Courts to one place in the district. We think that Congress, in its act aforesaid, did not prohibit the territorial legislature from providing for, nor the United States territorial judges from, holding courts in the several counties in the territories. We think, also, that a reasonable construction of the act of the territorial legislature, passed December 10th, 1856, entitled an "Act to conform the practice of the courts to the act of Congress of August 16th, 1856," shows that it authorized the holding of District Courts, for the transaction of territorial business, without cost to the United States, in Benton County. This act provides for the holding of a District Court in one place in each judicial district, and for *sittings* in each county, for the trial of issues of fact in cases arising in such counties. It provides that a grand jury be summoned by the marshal from the district, upon a venire issued by the clerk of the District Court; and that indictments shall be deemed at issue, on the plea of not guilty, without arraignment or formal plea, and sent down for trial at the first sittings thereafter. It provides, that every indictment shall state in what county the offence was committed;

and that issues in fact arising thereon should be sent down for trial to that county, and that no territorial prisoner, in actual custody or confinement, shall be conveyed out of the county for the purpose of pleading or receiving sentence. This territorial legislation, then, authorizes the holding of District Courts at one place in a judicial district, where all the United States cases may be disposed of; and also for the holding of *sittings* for all the counties, for the disposal of territorial business. If the word *sittings* had been used where the word *term* occurs in the recognizance sued upon, it would be clear that the recognizance is such as is authorized by law; and we think that the word *sittings*, as used by the territorial legislature, may be regarded as signifying "term." The district judges, in their *sittings* in the several counties, for the trial of issues of fact, attended as they were by clerks, sheriffs, juries, and all the paraphernalia of courts of record, were holding District Courts, and the duration of each of those sittings was a *term* of court.

Milner could not have been tried for an assault with intent to murder, as charged against him, except in Benton County, and in a District Court. We cannot suppose that the legislature, while assuming to provide for the punishment of territorial offences, intended to suspend all trials and punishments for those offences; yet, if it be true that District Courts could not be held but at one place in a district, and that such courts were lawfully held at Salem, in Marion County; and if it be also true that territorial offences could be tried only at the sittings, and in the counties where the offenses were committed, then, it necessarily follows that the legislature, while assuming to provide trial and punishment for offenses, did, whether intended or not, suspend the trial and punishment of all the higher territorial offences committed in those counties. We think that nothing of the kind was intended or effected. Our statute provides, that no action, brought on a recognizance, "shall be barred or defeated, nor shall judgment be arrested thereon, by reason of any neglect or omission to note or record the default of the principal or surety, at the term

when such default shall happen; nor by reason of any such defect in the form of the recognizance, if it sufficiently appear from the tenor thereof at what court the party or witness was bound to appear, and that the court, or magistrate before whom it was taken, was authorized by law to require and take such recognizance." The only place where Milner could be tried was in Benton County; the only tribunal before which he could be tried was a District Court; the recognizance required his appearance "at the District Court of Benton County, on the first day of the next term thereof." The recognizance binds the plaintiff in error as surety thereon, and the forfeiture thereof was authorized by law.

The judgment of the court below is affirmed.

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**JAMES STRANG, Plaintiff in Error v. MATTHEW  
KEITH, Defendant in Error.**

*Error to Multnomah.*

Under the statutes of this State, regulating appeals from justices of the peace to the Circuit Courts, the filing of notice of appeal with the justice, and serving a copy on the adverse party; also, filing and executing a sufficient bond, are conditions precedent to an appeal, and must be complied with within twenty days after rendition of judgment by the justice;—*Held*, that in default of these conditions, the Circuit Court had no jurisdiction.

MATTHEW KEITH brought suit, in the Recorder's Court of the city of Portland, against the plaintiff in error, for the sum of \$97.65 dollars. Upon the calling of the cause, the defendant below, James Strang, did not appear, and Keith had judgment by default. This judgment was entered on the 3d of April, 1860. On the 21st of April, as appears by a notice which is *said* to have been filed with the justice on that day,



the defendant notified the court of his intentions to appeal. The bond in appeal was filed, as appears by the record, on the 27th of April, and the justice, or recorder, acting as a justice of the peace, certifies in his docket that, on that day, he allowed the appeal.

In this condition the record and proceedings came into the Circuit Court; and, upon the calling of the cause, the plaintiff moved for judgment, for want of an answer, and the judgment was entered accordingly.

STRATTON, J. The plaintiff in error has brought the matter into this court, and assigns for error—

“That the court erred in rendering judgment against the defendant below—it not appearing that the notice of appeal from the justice of the peace was served on the plaintiff below.”

With this state of facts, the question now is, had the Circuit Court jurisdiction and authority to render such judgment? Title 17, section 186, of the Statutes of 1855, relating to appeals from justices' courts to the circuit courts, provides, that such appeals shall be taken within twenty days after the judgment is rendered, &c., and shall be by filing a notice of appeal with the justice, and serving a copy on the adverse party, or his attorney. Section 187, of same title, further provides, “that no appeal shall be allowed, *in any case*, unless a written undertaking shall be executed on the part of the appellant,” &c. These provisions of the statutes we deem imperative, and must be complied with before the Circuit Court could entertain any motion affecting the rights of the parties to the judgment below, other than a motion to dismiss the appeal. The transcript of the justice discloses a formal notice; but it nowhere appears, certainly, that such notice was ever filed with the justice, or that a copy was ever served on the opposite party. But, if these facts were not decisive of the whole question, the justice states explicitly, “that on the 27th day of April—twenty-four days after the rendition of the judgment by the justice—defendant filed his

bond, &c., for appeal; which bond was then approved and the appeal allowed." Clearly, this was too late to comply with an absolute condition precedent.

The judgment of the justice had fixed the rights of the parties, in respect to the subject-matter in litigation, beyond the questioning of any tribunal.

The Circuit Court, having no jurisdiction, its judgment is a nullity.

Judgment is reversed.

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L. J. C. DUNCAN, Plaintiff in Error, v. M. THOMAS et al., Defendants in Error.

*Error to Marion.*

1. A re-delivery undertaking, executed in pursuance of section 129 of the statutes, relating to attachments, is discharged by the seizure of the property therein specified, upon attachments in other suits, by the sheriff to whom the undertaking was executed.
2. Such seizure, within the time allowed for re-delivery, is tantamount to a re-delivery.
3. The undertaking, provided for in sections 146 and 147 of the same statute, operates as an absolute discharge of the property from attachment.

THIS cause, in the court below, was commenced in Jackson County, and removed to Marion County; and was brought upon a written undertaking, executed by the defendants to the plaintiff, as sheriff of Jackson County, for the re-delivery of thirty-four pack mules and one horse, levied upon by virtue of a writ of attachment against the defendant, Thomas.

The defendants demurred to the reply of the plaintiff; which demurrer was sustained by the court, and judgment for costs entered against the plaintiff, who brings the cause into this court for error.

*Kelly & Reed*, for plaintiff in error.

*Dowell & Wilson*, for defendants in error.

WAIT, C. J. The only matter assigned as error is, that "the court erred in sustaining the demurrer of the defendants to the plaintiff's replication."

The complaint, answer, and reply, as they come before us, show, in substance:

1st. (*Complaint.*) That the plaintiff claimed 1,798 dollars damages for an alleged breach of a re-delivery undertaking in attachment.

2d. (*Answer.*) That the plaintiff, subsequent to the execution of the undertaking sued upon, and before the time therein limited for the re-delivery of the property attached, repossessed himself of and sold said property.

3d. (*Reply.*) That the property came into the plaintiff's possession after the execution of said undertaking, but that the property was levied upon by virtue of three other attachments, and subsequently sold, and the proceeds applied in payment of the judgments rendered in such attachment causes.

The plaintiff's reply having been demurred to, it becomes necessary to pass upon the sufficiency thereof. The reply shows a taking of the property subsequent to the execution of the undertaking sued upon, and before the time therein specified for the re-delivery thereof; but alleges that such taking was upon attachments in other causes. Can a sheriff, having lawfully seized personal property upon a writ of attachment, and taken a re-delivery bond therefor, lawfully seize upon the same property upon other attachments within the time limited by law for such a re-delivery? Our statutes authorize two classes of undertakings in attachments. The *first*, p. 105, *Statutes of 1855*, provides, section 129, "the sheriff may deliver any of the property attached to the defendant, or any other person claiming it, and in whose possession it was attached, upon his giving a written undertaking therefor, executed by two or more sufficient sureties, em-

gaging to re-deliver it, or pay the value thereof to the sheriff, to whom execution, upon a judgment obtained by the plaintiff in that action, may be issued."

The *second*, p. 107, provides, section 146, "whenever the defendant shall have appeared in the action, he may apply, upon reasonable notice to the plaintiff, to the court or judge, for an order to discharge the attachment, upon the execution of the undertaking mentioned in the next section; and if the application be granted, all the proceeds of sales and moneys collected by the sheriff, and all the property attached, remaining in his hands, shall be released from the attachment, and delivered to the defendant."

*Sec. 147.* "Upon such application, the defendant shall deliver to the court or judge an undertaking executed by at least two sureties, approved by the court or judge, that the sureties will, on demand, pay to the plaintiff the amount of the judgment that may be recovered against the defendant in the action. The sureties may be required to justify, on application to the court or judge, and the property attached shall not be released from the attachment without their justification, if it be required."

The undertaking, provided for in sections 146 and 147, operates as a release of the property attached, and the property becomes at once subject to another attachment, or to execution. Does the undertaking sued upon, and provided for by section 129, so operate?

This re-delivery undertaking clearly authorizes a re-delivery of the property attached; and re-delivery timely made would discharge all liability upon the undertaking. A re-delivery would have been timely, by statute, if made upon the issuing of execution upon the judgment in the action; and a re-delivery would have been within the terms of the undertaking sued upon, if made on the first day of the next term of the District Court for Jackson County thereafter. Neither of these times had arrived, when the property was taken by the plaintiff upon other attachments. The plaintiff could not deprive the defendants of the power to re-deliver the property

by a seizure thereof upon the subsequent attachments, and then sue and recover for a failure to make such re-delivery.

The manner in which the plaintiff became possessed of the property was tantamount to a re-delivery thereof by the defendants.

The demurrer was properly sustained, and the judgment of the Circuit Court should be and is affirmed.

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ROBERT MOORE, Complainant v. AMBROSE FIELDS,  
Respondent.

*Appeal from Washington.*

1. The courts of this State will entertain no proceedings, arising out of facts still pending in, and undetermined by, the land department of the United States.
2. In the absence of any limit of time, when appeals must be taken from the land office in Oregon to the general land office, the courts will infer a reasonable time.

THE complainant exhibited his bill against the respondent in April, 1854, with a prayer for an injunction to stay waste, and also to compel the respondent to compensate the complainant for certain valuable timber removed from the premises of the complainant. The complainant settled upon a certain tract of land, in Clackamas County, in 1842, claiming 640 acres; and after the passage of the Oregon donation act, so called, of September 27th, 1850, the land was adjudged to him by the surveyor-general, John B. Preston. It was admitted, as facts in the case, that complainant's wife was never in this territory of Oregon; that she died in Missouri in 1848, two years before the passage of the donation act, and that he could not hold more than 320 acres, unless in right of his wife.

Originally, Robert Moore and others were joined in the

action, as heirs-at-law of Margaretta Moore, the wife of said complainant; but subsequently the suit was discontinued as to them, the successor of Preston having opened the case for the purpose of reversing the former decision as to the claim of Margaretta Moore, the commissioner of the general land office having advised the land office in Oregon, that nothing could be held in right of a person deceased before the passage of the act. In the mean time, about 1847, Moore had sold to Fields eighteen perches of land out of his tract, and executed a bond for a deed, when he, the complainant, should obtain a title from the United States for the land. Upon the establishment of a land office at Oregon City, and the appointment of a register and receiver, all conflicts of boundaries, &c., were passed from the surveyor-general's office to the office of the register and receiver. When the respondent became aware that Moore was entitled to but 320 acres of land, he set up a claim in his own right, filing his notification for a tract of land, which included his residence, as well as a large portion of land claimed by Moore. A conflict of boundary thus arose between the parties herein. No question was made as to the priority of Moore's claim—that was conceded.

On the 23d of December, 1855, the register and receiver proceeded to hear and determine the matter, and after consideration, fixed an initial point of Moore's claim, and directed in what manner the line should be run to include 320 acres. The survey was afterwards made by a deputy surveyor, according to his instructions, who reported to the land office, and his report was confirmed. The field notes and plat of this survey are among the exhibits annexed to the bill in this case. All the testimony in the case has reference to this survey. This suit was brought to a hearing at the June term, 1857, of the District Court for the second district; when, it appearing that the respondent had committed certain trespasses and wastes upon the lands of the claimant, the court referred the question of damages to Amory Holbrook, Esq., to take the proofs and report his judgment therein. The injunction originally allowed was continued. At the June term

of said court, 1858, the referee reported, having adjudged the damages of the complainant to be \$125. The court confirmed the report, but stayed the execution until the further order of the court, upon a suggestion of the respondent's counsel, that an appeal had been taken from the decision of the register and receiver, and was then pending before the commissioner of the general land office.

Thus the matter stood until October, 1859, when the complainant moved for an execution to issue, on the ground that no appeal had been perfected. The motion was allowed. From these proceedings the respondent has appealed.

*A. Holbrook*, for complainant.

*J. K. Kelly*, for respondent.

STRATTON, J. Two principal questions were made in the argument by counsel for the respondent:

*First.* That there ought not to have been any finding of damages for the complainant.

*Second.* That the court ought not, under the circumstances, to have ordered execution to issue.

As to the first point: The testimony reported by the referee is quite voluminous, and somewhat conflicting; but on looking into it, we are satisfied that the finding of the referee, and the judgment of the court below confirming it, was sufficiently favorable to the respondent, if indeed a larger amount of damages was not warranted by the testimony. Palpably the respondent had placed himself in the wrong, and ought to be made to pay the full damage consequent upon his trespass. There is nothing in his situation or conduct to exempt him, or to mitigate the damages.

As to the second point: The argument proceeded upon an established rule of this court, to entertain no proceedings arising out of facts still pending and undetermined by the tribunals of the land department of the United States; and where actions had been commenced, when the fact has been

made to appear that any such controversy was in process of investigation by the proper department, this court has uniformly suspended its proceedings, until the final judgment of the "land department." The register and receiver rendered their decision in 1855, at which time the respondent gave verbal notice of his intention to appeal to the commissioner of the general land office; but, in fact, took no other step until December, 1857, when the referee was proceeding to take testimony touching the question of damages, then Fields ordered the register to prepare his papers for transmission to Washington. In June, 1858, when the Circuit Court confirmed the report of the referee, upon a suggestion of this appeal, the judge ordered execution not to issue until further order of the court. For aught that appears, the respondent never took any further step in the matter of his appeal; and at the October term, 1859, of the Circuit Court, the judge very properly, we think, set aside the order staying execution. It does not appear that there is any fixed time in which appeals from registers and receivers shall be taken to the department at Washington; but, if there is not, justice and good sense would say that the time ought to be reasonable, and that the rights of a party ought not to be held in abeyance, an indefinite length of time, at the mere caprice or the interest of his adversary.

Here the respondent had more than ample time to make his appeal effectual for some purpose, and it is his own fault if he did not. But it is pretty clearly evident that he only sought a temporary respite from the execution.

**Judgment is therefore affirmed.**



ROBERT B. ZACHARY, Plaintiff in Error, v. JAMES  
W. CHAMBERS, Defendant in Error.

*Error to Washington.*

1. Claims presented to an administrator or executor against an estate, must be verified by the *claimant*.
2. Administrators, executors and guardians are the *claimants* of the estates of decedents, and persons whom they represent.
3. Requirements of statute, which are imperative in language, and for a specific purpose, cannot be controlled by any general provisions as to practice.
4. Where there is no *legal presentment* of a claim against an estate, it is a bar, after expiration of the statutory time for presentment, to suit on such claim.

THE plaintiff in error brought suit against Chambers, administrator of the estate of A. L. Zachary, to recover the sum of 696 dollars, for wheat and oats, sold and delivered to A. L. Zachary, in his lifetime. The action was originally brought in the County Court of Washington County, and trial and verdict for the plaintiff. Defendant appealed to the Circuit Court, where the issue was submitted to the judge under the statute, and a finding for the defendant. The plaintiff says that there was error in the judgment of the court, and the case is here for correction, if such is the fact.

*E. D. Shattuck*, for plaintiff in error.

*H. Jackson*, for defendant in error.

STRATTON, J. Chapter 4, section 4, Oregon Statutes, page 356, providing for the manner in which claims against estates shall be presented and allowed, enacts that "Every claim presented to the administrator shall be supported by the

affidavit of the *claimant* that the amount is justly due; that no payments have been made thereon, and that there are no legal offsets to the same to the knowledge of the *claimant*."

Section 9 further provides, that "No holder of any claim against an estate shall maintain any action thereon, unless the claim shall have been first presented to the executor or administrator."

The account on which this suit was brought was presented to the administrator, the defendant in error, on the first day of June, 1860, verified, *not* by Zachary, the *claimant*, but by one McCourt, who declares himself the agent of the claimant, Zachary. The account was endorsed, "Not allowed for want of proof," &c. Signed by Chambers, administrator. These facts, and the statute provisions we have quoted, present all the questions arising in the case.

The plaintiff's counsel now insists that the verification by the agent is, in contemplation of law, the verification of the claimant, upon the principle of the maxim, "*Qui facit per alium, facit per se*;" or, if this is not conceded, that section six, chapter ten, page 379, of the same act, making the practice of the Circuit Court applicable to the proceedings of the Probate Court, places the initial evidence of a claim against an estate upon the same footing with all verified pleadings in the Circuit Court, which are sworn to indifferently by principal, agent, or attorney, according to the circumstances pointed out by the practice act. The plaintiff further insists, that although the administrator might be justified, under the requirements of the statutes, in rejecting a claim, because the same was not verified by the claimant, yet such claimant would not thereby be barred of his remedy in the Circuit Court. To these propositions we cannot assent. Statutes for the protection of decedents' estates are, and ought to be, carefully framed for the protection of interests which, all experience has shown, are most liable to unfair dealing. There are many transactions of life, from want of a wise precaution, arising from that confidence which, too often perhaps men repose in each other, of which there are no wit-

nesses but the parties to the transactions; or, if there is any evidence of it *aliunde*, it is known only to them. The decease of one party leaves all such knowledge in the breast of a single individual, and that one the claimant. The law can provide but one avenue to that knowledge—an appeal to the conscience of the creditor under the solemn injunction of an oath. Looking at the frame and phraseology of section four, it would seem clear enough that the legislature proceeded upon some such reasoning, and that it was intended *in limine* thus to purge the conscience of the creditor. The language of the statute is, “that every claim presented to the administrator *shall* be supported by the affidavit of the claimant.”

But the plaintiff says that this is not imperative upon the creditor to do, nor the administrator to require. Such a construction, we think, would *cut up by the roots* all rules of interpretation, and transfer the functions of the law-maker from the halls of the legislature to the court-room.

A further reason for the construction, which the plaintiff seeks to establish, it is said with some force, is, that non-residents, seamen, soldiers, insane persons, and person diseased, without having verified their claims, might thus be defeated of their just rights.

To this it may be replied, that guardians of infants and insane persons, and administrators, would be the legal claimants, and competent to make the affidavit. As to non-residents, and persons abroad, it might have been well for the legislature to have made some further provision; but, if it has failed to do so, this court cannot usurp legislative powers, or violate a plain rule of construction for their relief. In the case of *Williams v. Purdy*, 6 Paige Ch. R. 166, Chancellor Walworth, in remarking upon a similar statute of New-York, said, “the object of requiring the affidavit of the creditor in such cases, is not to prove the existence of the debt, as it is not evidence for that purpose, but it is to prevent the exhibition of fictitious claims against the estate of the decedent, which have been discharged by him in his lifetime; and, also, to prevent the allowance of claims, against which there

existed a legal offset, *known only to the party presenting such claim*, and which those who are interested in the estate of the decedent may be unable to establish by legal proof."

The reasoning of the chancellor applies with pertinent force to the present case. Upon the first point, therefore, the court is of the opinion that the agent was incompetent to make the affidavit, and the administrator properly disallowed the claim.

As to section six, chapter ten, above referred to, admitting that, as a general rule, the proceedings in form of the Circuit Court are applicable to proceedings in litigated cases in the Probate Court, that section cannot affect this case. The requirements of section four are for a specific purpose, and imperative, and cannot be controlled by any general provisions as to practice. It remains to determine whether, the claim being rejected by the administrator for the reason assigned by him the claimant is barred by the statute (section nine) from bringing this suit. Section nine enacts, that no suit shall be brought, &c., unless the claim shall have been first presented to the administrator or executor, &c.

The presentment of a claim or demand presumes, at least, a legal subsisting interest in the hands of a person who has the right to present it, and to a party who is legally bound to respond. If either of these ingredients is wanting, it is no presentment, or at least an idle formality, which binds no one, and benefits no one. The *law merchant* has prescribed the time when, the place where, and the person to whom a presentment of negotiable paper shall be made by the holder to bind assignors or indorsers; and if the holder shall fail in any of these legal requirements, the law regards it as no presentment; in other words, the act, for the purpose intended, in contemplation of law is a mere nullity. The term presentment, under this statute, as elsewhere, in legal nomenclature, has a technical signification, and necessarily includes every ingredient which the law has affixed to it in the particular connection in which it stands. An executor or administrator is the representative of an interest which the legislature has guarded with a careful solicitude; and in so

doing have clearly vindicated the terms upon which a claim may be preferred against an estate, and the tests by which the administrator shall be justified in allowing it.

To hold that a claim, exhibited to an administrator, might properly be rejected by him, and yet not bar the claimant from bringing suit in the Circuit Court, would be to place the administrator in this strange dilemma—either to allow the claim upon a defective exhibit, and make himself liable to the heirs for the amount, or to disallow the claim, and subject the estate to the expense of a suit at law. It cannot be that the legislature contemplated such an absurdity. We are, therefore, also of the opinion, that there being no legal presentment, the plaintiff was barred by section nine of the right to bring this suit.

Judgment affirmed.

WAIT, C. J. dissenting.

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THOMAS GRAHAM et al., Appellants, v. SAMUEL  
MEEK, Appellee.

*Appeal from Lane.*

1. Parties bound by recitals contained in deed.
2. Doctrine of estoppel applied to married women.

MEEK, in the court below, filed his bill to foreclose a mortgage, dated March 23d, 1859, executed by Graham and wife, to secure the payment of a promissory note, for the sum of four hundred and thirty-one dollars. The land is described in the mortgage as follows, to wit: "Situated in Lane County, Oregon, in T. 15 S., R. 4 W., being the donation land claim of us, the said Thomas Graham and Sarah Graham," and then bounded generally on adjoining proprietors. The mortgage is, in its terms, a general deed of conveyance in fee simple,

without covenants. The defence set up is, that, at the time of the execution of the mortgage, the defendants had not resided on and cultivated the land the full four years required by the act of Congress of the 27th of September, 1850; and were not, therefore, possessed of any title which they could convey to Meek. But the appellants, Graham and wife, now claim to have acquired from the government of the United States the legal title to the premises, since the execution of the mortgage, the full term of four years' residence and cultivation being now complete, as required by law, to entitle them to a patent to the land; and that since said title became complete and vested in appellants, Graham and wife, Sarah Graham, the wife, conveyed her half of said land to defendant, Percel.

Graham and wife particularly rely—*First*. On the fact, as they say, that said act of Congress requires four years' residence and cultivation before the grant becomes complete; and, *Second*. On the provision in said act, that all sales of land, claimed under the same, are void, if made prior to the completion of the four years' residence and cultivation. The case went off in the court below, on demurrer to defendant's answer, setting up these matters as a defence, and it stands on demurrer in this court. The appellee insists that appellants are estopped from denying their deed; that the allegation in the deed, that the land is "*the donation land claim*," is a recital of their title from the government.

*Kelsay & Curry*, for appellants.

*G. H. Williams*, for appellee.

BOISE, J. The main question in this case is, are the appellants estopped from setting up their after-acquired title—being the same title named in the deed—to the premises, to defeat the mortgage? for, if it is held that Graham and wife are estopped from denying that the title, which they pretended

to convey by the mortgage, then the other questions raised are unimportant in determining this case.

I think the statement in the deed, that the land was "*the donation land claim*" of Graham and wife, shows that they derived their estate from the United States, and that such was the estate intended to be conveyed; and the whole deed, taken together, plainly indicates that such estate was then vested, and that it was the intention of the parties to convey a title in fee simple. It is a rule, in construing written contracts of all kinds, that they shall be construed according to the natural and usual import of the language. Now, apply this rule to this mortgage, and it imports that Graham and wife, having obtained from the United States a title to the land, convey it to Meek; and good sense and good morals, as well as high legal authority, forbid that a party conveying land under sale, by a deed purporting to pass an estate in fee, and naming the derivation of his title, should be allowed to come into court, and say that his deed is not true—that he did not own what he sold. The law will not allow a man thus to take advantage of his own wrong, and impose on innocent purchasers. In *Jackson v. Bull*, 1 *Johnson's Cases*, 91, in speaking on this subject, Chancellor Kent says: "If a man makes a lease by indenture, or levy a fine, of an estate *not vested*, and he afterwards purchase the land, he shall, notwithstanding, be bound by his deed, and not be permitted to aver he had nothing." And the same doctrine is declared in the case of *Jackson v. Murray*, 12 *Johnson's R.* 204. This principle is applicable to all cases of bargain and sale, where the deed, on its face, purports to convey an estate in fee simple, reciting the title, whether such deed be with or without covenants of warranty. When the deed is with covenants, the reason of the estoppel has been placed on the ground that the grantee should not be obliged to resort to his action on the warranty; but the principle is now fully established, by the best authority, that the doctrine of estoppel applies to conveyances without warranty, where it appears, by the deed, that the parties intended to deal with and

convey a title in fee simple. (*Van Rensselaer v. Kearney et al.*, 11 *Howard's R.* 322; 1st *Greenleaf's Ev.* 24.)

Again: it is insisted that the rights of Mrs. Graham do not come within this principle; that married women are excepted from the operation of the doctrine of estoppel. This is true, so far as covenants are concerned; but, in this case, there are no covenants; and if married women would not be estopped in a case like this, they would in no case. In cases of deeds without covenants, the same rule applies to a *feme covert* as to a *feme sole*, and especially under the constitution of this State, which gives married women the control and disposition of their real estate.

There were some other points urged in the argument; but in this view of the case they become unimportant.

Judgment affirmed.

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N. W. BLANCHARD, HENRY M. KNIGHTON and  
JOHN W. WATTS, Plaintiffs in Error, v. SQUIRE  
BENNETT and JAMES CAMPBELL, Defendants in  
Error.

*Error to Columbia.*

1. The allowance of amendments to a verification rests in the discretion of the Circuit Court, and cannot be revised here.
2. Appeals lie in all cases from final decisions in courts of justices of the peace, and in county courts; and that the remedy by *certiorari* is concurrent.
3. The jurisdiction and authority of a person, administering an oath, must appear in his certificate.

THIS case was originally commenced in the County Court of Columbia County, and was there dismissed on motion of defendants, and a judgment for costs rendered against the plaintiffs. Plaintiffs then removed the case to the Circuit Court of said county by appeal. In the Circuit Court, plain-



tiffs moved to amend their verification to the complaint, which motion was overruled by the court; and the case dismissed on the motion of defendants. To both of these proceedings the plaintiffs excepted.

*G. H. Williams*, for plaintiffs in error.

*W. W. Page*, for defendants in error.

BOISE, J. The errors assigned in this case are—*First*. That the court erred in overruling the motion of plaintiffs to amend the verification to the original complaint. *Second*. That the court erred in dismissing the appeal.

As to the first ground of error alleged, we think the matter of allowing amendments to a verification, either in form or substance, rests in the sound discretion of the Circuit Court, and is not subject to the revision of this Court.

As to the second ground of error: It is insisted by the plaintiffs, that the verification is sufficient without amendment, and that plaintiffs had a perfect case, which the court was bound to entertain.

In considering the matter, as to whether the court below ought to have entertained jurisdiction of the case, two questions present themselves. *First*. Does an appeal lie from a judgment of dismissal, and for costs in the County Court? *Second*. Was there a sufficient verification to the original complaint? The first question depends on the construction of the various statutes on the subject of appeal. Section 11 of the act organizing the County Court, and defining its jurisdiction, provides, that "An appeal shall lie from such County Court in all cases to the Circuit Court." This provision is very comprehensive and, unless limited by some other statute, would seem clearly to indicate that every decision or judgment of the County Court can be taken to the Circuit Court by appeal. It is said, however, that by the 23d section of the act organizing the County Court, the proceedings of the County Courts are made to conform to the practice in courts of justices of the

peace; and that by consequence, a writ of *certiorari* could have been sued out in this case, and that such was the only proper remedy. This conclusion does not, however, necessarily follow; a *certiorari* may have been a proper remedy, and so may have been an appeal. The statute regulating appeals from justices of the peace allows appeals in all cases, and is as comprehensive as the statutes above quoted. (*See Statutes of Oregon, 1854, page 295, sec. 185.*) I therefore conclude, that appeals lie in all cases from the final decisions of justices of the peace, and the remedy by *certiorari* is concurrent. The other question presented is as to the sufficiency of the verification. I think the form of the verification sufficient, under the 33d section of the act, regulating pleadings in courts of justices of the peace. *See Oregon Statutes, 1854, page 271*, which I think applicable to proceedings in the County Court. But I think this verification defective in this: that it does not appear, in the certificate of the officer who administered the oath, that he had any authority. This question has been decided by this court in the case of *Dennison v. Story*, where it was held, that the authority and jurisdiction of the person administering the oath, must affirmatively appear in his certificate.

**Judgment affirmed.**

**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**Supreme Court of the State of Oregon**  
**JULY TERM, A. D. 1861.**

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**AARON E. WAIT**, *Chief Justice.*  
**REUBEN P. BOISE AND**  
**RILEY E. STRATTON,** } *Associate Justices.*  
**J. G. WILSON,** *Clerk.*

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**July Term, A. D. 1861.**

*Ordered*,—That the second day of each term of this Supreme Court be set apart as the time when persons, desiring admission to practice as attorneys and counsellors in the courts of this State, may appear, and present their applications; and having been examined in open court, touching their qualifications for admission to practice, if found duly qualified, may be admitted; and that such admission shall entitle such attorney and counsellor to practice in all the courts of this State; and that applications for admission as such officers can only be made in this court.

*Ordered*,—That the fee for such admission be fixed at five dollars, which shall entitle the attorney to a certificate of admission.

JESSE ROBERTS, Plaintiff in Error, v. DANIEL CARLAND, Defendant in Error.

*Error to Douglas.*

In an action for the recovery of money or damages, if the plaintiff fail to recover fifty dollars on account of his demand, then he shall pay costs of the suit; but if he fail to recover this sum, and such failure results solely from a counter action or set-off, then, that costs shall follow judgment.

THIS action in the court below was brought by Daniel Carland against Jesse Roberts, to recover damages for the breach of a contract to manufacture and deliver flour. The plaintiff, in his original complaint, asked damages in the sum of four hundred dollars, and interest; and in his amended complaint, claimed damages in the sum of eight hundred and five dollars. The defendant admitted the detention of three thousand pounds of flour, manufactured from the wheat of the plaintiff. Verdict was rendered for the plaintiff for \$22.75, and judgment was rendered for this amount, with costs of suit.

*Mosher & Chadwick*, for plaintiff in error.

WAIT, C. J. The only point assigned as error, for the reversal of the judgment of the court below, is, "that the said judgment awards the costs and expenses to the plaintiff, when it should have awarded them to the defendant." Our statute provides, (chap. 8, sec. 2,) that costs shall be allowed, of course, to the plaintiff, "in an action for the recovery of money or damages, when the plaintiff shall recover fifty dollars or more." Section four of the same act provides, "that costs shall be allowed, of course, to the defendant, in the actions mentioned in the second section, unless plaintiff be entitled to costs therein." The true construction to be given to these pro-

visions of law is, we think, that, when a plaintiff brings suit in the Circuit Court for the recovery of money or damages, and sets out his cause of action, and makes his proof, if he fail to recover fifty dollars on account of his demand he shall pay the costs of the suit; but, if he fail to recover this sum, and such failure results solely from a counter action or set-off, then that costs shall follow the judgment. This is the construction which has prevailed in most of our Circuit Courts, and is based, as we believe, upon principle. (*Barnard v. Curtis*, 8 Mass. 535; *Gilman v. Burgess*, 12 Mass. 206; *Muling v. Rife*, 3 J. J. Marsh. 587; *Carrington v. Combs*, ib. 308; *Brown v. Pollard*, 6 J. J. Marsh. 116; *Odell v. Culbert*, 9 Watts & Serg. 66; *Cambridge Association v. Nichols*, 3 Bernard, 248; *Benton v. Martin*, 4 Miss. 200; *Levy v. Roberts*, 1 McCord, 395; *Burbank v. Willoughby*, 5 New-Hamp. 111.)

It appears from the answer of the defendant in the court below, that the plaintiff would have been entitled to a judgment of over one hundred dollars, except for the offset interposed. The plaintiff's claim was reduced below fifty dollars by reason of the offset of the defendant. The plaintiff was entitled to costs.

Judgment is affirmed.

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\*OLIVER P. GOODALL v. STATE OF OREGON.

*Error to Clackamas.*

1. Dying declarations having been admitted—*Held*, it was competent to show that the deceased was a disbeliever in a future state of rewards and punishments.
2. Evidence, sought for the purpose of laying a ground for impeaching a witness, must be relevant to the issue.
3. The court below having instructed the jury that, "to justify a killing in self-defence, it was necessary that an assault should have

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\* See 80 Am. Dec. 396.

been committed by the person killed; that it was not enough that the party killed had a pistol in his hand, but that there must have been a presentation of it, or some demonstration of shooting." And that "the having a drawn pistol in his hand, by deceased, would not be enough, although deceased had threatened to take the life of the prisoner, and those threats had been communicated to him." —*Held*, erroneous.

4. *Held*, that "if the jury believed from the evidence in the case, that there was reasonable ground for A. to believe his life in danger, or that he was in danger of great bodily harm from the deceased; and that such danger was imminent, and he did so believe, and acting on such belief, killed the deceased, he *was excusable*; and that it was not necessary that he should wait till an assault was actually committed."
5. The reasonableness of the appearances, under which a party claims to justify, may very properly be left to a jury, under the instructions of the court.
6. Under our statute, upon a charge of murder, the killing, having been admitted by the prisoner, does not devolve upon him the necessity of proving justification.
7. It is necessary for the prosecution, in all trials for murder, to go into the proof of the facts and circumstances of the killing, to establish *malice*, under our statute.
8. The only declarations of the deceased admissible are, either dying declarations, or those which are a part of the *res gestae*.

GOODALL was indicted, and convicted in the Circuit Court, for the murder of one Potts; and the case is brought into this court, and stands on errors assigned on bill of exceptions.

It appears from the evidence reported, that Potts (the deceased) went to the house of one Aldrich, where Goodall resided. Goodall was absent when Potts arrived. When Goodall came home, he first saw Potts at the door of the house, and at the door of Goodall's private room. Goodall was at a short distance from the house. Potts was shot with a pistol in two places, the balls striking near the door. He had a pistol which was not discharged, and as to whether it was drawn or not, the evidence is conflicting. One witness states that Potts drew his pistol before he left the house, immediately before he was shot. There was evidence tending to show that Potts had threatened violence to Goodall, and that Goodall was informed of these threats. The dying declarations of the deceased were admitted in evidence. And there was considerable other evidence, which is reported; but

this statement is sufficient to show the pertinency of the matters passed on by this court.

*Williams & Kelly*, for Goodall.

*W. W. Page*, for State.

BOISE, J. The dying declaration of the deceased being admitted in evidence, the counsel for the prisoner offered to prove that the deceased was a disbeliever in a future state of rewards and punishments, for the purpose of discrediting his dying declarations. And I am of opinion that such evidence should have been admitted; for this belief, and the anticipation of future retribution, is the only sanction of such declarations. It is supposed that one impressed with the fear of immediately impending dissolution and believing that he will soon be called to answer for the truth of his statements to his final judge, will be under restraint against falsehood sufficient to make the admission of such evidence safe, and generally contribute to the ends of justice. But when the deceased was a disbeliever, and consequently, under no apprehension of future punishment for his falsehood, it is reasonable to believe that, however much he may be impressed with the fear of immediate and certain death, still he would not be under such strong influences to make a true statement of the facts as one impressed with the belief of future accountability. (*1st Greenleaf Ev. sec. 157; 2 Russel on Crimes, 764, 766.*)

The next ground of error is, that the court refused to allow N. Bell, a witness for the prosecution, to answer this question to wit: "Did you state to Robbins and Hamilton, that if Goodall met Potts, he (Goodall) would be the worst-whipped man he ever saw?" This question was asked to lay a foundation to impeach the witness; and, as I think the evidence sought, by this question, was irrelevant to the issue, I am of opinion it was properly excluded.

The next question in this case arises on the several instruc-

tions of the judge, as to what would justify the taking of life in self-defence; and all there is on the subject, in the instructions, may be considered together. After instructing the jury in the language of the statute, the court said: "To justify a killing in self-defence, it was necessary that an *assault* should have been committed by the person killed; that it was not enough that the party killed had a pistol in his hand, but that there must have been a presentation of it, or some demonstration of shooting." The court also said, that "the having a drawn pistol in his hand, by deceased, would not be enough; although deceased had threatened to take the life of the prisoner, and these threats had been communicated to him."

I understand, by these instructions, that the court held the law to be, that an actual assault with the pistol was necessary to justify the killing, which means, that there must have been, on the part of the deceased, an attempt to shoot the prisoner; and until such attempt was made, the prisoner would not have been justified in acting on the defensive, and in shooting the deceased, although deceased appeared before him with a drawn pistol, and had threatened his life. If such be the law, then there is no such thing as available self-defence—when the assailant makes his attack with a pistol, or other kind of firearm; for, the assault and discharge of the weapon are simultaneous, or so nearly so, that resistance would be almost impossible. Suppose A., who has threatened the life of B., appears to B. suddenly, at the house of the latter, at an unusual place, armed with a gun, and in a threatening attitude, and B., induced by the previous threats and unusual appearance of his adversary, and believing his own life in imminent danger, and having himself a pistol, shoots A. and kills him, before A. actually makes an attempt to level his gun. Would this be murder? I think not. Such a case, unchanged by other evidence than the killing, would lack all indications of malicious intent, which is necessary to constitute murder.

.If B., under such circumstances, acting from appearances,



and believing that he was in actual and imminent danger of death, or great bodily harm, should kill A., I think he would be justified. By the common law, one acting from appearances in such a case, and believing the apparent danger imminent, would be justified, though it afterwards turned out that there was no real danger, and that the gun of the assailant was only loaded with powder. This is, certainly, as strong a case of justification as when one, alarmed in the night by the cry of thieves, rushes forth in the dark, and, by mistake, kills an innocent person; and, in such a case, the slayer would be excused at common law. Such was the dictum in the *Levett case*, which has been approved by the English commentators. (1st East P. O. 274; 1 Russel on Crimes, 669.)

In the case before us there was evidence tending to show, that when the prisoner first saw deceased, at the time the fatal shots were discharged, deceased had a pistol in his hand, and was standing on the door-step of the prisoner's private room; which was an unusual place for one who had threatened the prisoner's life, and whom he considered his enemy. And I think the court should have instructed the jury, that if they believe, from the evidence in the case, that there was reasonable ground for Goodall to believe his life in danger, or that he was in danger of great bodily harm from the deceased, and that such danger was imminent, and he did so believe, and acting on such belief killed the deceased, he was excusable; and that it was not necessary that he should wait until an assault was actually committed.

The whole doctrine of self-defence was most ably examined and illustrated in the case of Thomas O. Selfridge, tried in the Supreme Court of Massachusetts; and the doctrines of that case were adopted, in the State of New-York, in the case of *Shorter v. The State*, where it is declared by Bronson, judge, in speaking of the same case, "that when, from the nature of the attack, there is reasonable ground to believe that there is a design to destroy his life, or commit any felony upon his person, the killing the assailant will be excusable

homicide, although it should afterwards appear that no felony was intended." "To this doctrine," says the learned judge, "I fully subscribe; a different rule would lay too heavy a burden on poor humanity." He further says, that the authority of the Selfridge case was followed by the revisers, in framing the Statutes of New-York, touching this question. And our statute is a copy of the New-York statute, and if the doctrine is properly applicable there, then it is applicable here also.

As to what will constitute reasonable grounds of belief in such cases, sufficient to justify taking life, must depend, to a considerable extent, on the circumstances of each particular case. And the reasonableness of the appearances under which a party claims to justify, may very properly be left to a jury, under the instructions of the court. And, I think, it is going too far to lay down the general rule, that an actual assault must be committed; for such a rule would take away, or, at least, render almost unavailable, the right of self-defence, when fire-arms are used.

It is also assigned as error, that the court instructed the jury, "that killing being admitted by the accused, it devolved on him to prove that he was justifiable." I think this instruction in conformity with the common law; but it is not necessary to examine the common law authorities on this subject, for our statute, in the fourth section of the third chapter, provides, "there shall be some other evidence of malice than the mere proof of killing, to constitute murder in the first or second degree." This, I think, is conclusive on this subject; for it was the evident intention of the legislature, by this statute, to impose on the prosecution some further burden than the mere proof of the killing to establish the malice, which, under our statute, is not to be presumed from the mere proof of the killing, and I think the instruction of the court was error.

There is another ground of error assigned, which is, that the court erred in permitting the declarations of Potts to be given in evidence, made to his son prior to the killing, and

declaring the reason why he was going to the house of Aldrich, where he was killed. I think this evidence was improperly admitted; and that the only declarations of the deceased, which are competent, are dying declarations, or those which are a part of the *res gestae*.

Judgment is reversed.

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THOMAS CHARMAN and ARTHUR WARNER, Plaintiffs in Error, v. JAMES McLANE, Defendant in error.

*Error to Clackamas.*

1. Where an appeal bond is signed by a firm, as sureties for the appeal, the execution of such bond is not within the scope of the partnership business; and the partner who signed the firm name is alone liable, unless the other partner assented. If both assented, then both are liable.
2. In an appeal from the County Court to the Circuit Court, the latter court has authority, when the judgment appealed from is affirmed, to enter judgment against both the principal and the surety in the appeal bond.

THIS cause was appealed from the County Court of Clackamas County to the Circuit Court of the same county.

The plaintiffs in error were sureties on that appeal, and judgment was rendered against the principal and them in the Circuit Court; and these sureties bring the case here, and claim that judgment was improperly entered against them as sureties.

The merits of the case are not sought to be inquired into, only so far as the sureties are affected by it; and it is not necessary to an understanding of the case to make any further statement of it, than that the bond, on which judgment was rendered against said sureties, was signed Charman & Warner, and not executed by the individual names of each of the partners.

*W. C. Johnson*, counsel for plaintiffs in error.

*Kelly & Huelat*, counsel for defendant in error.

BOISE, J. Two points are raised in the assignment of errors:

*First.* It is said it was error to enter judgment on a bond thus executed by a firm.

*Second.* That the Circuit Court has no authority, when, on an appeal, judgment is affirmed, to render judgment against sureties, as well as principal, in an appeal bond.

As to the first point: The bond seems, on its face, to be the bond of a firm, known as Charman & Warner; and there can be no question but a bond of this description is not within the scope of the partnership business; and, to render both partners liable, it would be necessary that both should assent to and recognise its validity. If one of the partners signed the partnership name to it, without the concurrence of the other, he alone would be liable. There is nothing in the record to show which of the partners signed the bond, or whether both assented to it. The one who signed it would be liable, and both would be if both assented.

The court below must have inquired into these facts, in order to have rendered an intelligent judgment; and we must presume that the court below found that both of the plaintiffs assented to and recognised this bond.

As to the other point, I think it is clearly settled by the statute. On page 78, of the Session Laws of 1860, it is provided that, in cases of appeal from the county to the circuit courts, the filing in the Circuit Court of the transcript and papers, in a case appealed from the County Court, "the Circuit Court shall become possessed of the cause, and shall proceed in the same manner, as near as may be, as in regard to causes brought by appeal from justices of the peace."

The giving judgment is a part of the proceedings of the Circuit Court, on an appeal from a justice of the peace; and, in cases of appeal from justices of the peace, the manner

of giving judgment (in the Circuit Court) is clearly defined. In the 195th section of the statute, regulating courts of justices of the peace, page 323, it is provided, "In all cases of appeal to the Circuit Court, if on the trial anew in such court, the judgment be against the appellant, in whole or in part, such judgment shall be rendered against him and his sureties in the undertaking for the appeal."

It is clear that the legislature intended the Circuit Court should proceed in this respect in the same manner as on appeals from justices of the peace.

If this be so, then the judgment against the sureties was right.

Judgment affirmed.

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ROGUE RIVER MINING COMPANY, Plaintiffs in Error,  
v. JOHN D. WALKER, Defendant in Error.

*Error to Jackson.*

1. Errors cannot be assigned for irregularities in the proceedings of the Circuit Courts, unless excepted to at the time such irregularities occurred; but the same will be presumed to have been waived.
2. Where a party defendant not served appears, and offers to file an answer, or for any other purpose, such appearance will be considered equivalent to service.

THIS cause comes here from the Circuit Court of Jackson County, where it was originally brought. It is an action on account for labor, board, goods sold, &c.

The answer denied the indebtedness, and then set up, as a special defence, that said company was governed by certain by-laws, which required all contracts (for goods sold, board, and the like, as set up in the complaint) should be entered into only by the unanimous consent of a board of managers,

who were named in said by-laws, and alleged that such unanimous consent was not obtained to such contracts, and that plaintiff had knowledge of such by-laws and regulations at the time he furnished the goods, board, &c., sued for.

Another special defence in the answer was, that it was understood and agreed between the plaintiffs and defendant at the time the alleged indebtedness accrued, that payment of the balance of account now sued for was not to be paid until the company should realize the same from their mining enterprise, in which they were engaged, which was then the business of the company.

On motion of the counsel for the plaintiffs, the court struck from the defendant's answer the first special defence stated in the answer, or rather filed a new answer, leaving out of it the last named special defence, to wit, that the balance was not to be paid until it was realized from the mining enterprise, and issue was taken for such amended answer.

After this, one of the defendants, who had not been sued, to wit, Nicholas Pickle, appeared, and offered to file his separate answer, setting up the same matter which had been left out of the amended answer. The filing of the separate answer was objected to, and the objection sustained by the court to which proceeding Pickle did not except; and, in fact, no exception appears to have been taken to any of the rulings or proceedings of the court previous to the trial.

The trial resulted in a verdict for the plaintiffs, on which judgment was entered.

The bill of exceptions contained but a single point, and is an exception to the ruling of the court in excluding certain testimony from the jury.

*James K. Kelly*, counsel for plaintiffs in error.

*Dowell & Kelsay*, counsel for defendant in error.

BOISE, J. The four first grounds of error may be disposed of together. The first is, that the court erred in striking out

a part of defendant's answer. The second alleges the same thing in a different form. The third and fourth erred, in not allowing Nicholas Pickle to file his separate answer.

I do not propose to examine the merits of these proceedings of the court below, for the reason that these four errors, if errors at all, were waived; for, being acquiesced in by the defendant in the court below, and not excepted to, any supposed irregularity in these respects was waived, and cannot now be taken advantage of. Such was held to be the doctrine of this court in the case of *Scott v. Cook, Oregon R. p. 24*; and I fully concur with the doctrine there expressed, and will not stop to discuss it here.

The evidence set out in the bill of exceptions, which evidence was rejected by the court, and the rejection excepted to, tended only to prove the allegations in the original answer, which were abandoned in the amended answer, and which were not in issue in the cause on the trial, and counsel for plaintiffs in error admit was properly rejected.

The only other point is, as to the appearance of Nicholas Pickle. It appears, by the record, that Pickle appeared by counsel, and asked leave to file his separate answer, which was rejected. He then appeared at the final trial; and, I think, when he once appeared in the case in court for any purpose, such appearance was equivalent to service, and he was as liable to judgment as the defendant served. Such I understand to be the meaning of the statute, page 88, section 36.

**Judgment affirmed.**

GEORGE W. SNYDER, Appellant, v. JAMES A. VANNOY and BENJAMIN HYLAND, Appellees.

*Appeal.—Lane County.*

1. A Court of Chancery will not set aside a judgment at law, unless there be actual and specific fraud, accident, surprise, or mistake, alleged in the bill.
2. A Court of Chancery will not set aside a judgment at law where it appears, by the bill, that the matters complained of could have been properly interposed in the suit at law.

THIS is a proceeding in chancery, and the bill states, substantially, the following facts: First, that in June, 1859, Snyder, having a promissory note on Vannoy, payable to his (Snyder's) order, for about nineteen hundred dollars, on which there was due a balance of about one thousand dollars, delivered said note to Hyland, without being endorsed, to present to Vannoy for payment, Hyland having at the same time a note of his own on Vannoy. Hyland brought suit in his own name on both notes; that is, his own note and Snyder's note, which was not endorsed, as stated above, including both notes in the same action against Vannoy.

Hyland then settled this suit with Vannoy, giving him a receipt in full discharge of both notes. Soon afterward, Hyland returned to Snyder his note on Vannoy, with two hundred and ten dollars endorsed on it, which amount he told Snyder he had collected on the note, and he accounted to Snyder for the same; at the same time telling Snyder that the balance was yet unpaid. Snyder then brought suit on the note against Vannoy in the Circuit Court of Josephine County.

Vannoy answered, that he had fully paid said note to Hyland, (the agent of Snyder) and set up some other payments; and issue was taken on this answer, and the case tried in the Circuit Court of said county, and a verdict found for the defendant, Vannoy, and judgment entered thereon.



And now it is claimed, that this judgment should be set aside by this court, and Snyder have a decree against Vannoy and Hyland for the amount of said note.

The bill declares there was fraud in obtaining said judgment, in this, that the receipt, (mentioned above,) given by Hyland to Vannoy in settling the first suit mentioned, (to wit, the suit of *Hyland v. Vannoy*,) was permitted to be given in evidence to the jury.

The bill further charges collusion between Hyland and Vannoy; but there are other specific charges of fraud.

Defendant, Vannoy, demurred to plaintiff's bill, which demurrer was sustained by the court below, and the cause comes here on demurrer.

*G. H. Cartier*, for appellant.

*G. H. Williams*, for appellee.

BOISE, J. The question is, should this court, on such a showing, set aside the judgment of the Circuit Court of Josephine County, in the case at law between Snyder and Vannoy, and decree a collection of the note.

A Court of Chancery may, on a proper case made, showing fraud, accident, surprise or mistake, interfere and set aside a judgment of a court at law. But there must be a specific fraud, accident, mistake or surprise, stated in the bill with sufficient clearness, to show in what the fraud, accident, surprise or mistake consists. In this case, the only thing specifically alleged is, that there was a receipt given by Hyland to Vannoy against this note, admitted to the jury in evidence, by which the plaintiff was injured.

Now, this receipt would not have been proper evidence to defeat Snyder in that case, unless Hyland was first proved to be the agent of Snyder, at the time the receipt was given, with authority to execute the same in discharge of the note. If such receipt was improperly received in evidence by the court in that case, Snyder had his remedy by objecting to

the admission of such evidence. Such not having been done, we are to presume the court that tried the cause had proper authority for admitting the receipt.

It seems, therefore, that so far as the proceedings of Hyland and Vannoy were concerned in settling and compromising this note, they were all before the court that tried the suit, that resulted in the judgment which is here sought to be set aside.

The matter of whether Hyland was the agent of Snyder, having authority to give this receipt, was an issue tried in that case, and the jury found for Vannoy; if that verdict was against the evidence, then Snyder should have sought to set it aside in that court. All the facts seem to have been fairly before that court; and it would seem, that if that court committed any error in admitting the receipt, the remedy was by excepting to the ruling of the court in that respect, and bringing that judgment here on a writ of error to be reversed. That not having been done, I think a Court of Chancery cannot go behind such laches to open a judgment in a case like this.

**Judgment affirmed.**

CASES.  
ARGUED AND DETERMINED  
IN THE  
Supreme Court of the State of Oregon  
DECEMBER TERM, A. D. 1861.

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AARON E. WAIT, *Chief Justice.*  
REUBEN P. BOISE AND  
RILEY E. STRATTON, } *Associate Justices.*  
J. G. WILSON, *Clerk.*

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MATTHEW RUCKLES, Plaintiff in Error, v. STATE  
OF OREGON, ex rel. JOHN FULLERTON, Defendant in Error.

*Error to Douglas.*

1. A board of county commissioners is a tribunal of limited jurisdiction.
2. Such board has no authority to require a sheriff to execute a new bond when a prior one shall become insufficient, and to declare the office vacant in case of a failure to file such new bond.

THE suit in the court below was brought under the statutes to determine the right to the office of sheriff of Douglas County. The complaint alleges, in substance, that Fullerton, the relator, at the general election held in June, 1860, was duly elected sheriff of Douglas County, and that he gave a bond, which was duly approved, and took the oath required

by law, and entered upon the discharge of the duties of the office; that the relator was legally entitled to the office, and that Ruckles had usurped the same; that Ruckles pretends to claim and to hold said office by appointment from two of the board of county commissioners of said county, at a special meeting of said board, held without notice to the third member of said board, or to the relator. The answer of the defendant admits that the relator was duly elected and qualified sheriff of Douglas County, and that he gave an official bond, duly approved, and entered upon the duties of the office; and that, at a special meeting of the board of county commissioners for said county, held on the 18th of October, 1861, the relator being present and consenting, it was ordered by said board, that the sheriff file a new bond within ten days; that at a special meeting of said board, held on the 29th of October, 1861, it appearing that the sheriff had not filed a new bond, said board declared the office vacant, and filled the vacancy by the appointment of the defendant; that the defendant had not usurped the office, and that he, and not the relator, is entitled to the office, and that Hutchinson, the third member of the said board, at the time of said meetings, and for more than ten days prior thereto, was, and has since remained in the State of California. The plaintiff demurred to the answer. The court below sustained the demurrer, and the defendant, standing by his demurrer, judgment was entered for the plaintiff, and that the relator be reinstated in the office.

*L. F. Mosher*, for plaintiff in error.

*G. H. Williams*, for defendant in error.

WART, C. J. It is claimed, on behalf of the plaintiff in error, that a sheriff, duly elected and qualified, may be required by order of the board of county commissioners, to give a new bond, with sufficient sureties, and in case of a failure to comply with such order, said board may declare the office vacant, and fill the vacancy by appointment. Boards of county com-

missioners are clearly authorized to fill all *vacancies* within their respective counties in the office of sheriff. Had a vacancy occurred in the office of sheriff of Douglas County at the time of the appointment of Ruckles? We think not. Section 2, of title 2, of chapter 2, of the statute provides as follows: "Every office shall become vacant on the happening of the following events, before the expiration of the term of such office;" "6. His refusal or neglect to take his oath of office, or to give, or renew his official bond, or to deposit such oath or bond within the time prescribed by law." This statute clearly looks towards the renewal of official bonds; but upon whose application, and on the order of what tribunal, must such renewal be made? Shall the State, the county treasurer, an execution creditor, or one of the county commissioners, move in the matter; and when, how, and where shall the proceedings be instituted?

A board of county commissioners is a tribunal of limited jurisdiction. It possesses the power to fill a vacancy, because that power has been conferred by statute; and if the power to require a new bond, and to declare an office vacant, rests in that body, it is because that power also has been delegated to it. If Fullerton *had forfeited* his office, by reason of the insolvency of his sureties, or by reason of his failure to furnish a new bond, then the statute provides a remedy by action by the prosecuting attorney, on his information, or on the complaint of a private party. (See "*Actions in the place of scire facias, quo warranto, and of informations in the nature of quo warranto,*" chapter 1, sec. 5, of the Statutes.) Our statute also authorizes the governor to "declare vacant the office of every officer required by law to execute an official bond, whenever a judgment shall be obtained against such officer, for a breach of the condition of such bond." We have no provision of law which clearly authorizes the county commissioners to require a sheriff to execute a new bond, when a prior bond shall become insufficient, and to declare the office vacant in case of a failure to file such new bond. An officer, duly elected and qualified, is entitled to the en-

joyment of his office until lawfully deprived thereof, subject only to its clearly declared limitations and disabilities. The action of the board of county commissioners, in requiring Fullerton to give a new bond, and in declaring a vacancy and supplying the office, was without warrant of law.

Judgment affirmed.

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E. S. ALTREE et al., Plaintiffs in Error, v. JAMES M. MOORE, Defendant in Error.

*Error to Clackamas.*

1. In a case of forcible entry and detainer, a verdict in the form, "We, the jury, find the defendant guilty of the unlawful detainer, in manner and form, as the plaintiff in his complaint hath alleged," will be supported by the allegation in the complaint, that "the defendant unlawfully holds by force."
2. In forcible entry and detainer, defendant cannot set up a title paramount in himself; the possession being the only matter properly in issue.

THIS was a case of forcible entry and detainer, appealed from a Justices' Court to the Circuit Court of Clackamas County, where it was tried, and judgment rendered for Moore, the plaintiff, in the court below; and that judgment is brought here by writ of error. The original complaint alleges that Moore, being possessed of a donation land claim, which he held under the act of Congress of the 27th of September, 1850, donating lands to settlers in Oregon, on which were certain improvements, to wit, a saw-mill and appurtenances, leased said mill to one Holland; that the defendant Altree, by collusion with Holland, obtained possession of said mill, and took possession of the mill and dwelling-house; and Moore claims that the said lease to Holland thereby became forfeited.

Moore also alleges, that afterwards both defendants, Altree

and Aldrich, being in possession by means of the collusion, refused to deliver the possession to Moore; and retained such possession by force.

Defendants deny all collusion with Holland, and deny that the lease to Holland became forfeited as alleged, and deny that they unlawfully hold possession by force, and set up title in Altree, who claims a right of possession and title under a sheriff's deed, as conveying a title paramount.

*Johnson & Williams, for plaintiffs in error.*

*Kelly & Huelat, for defendant in error.*

BOISE, J. There are several questions arising under the pleadings, which tender somewhat to embarrass and confuse the case, which I do not think it necessary to consider. It is admitted in the pleadings that Moore was in possession of the mill at the time of the execution of the lease to Holland; for defendants claim in the answer that said lease was not forfeited by the entry of Altree under Holland, and that the same was still in force against Moore; and, as I understand the pleadings, defendants claim to have taken legal and peaceable possession of said mill under said Holland who had his only possession under said lease and the mill and dwelling house, and other appurtenances, were together on the claim, and together constituted the donation land claim of Moore. I think that the pleadings plainly indicate that Altree took possession under Holland, and, by consequence, could receive or legally claim no higher or greater estate than Holland had to bestow, and is not now at liberty, after having got possession from Holland, to set up a title paramount in himself; for the possession which he had from Holland was a possession under a lease, by the terms of which Holland was bound, on the expiration of the term, to restore to Moore the possession. Now, suppose the jury found that Altree entered peaceably under Holland; that there was the collusion charged in the complaint, and that the lease became

forfeited; and, also, that defendants, having no rights under the forfeited lease, were wrongfully holding over by force; would their verdict support such conclusions? The verdict is as follows: "We, the jury, find the defendants guilty of the wrongful detainer, in manner and form, as the plaintiff in his complaint hath alleged." The complaint alleges, "that the said defendants unlawfully hold by force." But the words, *in manner and form*, refer to the allegation in the complaint of force, and I think the verdict is in proper form to be supported by the allegation referred to. In a case of forcible entry and detainer, a defendant cannot set up a title in himself, and rely on that as a defence; he can only deny, and offer evidence to rebut the plaintiff's possession at the time of the alleged forcible entry; or, he may deny that he unlawfully holds, and offer evidence to rebut the plaintiff's case. If he, defendant, have a title paramount, he must assert it in a different manner. (*See Taylor's Landlord and Tenant, section 792.*) There was objection made to the admission of the decision of the register and receiver, but I do not see how that could have influenced the finding of the jury; for that decision was merely evidence of possession at the time of the lease to Holland, and that is admitted by the pleadings, and could not have affected the issue as to the unlawful holding by force; and I think, therefore, that it is not important in this case to consider this and other questions not necessary to this decision.

Judgment is affirmed.



JAMES GUTHRIE, Appellant, v. DAVID P. THOMPSON, Appellee.

*Appeal from Multnomah.*

1. Under a contract in writing to convey land, on payment of the price, the vendor, in order to maintain an action for the purchase money, must first execute and tender a conveyance to the purchaser; and the purchaser must tender the price, and demand a deed, before he can maintain an action for a breach of the contract.
2. A contract, in writing, to convey land, can be abandoned by parol.

IN this case, a decree, *pro forma*, was entered for the defendant before Chief-Justice Wait, at the Multnomah Circuit and the case is brought here by appeal. The bill states—

*First.* That Guthrie, being the owner of what is known as the Abernethy Island and Mills, at the Willamette Falls, in Oregon City, on the 15th day of October, 1858, executed to Thompson his promissory note for the sum of five thousand seven hundred and fifty dollars, payable two years from date, or sooner, if Guthrie could do so, to draw interest at fifteen per cent., if not paid in one year from date; which note was secured by a mortgage on said island and mills.

*Second.* That on the 20th day of December, 1858, the parties entered into the following agreement, *i. e.*;

*“December 20th, 1858.*

“It is agreed between James Guthrie, Jr., of the first part, and David P. Thompson, of the second part, as follows, to wit: That James Guthrie, Jr., is to sell and relinquish to David P. Thompson, before mentioned, the one undivided fourth of the Island Mills property, known as the Abernethy Island, lying and being situate at the falls of the Willamette River, near Oregon City, Oregon Territory; and the said Guthrie is to warrant and defend the above-mentioned prop-

erty against any person or persons holding, owning or claiming, under, through or by him. That the said Thompson is to release a certain mortgage, executed by Guthrie, on the seven-sixteenths of the Island Mill and island, for \$5,750, on or about the 15th of October, 1858, and becoming due one year from date, and to pay, on the 1st of January, 1859, the additional money if so valued.

"We agree to abide the valuation of said property, before mentioned, as made and determined by James K. Kelly and Ralph Wilcox.

"JAMES GUTHRIE, Jr.,

"D. P. THOMPSON.

"Attest,—JAMES K. KELLY."

*Third.* That in pursuance of said agreement, Wilcox and Kelly, on the same day of the date of said agreement, valued said property at the sum of twenty-five thousand dollars.

*Fourth.* That soon afterwards Guthrie executed and tendered to Thompson a deed, in proper form, to said property, as required by said agreement; which deed Thompson declined to receive, and refused to complete said agreement.

*Fifth.* That Thompson has commenced suit on said note and mortgage against Guthrie, and this proceeding is instituted to enjoin such suit, and a specific performance of said contract be decreed. The answer denies the valuation, as stated, the tender of the deed, and refusal of defendant to accept the same; and states, as a further defence, that said agreement was abandoned by the mutual consent of the parties; which allegation of abandonment, so set up in the answer, is denied by the plaintiff in his replication.

The issues of fact submitted to the court are—

*First.* Was there a valuation?

*Second.* Did Guthrie tender a deed, as he has alleged?

*Third.* Was the contract abandoned by the mutual consent of the parties?

*Johnson & Williams, for appellant.*

*Kelly & Huelat, for appellee.*

BOISE, J. There is, perhaps, sufficient evidence to establish the valuation by Wilcox and Kelly.

The only evidence of the execution and tender of a deed is, that Guthrie had a deed made out to the property described in the contract; but the witness does not know whether the deed was properly witnessed, or in proper form; and there is no evidence tending to show that any deed was ever tendered to Thompson; and, consequently, there is an utter failure to prove the tender. And the counsel for Guthrie admit that the proof of tender is very scant, and maintain that no tender was necessary; that it was the duty of Thompson to make and tender a deed to Guthrie for execution; and various authorities are cited in support of that proposition, which I shall consider hereafter.

This is a case of dependent covenants. The cancelling or giving up of the note and mortgage, and paying the balance of the purchase money, found on the valuation, and the making the deed, were to be concurrent acts. I think the understanding of the parties to such contracts is, that the vendor shall, at his own expense, prepare and tender the deed, and the vendee will not be in default until he does so.

And, generally, where either party to such a contract seeks to enforce it by suit, he must first put the other party in default—the vendor, by making and tendering the deed, and the vendee, by tendering the price and demanding a deed—which deed, in contracts like the one sued on, the vendor should have a reasonable time to prepare after demand. Such I understand to be the rule in New-York.

In *Connelly v. Pierce*, 7 *Wendell*, p. 129, the court say, “the party, who is to give a deed, certainly should prepare and have it drawn at his own expense.” It is true, a different rule prevails in England, as declared in the case of *Baxter v. Lewis*, *Forrest's Ex. R.* 61-2, referred to in *Sugden on Vendors*, Am. ed. 1820, pages 181-2; but the courts of New York have refused to adopt the English rule, for the good reason that such is not the practice of the country, or the understanding of parties to such instruments.

In England, the practice of conveyances was for the solicitor of the purchaser to prepare the deed, which practice is mentioned and discussed in a note to the case of *Fuller v. Hubbard*, 6 Cowen, p. 18. In this country the practice is different from the English practice. Here the vendor prepares the deed, and, where such is the practice and the understanding of the parties, such should be the rule.

From the current of authorities in New-York, I understand that, in that State, in order to maintain an action for the purchase money, under a contract to convey land when the purchase money is paid, the vendor must make and tender a deed; and the rule in England is the same, except that there the deed should be made by the purchaser. For there it is necessary, before the vendor can sue for the purchase money, to execute the conveyance, or offer to do so. The rule is thus laid down in *Sugden on Vendors*, page 162: "Thus, a vendor cannot bring an action for the purchase money without having executed the conveyance, or offered to do so, unless the purchaser has discharged him from so doing; and, on the other hand, a purchaser cannot maintain an action for breach of contract, without having tendered a conveyance and the purchase money."

The only difference between the rule here and in England is as to who shall prepare the conveyance; and such difference arises from the variance in the practice of conveyancers here and in that country.

The other point made is, that the contract was abandoned by the parties. This being a defence set up in the answer, and issue being taken thereon, the burden of proof is on the defendant, Thompson. The lapse of time, insisted on by defendant as evidence of abandonment, would not be sufficient, if the parties had treated the contract as still continuing; and the question of abandonment is really one of fact, as to the intent and understanding of the parties.

There is evidence on both sides on this point; and, on an examination of the depositions, the court is of opinion that Guthrie considered this contract abandoned, and so treated the property as his own.

The testimony of Messrs. Charman and Warner is the most definite, especially that of Charman, who testifies, that some time after the date of the contract Guthrie offered to sell to Charman and Warner one-half of this property, and told him (Charman) that he was the entire owner of the property, and that Thompson had a mortgage on the property of the amount named in the contract.

There could not well be more direct testimony of the abandonment of the contract by Guthrie, unless it were a written abandonment, and I think an abandonment by parol would be binding on the parties.

The decree of the court below will be affirmed.

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DANIEL D. BAILEY, Plaintiff in Error, v. HENRY WARREN, Defendant in Error.

*Error to Yamhill.*

A specific denial of all the material allegations in a complaint is a denial of the plaintiff's right of action.

THIS cause came up from Yamhill County. The complaint in the court below charges, in substance, that the plaintiff, Bailey, has an interest in, and is entitled to the possession of certain horses, of the value of \$2,000; that the defendant, Warren, as sheriff, by virtue of an execution, or attachment, against the property of F. G. Dorris, seized and took away said horses; and that the defendant wrongfully detains said property, to the damage of the plaintiff in \$2,000. The defendant, Warren, in his answer, specifically denies all the material allegations in the plaintiff's complaint. The plaintiff demurred to the whole answer. The demurrer was overruled, and the ruling excepted to.

*D. Logan*, for plaintiff in error.

*W. C. Johnson*, for defendant in error.

WART, C. J. A specific denial of all the material allegations in a complaint is a denial of the plaintiff's right of action. The language of a demurrer to a pleading is, "admitting the pleading to be true, yet a right of action remains." This deduction cannot be drawn in favor of a plaintiff, when all the material allegations in his complaint are specifically denied in the answer of the defendant. The answer of the defendant, denying all the materials allegations in the complaint, being admitted by the demurrer to be true, it necessarily follows that the complaint must be treated as untrue; and, hence wholly unavailable as a statement of a cause of action. The ruling of the Circuit Court in overruling the demurrer, and in the rendition of judgment, were clearly correct.

Judgment affirmed.

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BOARD OF COMMISSIONERS OF MULTNOMAH  
COUNTY, Plaintiffs in Error, v. STATE OF ORE-  
GON, Defendant in Error.

*Error to Multnomah.*

The State brought suit against Multnomah County, to recover a deficit of four per cent. on the proportion of State revenue, assessed against that county for the year 1859; the county claiming it as a compensation for collecting the State revenue.—*Held*, That when the State treasurer charges to each county, upon the report of the Secretary of State, the amount of revenue assessed to each county for State purposes, the county and State stand in the relation of debtor and creditor; the revenue becomes a debt, to be paid in full, and the county cannot burden it with any drawback or percentage for collecting it.

THE State brought this suit against the board of commissioners of Multnomah County, to recover the sum of

\$252.47, balance due on the State revenue of 1859, apportioned to the said county. The county claims to withhold it as the four per cent. compensation, allowed by law, for the collection and disbursement of \$5,509.18, the amount assessed against the county for that year. The complaint and answer disclose these facts. There was a demurrer to the answer, which was sustained, and judgment on the demurrer. Error is assigned upon the sustaining of this demurrer in the Circuit Court.

*J. K. Kelly*, for plaintiffs in error.

*W. W. Page*, for defendant in error.

STRATTON, J. The whole question turns upon the construction to be given to chapter 1 of the statutes of this State, in relation to the assessment and collection of taxes, or so much of it as pertains to the subject in controversy; and whatever may have been the practice, for there is a statement in the answer as to what that has been, the matter seems free from all doubt or embarrassment. Sections 27, 28 and 29, after directing in what manner the assessments shall be made in the several counties, and returned to the territorial auditor, provides, that the territorial auditor shall make an estimate of the tax to be collected in each county, for territorial purposes; that he shall make out and deliver, to the territorial treasurer, certified copies of such statement; and that the territorial treasurer shall also *charge* the respective counties with the amount of tax so ascertained to be raised in each. Section 46 is in these words: "On or before the first Monday in February, in each year, the several county treasurers in this territory shall pay over to the territorial treasurer, in gold and silver coin, the amount of territorial taxes *charged* to their respective counties." It is important to note the phraseology of these sections, as fixing the relations of the counties and of the State—the one becomes a *debtor*, and the other a *creditor*, for the amount *charged*; and on the day when the

law has fixed the time of payment, it is a debt due, and can be discharged only by payment, not in part, but in full, as all other debts are discharged. Unless the law so provides, neither the county nor the county treasurer can burden it with any expenses of collection, no more than A. can demand of B. a drawback or per centage, for the payment of a debt which A. owes to B. But it is urged by the plaintiffs in error, that under section 14 of an act relating to county treasurers, *O. S.*, p. 423, the treasurer is entitled to the four per cent. for receiving and disbursing of this amount of money, and that is true; but he must look to his principal, the county, whose agent he is for that compensation; and the last clause of this section provides, that he shall receive the above per cent. "on all moneys paid out by him for the county." The act, in which this 14th section is found, has no reference or relation to any act or duty which he is compelled to do on behalf of the State, and, as a matter of course, cannot charge the State for services performed for the county. In the event that this court should take a different view of the law from that above stated, several alternative questions were discussed at the bar, upon which it is not now necessary to pass.

Judgment is affirmed.

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J. M. CAIN, Plaintiff in Error, v. JOHN HARDEN, Defendant in Error.

*Error to Washington.*

1. In an appeal from the County Court, where the defendant was defaulted, under the statutes of this State, he could not be allowed to put in an answer in the Circuit Court, for the first time.
2. On motion for leave to answer in the Circuit Court, on appeal, affidavits in support of the motion were properly refused a hearing.
3. In all appeals from the County Courts, no other or different is-



sues, than those upon which judgment was rendered in the court below, can be heard in the appellate court.

4. The amendments contemplated by the statutes are such only as operate to perfect informal pleadings or imperfect issues.

JOHN HARDEN, defendant in error, brought suit against plaintiff in error, in the County Court of Washington County, and the defendant below was defaulted. From this the defendant took his appeal to the Circuit Court, and, at the calling of the cause, moved for leave to put in an answer, the motion being supported by affidavits, to the effect that, at the time of the trial in the County Court, the defendant below was insane, so far as to be incapable of attending to his business. The court overruled the motion for leave, and refused to hear the affidavits.

*Smith & Grover*, for plaintiff in error.

*W. O. Johnson*, for defendant in error.

STRATTON, J. The first and most important question presented for consideration is, as to the right of the appellant to put in an answer in the Circuit Court, having failed to appear and plead below. Session Laws, 1859, section 15 of the act organizing the County Courts of this State, provides, that "all cases removed from the County Court, whether in civil or criminal cases, shall stand for trial in the Circuit Court, on the papers and pleadings filed by the parties and said County Court; *provided*, that either party may amend on such terms, as to costs, as the law, or the rules of the Circuit Court, may prescribe." Neither under this section, nor under a similar one, providing for appeals from Justices' Courts, has it ever been held that this right of amendment, in the Circuit Court, extended to the putting in of an answer, or reply, for the first time. It may have sometimes happened, under the peculiar pleadings in Justices' Courts, that the parties may have tried an issue, which does not appear upon the record. In such a case, the courts may have gone so far, and rightly too, as to

allow the parties to perfect such issue, as was actually tried in the first instance. Under the section quoted, the right of amendment is limited to like cases. Upon inspection, should the pleadings be so informal as to be insensible, repugnant, ambiguous, or argumentative, or so indefinite as to make the trial of any issue embarrassing, an amendment should always be allowed; but not to the extent of raising any new or substantially different issue from the one tried in the County Court. To give this statute any other construction, would practically abolish all benefit to suitors from the jurisdiction of justices of the peace, or the County Courts. A party, from interest or caprice, might fail or refuse to appear in a subordinate court at all, or appearing, make one issue, go to trial, and if beaten, appeal to the Circuit Court, amend his pleading, make a different issue, and take his chances on that. Thus litigation would be multiplied, and costs made burdensome and intolerable. The case at bar may be one of great hardship, but a rule of construction, to be of any value, must be inflexible. The motion for leave to answer was properly overruled; and it must follow, as a matter of course, that there was no error in refusing to hear the affidavits, which is made a part of the assignment of error.

The second error alleged was, in entering judgment on a complaint, which, it is said, does not state facts sufficient to constitute a cause of action. Section 30, of the justices' act, page 297, of the Statutes of 1855, enacts, that "pleadings shall not be required to be in any particular form, but shall be such as to enable a person of common understanding to know what was intended." Section 23 of the act of 1859, organizing the County Court, adopts this as the rule of pleading in that court. There is nothing in the point. The complaint is sufficient under the statutes. When judgment was rendered in the Circuit Court, it was given against the principal and the sureties on the appeal bond, jointly, to the amount of the bond, five hundred dollars, which was the amount of the judgment below, but the costs were separately taxed against appellant. It is now objected by the appellant and his sureties, that this

bond was not a statutory bond, in double the amount of the judgment, and therefore could not operate as a supersedeas. However this may be, neither the appellant nor his sureties can be heard to make this objection. The bond was formal enough, except as to the amount; was conditioned to pay the judgment, or any modified judgment that might be rendered in the Circuit Court. If the appellee was content to take a less security than the law gave him, he might do so, instead of moving to quash the appeal. Under the statutes of this State, this court has decided that in appeals from justices of the peace, it is not the bond, but the notice, which confers jurisdiction upon the Circuit Court. Statutes of 1855, page 323, section 194, enacts, that no appeal allowed by a justice shall be dismissed on account of the undertaking being defective, if the appellant will, within a specified time, execute and file a sufficient one, or such an one as he should have filed below.

By an act to amend an act to organize County Courts, approved October 19, 1860, (*Session Laws*, 78,) it is provided, that upon the filing of the papers and transcript from the County Court, the Circuit Court shall become possessed of the cause, upon which the appeal is taken, and then, "shall proceed in the same manner, as near as may be, as in regard to causes brought by appeal from justices of the peace." We are, therefore, of the opinion, that the Circuit Court had jurisdiction to proceed in the matter as fully as if a perfectly formal bond had been filed; and though the appellee had the right to ask the dismissal of the appeal for want of such formal bond, he might waive it, as the only party who could be prejudiced, by the penalty being less than the statute provided for his security.

The judgment against the appellant and his sureties for the amount of the bond was correct. Nor was it error to tax the costs separately to the appellant.

Judgment is affirmed.

MATTHEW KEITH, Plaintiff in Error, v. W. S. QUINNEY, Defendant in Error.

*Error to Multnomah.*

1. The service of the complaint and notice upon a defendant, before the same are filed in the office of the clerk of the Circuit Court, is a good service.
2. In construing statutes, the primary object of the court should be to effectuate the intent of the law maker; and, for such purpose, it is proper for a court to look into the circumstances at the time, and the necessity which called for the enactment of a particular statute.

THE case presents but one question. The complaint and notice were served on the 20th day of May, 1861, and the complaint was not filed until the 30th day of the same month. The defendant below was defaulted. The error alleged is, that there was no legal service, the complaint not having been filed at the time the pretended service was made.

*G. H. Cartter*; for plaintiff in error.

*G. H. Williams*, for defendant in error.

STRATTON, J. By the *Statutes of 1855, p. 85 sec. 24*, actions at law were commenced "by filing a complaint with the clerk of the court, and the issuing of a summons thereon." Under this enactment there is no question but that the filing of the complaint must precede the service of the summons, and it is insisted that this has never been repealed. As the act of December 10, 1856, (*Session Laws, p. 18*,) and the act of June 2, 1859, (*Session Laws, p. 17*,) are not very clearly drawn, it becomes necessary to examine a little into the circumstances under which these acts were passed, and of the necessity and consequent object of the legislature in making the change, if it was made. The General Laws of 1853-4,

adopted from the report of the Code commissioners of the previous session, radically changed the practice act of the then territory, and created one entirely independent of any former system.

Under the new Code, one or more terms of the District Court were held in each organized county of the territory. An act of Congress, passed August 16, 1856, was supposed to have abolished the District Courts of the several counties, and confined them to be holden at a single place in each district. There could, therefore, be but three places of holding courts in the territory. The clear intent of the act of December 10, 1856, was to conform the practice to this state of things, and make it as convenient, as little expensive and embarrassing to suitors as possible. Each of the three District Courts was, therefore, made appearance or issue terms, where all papers were first to be filed, and the issues made up; afterwards to be sent down to the several counties for trial. The first section of this act provides for the appointment of a deputy-clerk in each county; the second section, that such deputy shall forthwith transmit to his principal the original files of all causes, other than appeals, pending and undetermined, in his county. It is obvious, then, that the deputy was to have the custody of no papers, except as afterwards provided. The third section abolishes the writ of summons, and provides for a form of notice, to be signed by the plaintiff, or his attorney, and attached to the complaint, and served with it. Section four further enacts, that every complaint shall be entitled of the county in which the action would have been triable, under the existing laws. It is important to note this last provision, as indicating that there was no filing of papers in the county when the venue was laid; but this entitling of the cause was for the purpose of guiding the court in disposing of it for trial. The succeeding clause of the same section leaves it entirely optional with the plaintiff as to the place where the defendant shall be notified to appear; and it may be fairly inferred, that the original papers had not yet passed from the plaintiff's hands. Section five gives the first inti-

mation of any filing of papers, and provides *where* it shall be done, and for what purposes. Taking all these provisions in the order in which they occur, we think it a reasonable inference, that the service was complete before a paper was presented to the clerk for filing. "It is a sound principle," says the Court of Appeals, in New-York, "that such a construction ought to be put upon a statute, as may best answer the intention which the makers had in view, and that is sometimes to be collected from the cause or necessity of making it; at other times, from other circumstances. Whenever the intention can be discovered, it ought to be followed with reason and discretion in its construction, although such construction may seem contrary to its letter." (*Sedgwick on Com. and Stat. Law*, 232.)

This court may properly take notice of the existing state of things when this law was passed. If the necessity for filing a complaint was not abolished with the writ of summons, as a precedent act to the service of the complaint and notice, then this palpable hardship fell upon litigants, that in many cases suits could not be commenced without many days of expensive travel to the place where one of the three courts of the territory would be held, involving an expense and loss of time, which, in many instances, would have made legal remedies a burden rather than a benefit; and this, for no other purpose, but simply to place on file a paper.

Is it reasonable to suppose that the legislature lost sight of the only real necessity for a change of the practice? The circumstances and the letter of the statute, we think, speak a different language. We conclude, therefore, that a filing of the complaint, under this act, was not necessary before the service on the defendant. This act of 1856 has been thus carefully examined, because upon its construction as to this point the existing law must depend. The act of 1858 repealed most of the act of 1856, but, in terms, re-enacted the portion of it which pertained to the service of summons; and in the repealing clause specially excepted some enactments which were to follow. The practice act of 1859 (*Session Laws*, p.

17) abolishes the service by summons, and adopts the service by a notice, &c., and for the third time does so in the exact words of the statutes of 1856 and 1858. It may, therefore, be concluded, that if the first act was intended, and did abolish, not only service by summons, but also dispensed with the necessity of filing the complaint, that the subsequent acts did not revive such necessity, unless it should appear to be so done in direct terms; and since the legislature has not done so, we conclude that the service of the complaint and notice precede the filing in the office of the clerk of the court. The question whether these statutes are repugnant does not arise, if we are satisfied as to the intention of the legislature.

Judgment is affirmed.

ANTOIN BRAUNS, Plaintiff in Error, v. DAVID E.  
STEARNS, Defendant in Error.

*Error to Jackson.*

A suit was brought to recover the value of a certain number of grape roots in the possession of the defendant, a nurseryman. The plaintiff, to support his title, offered in evidence a deed, which recited, in the body of the instrument, the defendant, A., as the maker, but executed by B.—*Held*, 1. That the deed was properly rejected as incurably ambiguous. 2. That in cases of patent ambiguity, parol testimony could be admitted only to explain technical terms, or fix a meaning to words whose import was not apparent to the court. 3. That after the calling of a cause for trial, a motion to amend a pleading is addressed to the sound discretion of the court, and upon the ruling of the court no error lies.

THE plaintiff brought suit against the defendant, a nurseryman, to recover the value of 2,880 grape roots, which the plaintiff alleged the defendant withheld from him. The plaintiff claimed title to the roots under a deed from one A. September, which deed is in the following words:

"Know all men by these presents, that I, D. E. Stearns, for and in consideration of the sum of three hundred dollars, to me in hand paid by Antoin Brauns, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do bargain and sell unto the said Antoin Brauns, seven thousand grape vines, on said Stearns' place or farm, at Robin's Nest, in Jackson County, Oregon.

"Witness whereof, I have hereunto set my hand and seal this 11th day of May, A. D. 1860.

"A. SEPTEMBER. [SEAL.]

"Attest,—HENRY BAKER."

*Dowell & Kelly*, for plaintiff.

*G. H. Williams*, for defendant.

STRATTON, J. Upon the trial, plaintiff, to prove his title to the grape roots and right to their possession, offered this instrument in evidence, which was rejected by the court, on the ground of incurable ambiguity; to which ruling exception was taken. Upon this the *first* error is assigned.

This evidence being excluded from the jury, the plaintiff asked leave to amend his complaint by striking out the word "deed," for the purpose of letting in parol testimony of this contract. The motion was not granted; and this is the ground of the *second* assignment of error.

As to the first point, it is said that the court should have applied the maxim, "*Falsa demonstratio non nocet*" to this deed; that the recital of the name of D. E. Stearns, in the body of the instrument, might and ought to have been rejected in its interpretation as surplusage. The general rule, that parol testimony is not to be admitted to contradict, alter, or vary a written instrument, deliberately committed to writing by the parties, is well understood; but it unfortunately happens too often, that the sharpest intellects and most skillful draughtsmen make use of language which fails to convey the meaning intended, or conveys too much to make the instru-



ment speak a sensible language upon its face; or, being perfectly intelligible in itself, some extraneous proof is necessary to apply the terms of the instrument to the subject-matter upon which it is intended to operate. In the one case, the difficulty is inherent and apparent upon inspection; in the other, it can only be known by showing some extrinsic fact, or existing state of things beyond the body of the instrument itself.

For the sake of convenience, uniformity and certainty, as well as a just administration of the law, text writers have denominated the first a patent ambiguity, and the second a latent ambiguity. Lord Bacon long since laid down the rule, "that *ambiguitas patens* is never holpen by averment; and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of inferior account, in law, &c.; but if it be *ambiguitas latens*, then otherwise it is." (1st Greenleaf's Ev. sec. 297.) In other words, the general rule seems to be, that, for an apparent ambiguity or uncertainty upon the face of the instrument, no proof can be admitted, if it be perfectly consistent in itself; but if there is difficulty in applying its terms to the subject-matter, with reference to which those terms or stipulations were made, then parol evidence is admitted. The reason of the rule is perfectly clear: the object of the law is to carry into effect the intention of the parties, as expressed through the medium of language, which they have, more or less, solemnly and deliberately committed to writing. Now, let it be supposed that this apparent ambiguity, inherent in the words themselves, is perfectly inconsistent and unintelligible, and are, moreover, incapable of being explained and made intelligible by any of the rules of interpretation known to the law, the effect of admitting vague and uncertain testimony of the intention of the parties, would be to substitute a contract, or create terms or stipulations, in reference to the subject-matter of the instrument, entirely independent of the particular expressions which the party or parties thought fit to use.

Suppose, again, that the words are intelligible, but capable, upon their face, of two constructions, and parol testimony is admitted to settle which meaning shall be taken, is it not clear that it is the testimony, admitted which produces the effect, and not the language of the instrument? There is one instance where such testimony is admitted, sometimes mentioned as an exception, but which, in fact, is not. Where expressions or technical terms are used in an instrument, unintelligible to the common reader, yet susceptible of a definite interpretation by experts, then explanation is admitted, for the purpose of effectuating the intention of the party, through the medium of his own language. (*Attorney-General v. Clapham*, 31 E. L. & E. R. 164; 1st *Greenleaf's Ev.* 298-9; 2 *Starkie's Ev.* 756.)

The deed offered in evidence on the trial below, and rejected by the court, is an unquestioned example of patent ambiguity; and, if the principle above stated be correct, could be interpreted only in two ways: *first*, by the interpretation of words unintelligible to the court, but capable of interpretation by an expert. This cannot apply, for the reason that there is no such word in the instrument; but, *secondly*, by rejecting some portion of the language as surplusage, on the principle of the maxim, "*Falsa demonstratio no nocet cum de corpore constat.*" Can a word of this deed be stricken out, and leave it a sensible instrument? If the name of D. E. Stearns is stricken out, the word "said" must also be excluded, and then the initials of Stearns must be inserted in another place, and also a pronoun must be substituted. But, as a matter of fact, there is not a surplus word in the body of the deed; not a recital, that is not so connected with the name of D. E. Stearns, that to strike out one is to destroy the deed altogether. It is the name of A. September that creates the first and only ambiguity. If there is to be an elimination, the line is to be drawn between the whole body of the deed and the signature; and the court would be as much warranted in striking out one as the other; in the one case, there would be the parties and subject-matter perfectly described, but no

ratification; in the other, a name, and nothing else; either way, certainly no deed. But it will be found generally, if not in every case, that the rule has been applied to the *subject*, either person, or thing, upon which the instrument was to take effect, and not to one, who is a party to the writing, or recited as such. Upon an examination of the decided cases, we have found no one going the length for which plaintiff's counsel contends. *Secondly*. Did the court err in overruling the motion to strike out the word "deed" in this complaint, so as to prove a contract by parol? There is a short answer to this question. The motion was made at a time in the trial of this cause when it was in the discretion of the court to allow the amendment or not, and from the exercise of that discretion no error lies. The third error was assigned upon the rejection of the testimony of A. Hartz, as to the contract generally between the plaintiff and A. September. The witness stated, that all the contract he knew of was by him reduced to writing at the time; it being the deed excluded from the jury by the court. The amendment being refused, the rejection of this evidence was, as a matter of course, upon the principle that when parties have reduced their contract to writing, it must be proved, by the writing, when it can be produced.

**Judgment affirmed.**



ORDERS AND RULES  
OF THE  
UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON.

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*Ordered*,—That any person may be admitted to the bar of this court as an attorney at law, solicitor in chancery, and proctor in admiralty, upon the certificate of two attorneys of this court, that such person is of fair moral character, and when it further appears that such person is a resident of the district, and that he has been admitted to the bar of the Supreme Court of this State for six months.

RULE 1.

In all suits and proceedings at common law, the practice of this court shall be the same as prescribed to the Circuit Courts of the State of Oregon, in the volume of the Statutes of Oregon, published by the public printer in the year eighteen hundred and fifty-five, so far as the same is not provided for by the laws of Congress, or otherwise regulated by the rules of this court.

RULE 2.

All writs of summons shall be made returnable on the first Monday of the month following the day of their sealing. The defendant, when served, shall appear and demur to, or answer the complaint within ten days from the return day of the writ. The plaintiff shall demand a reply to the  
[1 Oregon]

answer within twenty days from the return day of the writ: *Provided*, that in case the first Monday following the sealing of the writ shall be less than twenty-five days thereafter, then said writ shall be made returnable on the first Monday of the second month following said sealing.

#### RULE 3.

Within five days from the return day of the writ, the defendant may move to strike out of the complaint any or all allegations of the complaint which are irrelevant, redundant, or so indefinite or uncertain that the precise nature of the charge is not apparent. Within fifteen days from the return day of the writ, the plaintiff may move to strike out any or all allegations or defences contained in the answer which are sham, irrelevant, redundant, or so indefinite or uncertain that the precise nature of the defence is not apparent. Within twenty-five days from the return day of the writ, the defendant may move to strike out of the replication any matter which, for like cause, he might move to strike out of the complaint.

#### RULE 4.

Whenever a motion to strike out shall be made, the opposite party may either submit to it, or require the same to be heard before the judge at chambers, on the first Monday of the month following. In either case, he shall signify his intentions in writing, to be filed with the clerk within five days from the last day when said motion might have been filed.

#### RULE 5.

Whenever a demurrer shall be interposed to a complaint or answer, the party filing the complaint or answer may either confess the demurrer, or set the same down for argument before the judge at chambers, on the first Monday of the month following. In either case, he shall signify his intention in the same manner and time as in case of motion to strike out.

## RULE 6.

Whenever a motion to strike out is submitted to, or a demurrer is confessed, the party so submitting or confessing may, within five days of the notice of such submission or confession, file an amended complaint, answer, or replication, as the case may be; to which amended pleadings the opposite party shall have the same time to move, to strike out, demur, answer or reply, as if the same was an original pleading, counting from the return day of the writ.

## RULE 7.

Whenever a motion to strike out, or a demurrer is determined upon argument, before the judge at chambers, the judge may make such rule as to amendment of the pleadings, or leave for further pleadings, as the exigency of the particular case may require.

## RULE 8.

No pleadings shall be amended by interlineations or additions upon the same paper, but each amended pleading shall be a new statement of the cause of action or defence.

## RULE 9.

Whenever a plaintiff shall unite several causes of action in the same complaint, each cause of action shall be alleged in a separate count; but the demand for relief shall be made but once at the close of the complaint.

## RULE 10.

Whenever a defendant shall plead more than one defence, he shall plead them in separate pleas, and refer to the counts of the complaint which they are intended to answer, by their number in the order in which they occur.

## RULE 11.

The verification of a pleading shall be made by the party pleading, or one of them, if he, or either of them, reside, or

day of the process, unless a shorter time shall be prescribed by special order, founded on the exigencies of the particular case; all process, and all notices for publication in a newspaper, in pursuance of rule nine of the rules of practice in Admiralty and maritime causes, prescribed by the Supreme Court, shall be drawn up by the clerk, and no process, except subpoena, shall be issued by him in blank.

#### RULE 20.

The notice mentioned in the last preceding rule shall contain the title of the suit, a summary statement of the cause of action, the amount of the demand, and the day and place fixed for the return of the process, and shall have affixed, at the close thereof, the name of the proctor of the libellant, and that of the marshal, or his deputy intrusted with the execution of the process.

#### RULE 21.

The notice prescribed by rule nine of the Supreme Court may be published in any daily paper published in the town of Portland, at the option of the marshal, or the deputy intrusted with the process.

#### RULE 22.

The banking-house of Ladd & Tilton, in the town of Portland, is hereby designated, in pursuance of rule two of the Supreme Court, as the place of deposit for moneys paid into court.

#### RULE 23.

Exceptions taken to any libel, allegation or answer, in pursuance of rule twenty-eight of the Supreme Court, must be filed on the return day of the process, on the part of the defendant, and by the libellant within four days from the filing of the answer or allegations to which he excepts; whereupon the party filing the libel, allegation or answer, shall, in four days thereafter, either give notice to the party excepting, of his submitting to the exceptions, or set the same down for hearing on the first Monday of the month following; in de-



fault whereof, the like order may be entered, of course, as if the exceptions had been allowed by the court. If a party submit to exceptions for insufficiency, he shall answer further within four days after notice of his submitting.

#### RULE 24.

All libels, in instance causes, civil and maritime, shall be verified by the oath or affirmation of the libellant, if he reside in the district; but if not, such libel may be verified by the agent or attorney of the libellant, who is a resident of the district, and in such case, said agent or attorney must state in such verification the residence of the libellant.

#### RULE 25.

When the libellant is not a resident of the district, he shall, at the time of commencing his suit, give a stipulation, with one or more sufficient sureties, to be taken and approved by the clerk, in the sum of at least one hundred dollars, if the suit is *in personam*, and in the sum of at least two hundred and fifty dollars, if the suit be *in rem*, conditioned that he will appear from time to time, and abide by all orders interlocutory and final of the court, and pay the costs and expenses, if any, which shall be awarded against him by the final decree of this court, or of any appellate court; *provided, however*, that this regulation shall not extend to suits for seamen's wages, nor to suits for salvage, when the salvors have come into port in possession of the property libelled.

#### RULE 26.

In all cases not embraced within the last preceding rules, on motion of the defendant or claimant, the court will, in its discretion, direct the libellant, on pain of dismissing his libel, to give the like security.

#### RULE 27.

Instead of the security specified in the last two preceding rules, the party from whom it is required may, at his option, deposit in court a sum of money of the like amount.

## RULE 28.

If, in any case, a libel shall be filed in behalf of a libellant who is not a resident within the district, before security for costs and expenses shall be filed, as required by rule twenty-five, the proctor for such libellant shall be liable for costs and expenses to the amount specified in the said rule, until such security shall be filed, and the payment thereof may be enforced by summary process *in personam* against such proctor.

## RULE 29.

When interrogatories are propounded by the defendant, at the close of his answer, touching any matters charged in the libel, or touching any matter of defence set up in the answer, according to rule thirty-two of the Supreme Court, the libellant shall answer the same within ten days, unless for sufficient cause shown, he shall, by special order, be allowed a longer period, and the court may, in its discretion, require such interrogatories to be answered in a shorter time, or immediately.

## RULE 30.

When interrogatories are propounded to a garnishee, according to rule thirty-seven of the Supreme Court, a copy thereof shall be served upon the garnishee personally, or in case of his absence from his dwelling-house, or usual place of abode, by leaving such copy with some person over fourteen years of age, who is a member or resident of the family; and the garnishee shall be required to answer the interrogatories within ten days after such service, unless a longer period shall, by special order, be allowed for that purpose; and the court may, in its discretion, require such interrogatories to be answered within a shorter time, or immediately.

All rules or orders regulating the practice of this court, heretofore made, are hereby revoked.

# DECISIONS

RENDERED IN THE

## District Court of the United States

FOR THE

### DISTRICT OF OREGON

FROM 1859 TO 1862.

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HON. M. P. DEADY, *U. S. District Judge*,

APPOINTED, 1859.

S. NORRIS, *Clerk*.

-----  
JAMES P. O. LOWNSDALE *v.* THE CITY OF  
PORTLAND.

*U. S. District Court for the District of Oregon—In Equity  
—Bill for Injunction—Amendment— Exceptions to Sec-  
ond Amendment—Answer.*

AT CHAMBERS, JUNE 8, A. D. 1861.

1. A decree, at the suit of A., a private lot holder, in the town of Portland, against B, C. and D., declaring a certain strip of land to have been dedicated to the public, cannot be pleaded as an *estoppel*, in a suit by the grantee of B. against the municipal corporation of Portland, concerning a portion of the same premises. The municipal corporation and A. are not privies.
2. The decree pronounced by the Supreme Court of the late territory of Oregon, at the June term thereof, A. D. 1854, in the cause of Parish *v.* Lownsdale, Chapman and Coffin, was void; because neither party had any interest in the land in controversy.
3. That decree was not a decree *in rem*, but *in personam*; and although it is pleaded *twice* in the answer, its character is not thereby changed.
4. The act of Congress, August 14th, 1848, organizing the territory of Oregon, did not extend the act of 1844, commonly called the town-site law, over Oregon. The first act of Congress affecting

[1 Oregon]

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the settlement and disposition of the public lands in Oregon, was that of September 27, 1850, commonly called the donation law.

5. The provision in the act of August 14th, 1848, providing that the laws of the United States should be in force in Oregon Territory, "so far as the same, or any portion thereof, may be applicable," devolves upon the court, when the question arises, the power to determine what laws were "applicable," and what were not. In determining this question, the court is not bound by any construction that the executive department of the government may have given to such provision, in the discharge of its official duties.
6. A settler on the public lands in Oregon, prior to the 27th of September, 1850, held the mere possession under what was known as the "land law" of the "provisional government of Oregon." His control of interest ceased with his occupation, and when he abandoned or transferred the possession to another, that other took it as though it had never been occupied. The first one could not, by any act of his, charge the land in the hands of the second one with any easement or incumbrance whatever.
7. A dedication to public uses, by a release, upon condition that a pending suit concerning the premises shall be dismissed, does not take effect in case said suit is not dismissed. Such dedication by a release, without warranty or covenants, by a person who is a mere occupant, without any estate in the land, does not bind an after-acquired estate in the same land.
8. Where an answer is excepted to for impertinence, if the matter excepted to be in response to the bill, the exception will not be allowed, though the matter be impertinent.

**DEADY, J.** The complainant alleges that he is seized, in fee, of lots numbers one, two and three, in block number seventy-four, in the town of Portland, and that he has been so seized, and occupied the same, since the first day of January, 1853. That about the first day of July, 1860, he commenced to improve said lots, by the erection of wharves and wharf-houses. That he continued said improvements, without let or hindrance from said defendants, until about the time of filing his bill in this cause, to wit, November 9th, 1860, when the defendants threatened to destroy and remove the same, and did proceed to put said threats into execution, by arresting his agents and workmen engaged in erecting said improvements. That the defendants have no right, title, or interest in the premises, and that the proceedings and doings of the defendants impair the value of the premises, and are to the irreparable injury of complainant. That the complainant is a citizen of the State of Indiana.

Upon filing an amended bill, a temporary injunction was issued against the defendants, restraining them until the further order of the court.

The defendants have filed a second amended answer, to which complainant has filed amended exceptions, excepting to eight portions of said answer for impertinence. In considering these exceptions, I must treat this answer as a whole. Much of the matter to which the exceptions go might have been pleaded as pleas, but the defendants have chosen to avail themselves of the option given them by the rule of the Supreme Court of the United States, and pleaded them by way of answer. An answer being necessarily a whole, the attempt to plead certain parts of it separately, by calling them "counts in equity," does not change the effect. Indeed, I know of no such thing as "counts" in chancery pleadings. It is a phrase that belongs to common law pleadings, and even there applies only to the pleadings of the plaintiff. Wherever, then, matters alleged in one of the "counts" in the answer is contradicted by the allegations in another "count" or portion of the answer, I have, for the purpose of these exceptions, considered such allegation as untrue.

The answer denies the seizin, possession, and occupation of the complainant, and then "for further plea and answer," by way of what is called in said answer a "count in equity," pleads a decree of the Supreme Court of the territory of Oregon, pronounced at the June term of said court, 1854, in a suit in equity, wherein J. L. Parish was complainant, and Daniel H. Lownsdale, Stephen Coffin and W. W. Chapman were defendants. The said "count" recites from the pleadings in said suit, that in 1850 said Parish, having before that time purchased a block of lots fronting on Water-street, in said town, filed a bill in chancery, praying an injunction against said defendants, because said defendants were about erecting buildings on the strip of land adjoining the Willamette River, in front of said block, to the irreparable injury of said Parish. That Pettigrove and Lovejoy, former claimants of the town site, had, in laying out said town, dedicated

said strip of land to public use as a levee. That the defendants answered said bill, denying said dedication, and that upon the hearing, the court aforesaid found and decreed that the strip of land was so dedicated, and that the same was a part of Water-street, and perpetually enjoined the defendants from erecting obstructions on the same. The said court further alleges that the city of Portland had notice of said suit, that it was a party in interest, and employed McCabe to appear for them in court. That the complainant has no other title or interest in the premises than what he has derived from D. H. Lownsdale, and that the conveyance from D. H. L. to the complainant was long after the commencement of said suit, and that the premises in question are a part of said levee of Water-street, declared by said decree to have been dedicated to public use, and that, therefore, the complainant is estopped.

This "count," or portion of the answer, is excepted to as impertinent, because it appears that the decree therein pleaded was pronounced in a suit between different parties; and if that were otherwise, because it appears the decree is void, the court that gave it not having jurisdiction of the subject-matter, because, at the commencement of said suit, no law had been passed by Congress, whereby anybody could acquire any title to, or interest in, lands in Oregon.

On the contrary, the defendants insist that the decree is a valid subsisting decree, and that the present defendants are privies of Parish, and that, therefore, the decree is a bar to the relief sought by the complainant. The rule of law claimed by the defendants is admitted, that where a court of competent jurisdiction has determined a controversy, the parties to such suit, their privies in blood, law, and estate, are bound by it, and estopped from asserting in any court the contrary. The estoppel must be mutual and bind both parties. It is admitted that the complainant is a privy in estate with D. H. L., but denied that the present defendants are privies in estate with Parish. If privies at all, they are privies in estate. In support of the proposition that the defendants were par-

ties to the suit by Parish, effect is sought to be given to the allegation of this "count," that they (the defendants) were parties in interest, and employed counsel to appear for them. If, by the words, *party in interest*, it is meant that the city was a party to the suit in the usual way known to the law, by being a party on the record, then the allegation is shown to be untrue by the answer itself, because it appears from that, that Parish was the sole complainant on the record. But if the words are used in the sense that the city had an interest in the question, by having a like claim to this or other property similarly situated, then they signify nothing, because to be interested in the question determined in a suit, in no way makes the city a party to it.

If, in a suit between A. and B., the question is, whether a conveyance from A. to B. of Blackacre, by a deed not acknowledged, passes the estate, and there should be one hundred other persons in the same State having conveyances to land similarly executed, they would all have an interest in the question, because the law, as determined in that case, is the rule for like cases; but no one would pretend, for that reason, that they were parties to the suit, or in any way estopped by the judgment of the court.

As to the employment of counsel by the city, the record shows that the counsel spoken of appeared for Parish, and not for the city. The fact is, I suppose, what often occurs, that the city, after its incorporation, thinking that it had an interest in the question, *or being so advised by the counsel*, contributed something to him to stimulate his efforts as the attorney of Parish. It is the same as if the hundred persons in the case I have supposed, who were similarly situated with B., had contributed money to employ counsel to argue B.'s case, and to procure a determination which, as a precedent, would be favorable to themselves. This would not make them parties to the suit. But there is a fact stated in the answer which makes it impossible that the city could have been a party to the suit, and that is, that the city was not incorporated until 1851, after the commencement of the suit.

A party to a suit must be either a natural person or a legal entity, as a corporation created by law. The city of Portland had no existence before its corporation, and how could it be a party to a suit before it existed; as well might an unborn child be called a party to a suit.

There may have been people living in the town of Portland at the commencement of the Parish suit, and, in the common parlance of lot speculators, they may have called the place a city; but none of these persons, except Parish, were parties to that suit, and the municipal corporation since created, called by law the city of Portland, and which now represents the people, and is here defendant, did not exist. Neither is there any privity in estate between the defendants and Parish. They do not claim through him or under him. The suit of Parish proceeded on the ground of a private right in him to have the levee left open for the public to have free access to his, Parish's, premises; and that if the defendants in that suit were allowed to obstruct the levee in front of his premises, and thus prevent the public from reaching his place of business, it was to him, Parish, a private injury, because it depreciated the value of his property. To my mind it is as plain as that two and two make four, that the city was not a party to the Parish suit, nor in any way a privy in estate with him. The city would not be estopped by this decree, and as all estoppels must be mutual, neither can the complainant be.

As to the second question made by the complainant in support of his exception, I do not think that I can take judicial notice that the case of *Parish v. Lownsdale et al.*, 21 How. U. S. S. C. R., is the same cause that is pleaded in the answer. But the principle laid down in that case is applicable in like cases, and of binding authority in this court. The Supreme Court, in that case, dismissed the appeal, because the subject of the controversy, *as to the parties*, had no value. Why had it no value? Because "neither party," in the language of the court, "had any title or interest in the land whatever." They had no interest in the land, because, says



the same authority, "Congress passed no law in anywise affecting title to lands in Oregon Territory till September 27th, 1850," and before that time this suit was commenced. Under this state of law and facts, had the territorial court jurisdiction of the subject-matter? To answer this question, it would seem to be enough to ask what *was* the subject-matter? It was the alleged interest of the parties in this land; but as neither had any interest in it, there was nothing in the power of the court to adjudicate. From these premises it necessarily follows, that the decree of the territorial court is *void*, and estops nobody. The exception to the first "count" must be allowed.

The answer then proceeds, in what it calls a second "count in equity," to plead the same decree, omitting the allegations in relation to the city being a party in interest, and having employed counsel.

It is difficult to understand the object of pleading the same decree twice in the same answer; but I believe the learned counsel for the defendant insists that this decree, as pleaded in this so-called second "count in equity," is, in some occult way, an adjudication *in rem*, and binds all the world. If such becomes the effect of this decree by simply pleading it twice, it might be a curious question in *legal alchemy* what would be the result of pleading it *thrice*? A judgment *in rem* is given in a proceeding in courts of Admiralty and the Court of Exchequer; the suit is against the thing, and called *in rem*, as a ship claimed as prize, or goods imported in violation of the revenue laws, and the judgment of the court is given directly against the *thing*, and determines its *status*, and all questions of ownership, or property depending thereon, from thenceforward. From the necessity of the case, for the convenience of commerce, to this judgment all the world are said to be parties, and are bound by it. During the pendency of the suit, any one may come into court, prefer a claim to the thing, or an interest in it, and be heard, and control the proceedings; and if any one having such a claim omits to do so, he is deemed to acquiesce in what takes place. But in a

criminal proceeding, at the suit of the king in the exchequer, against a person charged with unlawfully importing goods, although the question of unlawful importation is determined, the judgment of the court is not *in rem*, but *in personam*, against the unlawful importer, and is not conclusive against third persons, as to the ownership of the goods.

This decree, then, is in no sense a decree *in rem*. It was pronounced in a suit *in personam* against the person. This "count" is nothing but the first count repeated, with the omission of the allegations above referred to, and the exception to it must be allowed for the same reason. .

The third exception is taken to so much of the answer as is called therein the fourth "count in equity." This portion of the answer alleges, that, in 1845, a number of persons occupied the present site of Portland, and laid out a town thereon for the purposes of trade and commerce. That said persons, and others, the inhabitants of Portland, did, and always have, used said levee as a public easement, except certain portions of the same wrongfully appropriated and held by private persons. That the territory of Oregon was organized by act of Congress in 1848; by virtue of which act, the act of Congress of 1844, commonly called the town site law, was extended over Oregon. That in 1851 the town of Portland was incorporated, and that in 1852 the United States surveys were extended over the place. That in 1858 the city of Portland entered, at the proper land office, the present site of Portland, under the act of 1844. That in 1860 the city received a patent therefor from the United States for the purposes of the act of 1844. That complainant derives title from D. H. Lownsdale, and that the title of the latter is founded upon his entry of the 11th of March, 1852, under the donation law of 1850. That said lands were not subject to donation under the law of 1850. That said D. H. Lownsdale acquired no title by said entry, but that said lands were vested in the occupants, under the act of 1844. That the premises in question are within said city entry.

Counsel for the complainant insist that the matters stated in

this "count" are no bar to the complainant's bill, because the act of 1844 was not in force in Oregon, and, consequently, the city took nothing by the entry and patent; but if said law was in force, then, in that case, the city is seized only as trustee "for the benefit of the occupants thereof, according to their respective interests." That the complainant is the occupant of the lots in question, and that his interest includes all the estate in said lots, except the naked legal title, held by the city as trustee for his benefit. For the defendants it is contended, that by the provision of the act of 1848, which "declared the laws of the United States extended over" and "in force in said territory so far as the same, or any provision thereof, may be applicable;" the act of 1844 was extended to this country, and the decision of the land office, and the issuance of the patent, are relied on as authority for such construction. That an occupant, under the law of 1844, in his right of selection as to the particular place he will occupy, is subordinate to, and must accommodate himself to the law of the community who constitute the occupants of the town. That such portions of the town as the community may designate as streets or public grounds, *for that reason becomes so*, and are not liable to individual occupation.

As to the question of the individual right of occupation, it is difficult to determine; and the difficulty is principally in the inadequacy of the law to the regulation of the subject. Where a number of persons, coming together fortuitously, settle down upon a piece of land, and a town gradually grows up around them, under the act of 1844, it is hard to find any authority for any portion of said occupants to constrain any less number of said occupants to occupy more or less of said ground, or in this or that place. I suppose the law, when originally passed, was a special and temporary measure, intended for some town already built up, and it adopted the state of things as to streets and lots that it found existing. But I do not think it necessary to determine this question, because the answer denies the seisin and occupation of the complainant, and, for the purposes of the present

proceeding, that denial must be considered true. It results that the complainant is not an occupant of the lots, and if the law of 1844 was in force in Oregon by virtue of the provisions of the act of 1848, then the complainant would be without interest in the premises.

This leads me to consider whether the law of 1844 was in force in Oregon prior to the time of its extension here, by special act of Congress, July 17, 1854. Its operation since that time could not, I conceive, affect the rights of the parties to this suit; because it appears, by the answer, that D. H. L. entered the land in question, under the donation law, as early as the 11th of March, 1852, and the question must be determined by the laws in force prior to the time of said entry.

When Congress, by the act of 1848, organizing the territory of Oregon, said that the laws of the United States should be in force in said territory, "*so far as the same, or any provision thereof, may be applicable,*" they did not mean that any particular law of the United States should be in force here, but only such as should be *determined* "to be applicable." Under this state of things, authority is necessarily given to the courts of the country, and it becomes their duty, whenever the question arises, to decide what laws were in force and what were not. Doubtless any administrative department of the government—the land-office, for instance—charged with the duty of disposing of the public lands in this territory, may be called upon to decide the same questions; but I respectfully submit, that while their decision may operate to pass the title out of the United States, it does not conclude the courts in a proper case, when parties are before the court, claiming under conflicting laws of the United States, or *any* law of the United States, from deciding what laws were *applicable*, and consequently in force, and what were not, at a particular time, independently of the decision of said department, or even adversely to it.

It is well known, that at the time of the organization of Oregon Territory, an anomalous state of things existed here.

The country was extensively settled, and the people were living under an independent government, established by themselves. They were a community, in the full sense of the word, engaged in agriculture, trade, commerce and the mechanic arts; had built towns, opened and improved farms, established highways, passed revenue laws and collected taxes, made war and concluded peace. As a necessity of their condition, and the corner-stone of their government and social fabric, they had established a "land law," regulating the possession and occupation of the soil among themselves. That all this was well known to Congress, at the time of the passage of the act of 1848, would be highly probable from its historic importance, and is certain to have been so from the language of the act itself. (*See secs. 14 and 17 of the act of 1848.*)

The leading feature of the land law of the provisional government was that which provided that every male inhabitant of the country, over a certain age, should hold and possess 640 acres of land. The uses that the land might be put to were immaterial. The occupant might cultivate, pasture it; or, if he possessed a good site, and had the thrift and enterprise, he might build a town upon it. In the disposition of the public lands, this state of things called for peculiar legislation, differing *in toto* from that required in an unsettled country. Under these circumstances, is it to be presumed that the act of 1844—an obscure and special provision of the then existing land system of the United States—was extended over this country, and the general provisions of the same, contained in the pre-emption act of 1841, left behind? Nothing can be more unreasonable. It would tax the ingenuity of man to find a provision in the land system of the United States, as it stood in 1848, less applicable to the condition of the country, or that would have worked greater hardship, confusion and injustice, than the act of 1844. To the *thrifty and enterprising* settler it would have said: By your enterprise and industry in building up this town upon your claim, you have lost it. If you had merely erected a

seven-by-nine cabin on it, with a straggling "lean-to" attached, and pastured it with a few Spanish cattle and Cayuse ponies, it would have been yours.

The acts organizing the territories of New Mexico, Kansas and Nebraska, extended the laws of the United States over them in the same language that the act of 1848 did over Oregon; yet that was not deemed to have extended the act of 1844 over these territories. But Congress, by special enactment of 22d July, 1854, extended said law over those territories. If these words of the organic act extended the law of 1844 over them, why this special legislation for the same thing? By the act of 9th of September, 1850, California was admitted into the Union. The act declares, (section 3,) "that all the laws of the United States, *not locally inapplicable*, shall have the same force and effect, within the same State of California, as elsewhere in the United States." This never was supposed to have extended the law of 1844, or any portion of the land system of the United States, over that State; but, on the contrary, Congress, by special act of 3d of March, 1853, provided for the disposition of the unclaimed lands within that State, and extended the provisions of the act of 1844, by name, over the lands not "mineral," "*occupied by towns and villages*." But this question has been negatively determined by the Supreme Court of the United States, in the case of *Parish v. Lownsdale et al.*, 21 *How. S. C. Rep.* The court says, that on the 29th of July, 1850, when that suit was commenced, "Congress had passed no law in anywise affecting the title to lands in Oregon," nor did not, "till September 27, 1850"—referring to the donation law. The general expression includes the particular; and, in this case, the court must have considered whether the particular law of 1844 was in force or not; for the parties litigant before them were occupants of lots in the town of Portland, claiming an interest in them. Yet the court says, that no law had been passed by Congress in anywise affecting the title to lands in Oregon, before September 27, 1850; thus

negating the proposition that the law of 1844 was extended here by the act of 1848.

But the passage of the donation law is further evidence that Congress did not deem the law of 1844 "applicable," and never intended to extend it here. This law is a wide departure from the law of 1841, commonly called the pre-emption law. It is a system complete in itself, and was admirably adapted to the condition of the people and country as it found them. It substantially gave to every settler in the country his land claim as he held it, without any reservation of lands fitted for the purposes of trade and commerce, or town sites whatever. It assumes to be, as it really was, the first regulation by Congress affecting the public lands in Oregon. It was a practical recognition and confirmation of the land law of the provisional government. This law is in direct conflict with the act of 1844, and puts the question beyond cavil or doubt, that the law of 1844 was not in force in Oregon until specially extended here. This subject is ably and intelligently examined in the case of *Martin v. T' Vault et al.*, decided in the Supreme Court of the late territory of Oregon, at the June term, 1854. This exception must be allowed.

The fourth exception is to a portion of what is called the fifth "count in equity." Said "count" alleges, that in 1845 Pettigrove and Lovejoy selected the present site of Portland, and caused it to be laid out as a town. That said P. and L. dedicated said levee to public use as far as was in their power. That the people of Portland accepted said dedication, and occupied said levee without let or hindrance up to the year 1849. That then said P. and L. sold their claim to said town to D. H. L. That said D. H. L. recognised said dedication, but does not state when or how. That the people of Portland have always enjoyed the free use of said levee, except where private individuals have wrongfully held the same. That said D. H. L. did dedicate said levee to public use, and has never paid any taxes on the same. That D. H. L. claims to have acquired title to said lands since said dedication.

That complainant derived his title from D. H. L. long after said dedication by D. H. L.

This exception is to so much of said so-called "count" as alleges the acts and doings of P. and L., and extends to the words "1849." This exception must be allowed. It is too plain for argument. P. and L. had no interest in the soil, never acquired any, and had nothing to dedicate. They simply held the naked possession of the land under the laws of the provisional government, according to the custom of the country at the time they gave up and abandoned the possession to D. H. L., who took it as though the foot of man had never been upon it, except as to the extent of its boundaries, or any personal liability he might take upon himself by special agreement with said P. and L. in relation to their past acts concerning it.

The remainder of this so-called "count" is also excepted to. The exception will be disallowed. It alleges a dedication, upon the part of D. H. L. directly, and by recognition of the one said to have been made by P. and L. If D. H. L. made a dedication of the premises to public use, or recognised and confirmed one made by others, it is binding upon him, and of course upon his grantee, the complainant, by reason of the privity of estate between them. What amounts to a dedication and what does not, and whether any dedication made or recognized by D. H. L., before the passage of the donation law, will bind him, are questions that will properly arise on the hearing.

The next exception is to what is called in the answer the sixth "count in equity." This "count" alleges, that on the 14th of August, 1850, D. H. L., Stephen Coffin and W. W. Chapman, released to the public certain lots in said levee, including the one in question; that the release was made upon certain conditions, one of which was, that the suit of *Parish v. Lounsdale et al.* should be dismissed; that the conditions upon which said release was made have been fulfilled, and the release accepted by the people. That the city has power, by the charter, to remove obstructions from the



levee. That complainant's title is derived from D. H. L. long after the making and acceptance of said release.

In support of the exception it is urged by the complainant, that said release appearing to have been made before the 27th of September, 1850, D. H. L. at the time had no interest or estate in the soil, and that, being without warrant or covenants, it does not bind an after-acquired estate in the premises, and, if this be otherwise, the release never took effect, because the answer shows that the condition upon which it was given was never fulfilled; that is, the dismissal of the suit of *Parish v. Lownsdale et al.*

Upon examination of the authorities, I find the decisions, without exception, concurring in the rule, that a conveyance by deed of bargain and sale, or release, without warranty or covenants, does not bind an after-acquired estate in the same lands, which, as to the grantor, was then contingent. That where said after-acquired estate is obtained by the grantor from any other source than the title released, or bargained and sold by him, he is not estopped by said deed or release from claiming the premises even against his own grantee. The release was made when D. H. L. had no interest in the soil. It passed nothing beyond the mere naked possession which he held under the laws of the provisional government. If D. H. L. afterwards acquired title from the United States, it does not enure to the benefit of the public on account of said release. Where a party has the equitable estate in lands, and conveys by bargain and sale, or release without warranty, if he afterwards acquire the legal estate, while he is not estopped by his deed from asserting said legal estate, yet equity will compel him to convey it to his grantee of the equitable estate.

Where there is a dedication to public uses, without deed, but by public acts and declarations, under similar circumstances, the rule seems to be, that the after-acquired legal estate attaches to the dedication as soon as acquired by operation of law. There can be no question, then, upon authority, but that this release does not bar the complainant, and,

upon the showing of the answer, it would be against equity and good conscience that it should. For while it is true that this "count" avers that the conditions upon which the release was made were fulfilled elsewhere, the answer shows that this averment is not true. At the time the release was given it appears that the suit of Parish was pending. It involved the right of the public on the one hand, and Lownsdale, Coffin and Chapman on the other, to the levee. The terms of a compromise were agreed upon, by which the defendants were to release their claim to a portion of the levee to the public, the public relinquishing all claim to the remainder, and to *procure the dismissal of the pending suit*. Now, it appears from the answer that said suit never was dismissed; that it was prosecuted to final decree against the defendants, and the decree is now pleaded in this same answer as an estoppel. For the defendants to claim any thing under this release, under those circumstances, ought not to be allowed. It would be a fraud upon the releasors. This exception must be allowed.

There are two other exceptions, one to the separate answer of Recorder Risley, and the other to the separate answer of Marshall Lappeus. They are disallowed. They may be impertinent; but being called for by the amended bill is a sufficient answer to the exception for impertinence. The order will be, that the first, second, third and fourth, and sixth sections be allowed; and that the fifth, seventh and eighth be disallowed.

*Williams*, for complainant.

*Cartier*, for defendant.

## J. P. O. LOWNSDALE v. THE CITY OF PORTLAND.

*United States District Court for the District of Oregon.—In Equity.—Bill for Injunction.*

ADJOURNED TERM OF SEPTEMBER TERM, DECEMBER, A. D. 1861.

1. A dedication to public uses by an occupant of public lands in Oregon, prior to the 27th of September, 1850, does not bind or estop a subsequent occupant.
2. The exhibition or publishing of a map of a town, with certain spaces marked as streets and public squares, is evidence of a dedication to public uses.
3. Where a dedication to public uses is attempted to be established by proof of casual conversations and remarks by the proprietor, susceptible of various constructions, such proof should be closely scrutinized, and, unless in harmony with the admitted circumstances of the case, but little heeded.
4. A dedication to public uses, is not to be *presumed* as against the owner of the land, but must be shown by acts and declarations of the proprietor of such a public and deliberate character, as makes it generally known, and not of doubtful intention.
5. The adoption, by the corporate authorities, of a map showing that Front street is bounded by two parallel lines, and does not include the strip of land east of it, and between it and the Willamette River, is a recognition and solemn acknowledgment that said strip of land is not a part of said street, and binds said corporation and its successors.
6. A release, without warranty or covenants, by persons having no estate in the land, but simply the possession, does not bind an after-acquired estate in the same lands.

DEADY, J. The original bill in this cause was filed on the 9th day of November, 1860. On the same day the parties appeared before the judge at Chambers, and the complainant moved for an injunction. An order was made postponing the consideration of the motion until the 10th instant, and allowing the complainant to file an amended bill, which was then done, and restraining the defendant, according to the prayer of the bill, until the further hearing of the motion.

On the 10th instant, the motion for an injunction was allowed until the further order of the court. On the 30th November, 1860, the defendants, Robbins and others, being the mayor, common council, recorder, and marshal of said city of Portland, answered the amended bill of the complainant, and disclaimed any right, title, or interest, or claim of such to the premises in controversy, for themselves as *individuals*, and prayed to be dismissed. On the 3d of December, 1860, the city attorney filed an answer for the defendant, and moved to dissolve the injunction, which motion was disallowed. On the 22d of December, 1860, the defendant had leave to file an amended answer, which was then done. On the 7th of January, 1861, the complainant filed exceptions to the amended answer. On the 6th of February, 1861, on motion of the defendant, the hearing of the exception was continued until February 11. On last date, on motion of defendant, the hearing of exceptions continued until 11th of March, with leave to the defendant to file a second amended answer by said date, at its option. March 11th, second amended answer filed. Defendant also filed three motions: first, to dismiss the bill, because the original was not verified before a proper officer, and the amended one not at all. Second, to dissolve the injunction, because allowed by the judge at chambers. Third, same prayer, because injunction allowed without reasonable notice to the defendant. On the 30th March said motions were argued by counsel, and disallowed. On the 1st of April complainant filed exceptions to the second amended answer. On the 6th of May the complainant had leave to file amended exceptions. On the 8th of June, after argument by counsel, the first, second, third, fourth and sixth of the exceptions were allowed, and the fifth disallowed. On the 1st of July the complainant filed a replication. At the September term following, the cause being on the docket for hearing, the defendant moved to strike the same from the docket, which motion was disallowed. Then, on motion of defendant, the cause was continued for hearing at the next adjourned term. At an adjourned term, on the

2d of December, the defendant moved that a jury be impanelled to try the issues, no testimony having yet been taken; and the court, unadvised as to the necessity thereof, the motion was disallowed. At the same term, on the 5th of December, the defendant moved to continue the cause, on account of an absent witness, which motion was disallowed. The testimony was then heard, and, on motion of defendant, with consent of complainant, the parties had a day to file written arguments, which was afterwards done. No oral arguments were heard.

The questions to be decided arise upon the amended bill, and such portions of the second amended answer as remains after the allowance of the exceptions for impertinence. These are substantially as follows: The amended bill alleges that the complainant is a citizen of Indiana; that he is the legal owner, and entitled to the exclusive possession of lots one, two and three, in block seventy-four, as described in the recorded plat of the city of Portland. That he has been seized in fee of the same, and had possession thereof since about the first day of January, 1853, and that he is now entitled to the quiet and exclusive possession thereof. That in pursuance of a long contemplated purpose, about the first of July "last past," at a great expense, he caused piles to be driven, and the framework for certain wharves and wharf-houses to be erected on said lots. That the value of said improvements is about one thousand dollars. That said improvements were made without objection or hindrance on the part of defendant. That afterwards, and while complainant was causing said improvements to be finished, the city of Portland, her common council, recorder and marshal, wrongfully and fraudulently conspired together to prevent the completion of said wharves and wharf-houses. That the defendant, by its corporate authorities, have threatened to remove, tear down and destroy the improvements aforementioned; that the defendant has attempted to execute said threats, by arresting the agents and employees of complainant engaged in making said improvements, and now hold them in custody without authority of

law. That the defendant falsely alleges that the city of Portland has some right or title in and to said lots adverse to the complainant, and by means thereof the defendant makes said threats, and will execute them, unless restrained. That said defendant has not any right, title, or estate in said lots, or the appurtenances in any way, either at law or in equity. That if the defendant be permitted to execute said threats, said lots will be valueless to the complainant; that said improvements will be of no value, and that the complainant will suffer great and irreparable damage. That said defendant, by reason of the false and wrongful representations aforesaid, has caused many persons to suspect that complainant's title is invalid, and have thereby impaired the value of said lots. That said lots are worth about twelve thousand dollars. That the defendant be required to answer, with a prayer for a perpetual injunction on the final hearing.

The second amended answer avers, that the complainant is not the legal owner, and entitled to the sole absolute and exclusive possession of said lots. That he is not seized thereof in fee, and that he has no right, title or interest whatever, legal or equitable, to said lots. That complainant has not been in the possession of said lots since 1853; that he has never been in the possession of them, and is not entitled to the possession of them, or any part thereof. What is denominated the "fifth count," in the said answer, avers, that in the year 1845, the present site of Portland was laid off in blocks, lots, streets, squares, and a levee, by Francis W. Pettigrove and Abbott L. Lovejoy; that said blocks, lots, streets, squares and levee were dedicated to the public by said Pettigrove and Lovejoy, forever. That the people of said town did accept such dedication, and occupy and possess the same up to the year 1849, when the said P. and L. transferred all their right and title to the land claim to Daniel H. Lownsdale. That said Daniel H. Lownsdale recognized and affirmed said dedication and did particularly represent and state, that what is now called the levee, and then Water street, was public property, and, by reason of such representations, did sell lots

adjoining thereto at enhanced prices. That the people of Portland have always had the free use of the same, except where private claimants have wrongfully deprived them of the same. That D. H. Lownsdale has never paid any taxes on such lots for the support of the city government, or that of the county, State, or territory. That said D. H. L. claims to have acquired title to said lands since the dedication aforesaid. That the premises in controversy are within said dedication. That the complainant claims through said D. H. L., and therefore is barred from asserting any interest in said lots against said defendant. And for further answer the defendant says, that the corporation is authorized by its charter, "to prevent and remove all nuisances; to prevent and remove all obstructions from the streets, cross and side-walks; to provide for the prevention and removal of all obstructions in the Willamette River, within the city, and the throwing therein of ballast or other things." That the common council of said corporation, on the second day of August, 1860, passed an ordinance, entitled "An ordinance to prevent and remove obstructions from Willamette River, and the levee between Washington and Main streets."

O. Risley, the recorder, for himself, says, that by virtue of the provisions of that ordinance, he issued a warrant for the arrest of the agents and employees of the complainant engaged in erecting said improvement on said lots.

James H. Lappeus, the marshal, for himself, says, that by virtue of said warrant, he did arrest and bring before the recorder the agents and employees aforesaid. A copy of the ordinance of August 2, 1860, and a printed copy of the city charter, without date, are annexed to the second amended answer, and marked Exhibits A. and B., respectively.

To this second amended answer, or so much thereof as exceptions for impertinence were not taken and allowed to, there is a general replication.

In considering this cause on the pleadings, the court will consider the disclaimer of the mayor and others, the common council, recorder and marshal, as determining the controversy

as to them individually. The bill is substantially against the corporation; and although somewhat ambiguous in this respect, it may be well doubted whether such disclaimer was really necessary. The second amended answer, although it speaks in the name of the persons of the corporation, and in part professes to be the individual answer of the recorder and marshal, will be considered by the court, as it has been treated by counsel, as the answer of the corporation.

Certain facts appear from the pleadings and proofs, which it will be well to state in their chronological order, before investigating those that are controverted and about which doubts may exist. These are, that some time in the year 1845, Pettigrove and Lovejoy took up the land claim upon which the town of Portland is now built, and occupied it until the fall of 1848. That the claim comprised the usual amount of such claims, 640 acres, and that during the time P. and L. occupied it, they laid out some portions of it in blocks, lots and streets. That P. and L. held the possession of the claim under what were called the land laws of the provisional government of Oregon, the title being in the United States. That in the month of September, 1848, said P. and L. abandoned or transferred their possession to Daniel H. Lownsdale. That some time in 1849, Chapman and Coffin became interested in the possession with D. H. L. That said D. H. L., under the donation act of 27th of September, 1850, became a settler upon the one-third of said land claim, including the premises in controversy, and by virtue of the necessary residence and cultivation thereon, as evidenced by the donation certificate, (*Ex. A. p. 1, Ev.*) became the legal owner thereof. That said D. H. L. and wife did convey to complainant lots one and two in block seventy-four, by deed executed on the first day of January, 1853; also, lot three in said block, by deed executed on the twentieth day of September, 1851. (*Ex. B. and C. p. 1 and 2, Ev.*) That on the 29th day of April, 1852, the common council, by resolution, adopted the plot of the city, "drawn by John Brady, as the city plot." (*Ex. F. p. 9, Ev.*) That the common council, by an ordinance of August



2, 1860, asserted the strip of land east of Front-street to be a public levee, and provided for removing all obstructions therefrom. (*Ex. A. amend. ans.*) That the common council, by an ordinance of June 14, 1861, repealed said last mentioned ordinance. (*See Ex. D. p. 9, Ev.*) That said council, by an ordinance of August 6, 1861, asserted said strip of land to be private property, and authorized and permitted the holders thereof to build wharves, wharf-houses and docks thereon. (*Ex E. p. 9, Ev.*) That the corporation assessed the premises in 1854 for city revenue, and that on the 10th of April, 1855, the same was paid to "Thomas J. Holmes, city collector," with the incidental expenses caused by the delay, by D. H. L. (*Ex. G. p. 10, Ev.*) That the same tax was collected for the year 1858 by "Z. N. Stansbury, city collector," and paid by D. H. L. for complainant. (*Ex. H. p. 11, Ev.*) That D. H. L., by a notice in the weekly *Oregonian*, on the 20th of April, 1851, and for six successive weeks thereafter, claimed the land east of Front-street as private property, and warned all persons from trespassing thereon. (*Ex. I. p. 11, Ev.*)

The complainant claims through D. H. L. by a paper title, and the defendant claims of the same person by a dedication to public uses. Both parties admit the title of D. H. L. The paper title of the complainant has been shown beyond question. He is shown to have been in the actual possession of the premises at the commencement of this suit, and from the July previous. To what extent, if any, the premises were actually occupied by him before this time, does not distinctly appear; but the title draws to it the possession, and he would be presumed to have it, if material to his rights, unless the contrary were shown.

The defendant alleges that the dedication was originally made by P. and L., but the allegation is not supported by any evidence whatever; but, on the contrary, the evidence, so far as it shows the condition of this property, called the levee, during the time it was occupied by P. and L., indicates that it was held and occupied by them as private prop-

erty. They had upon it a private wharf and slaughter-house, used as such. (*See Ev. Robinson, p. 8; Ev. of King, p. 11.*) But if the fact were otherwise, and it appeared, beyond doubt, that P. and L. did make such dedication, it would be immaterial. They had nothing in the land to dedicate. They were mere occupants; held only the naked possession, which terminated with such occupancy, and could not, by any act of theirs, charge the land in the hands of any subsequent occupant with any easement or incumbrance whatever. This subject was fully discussed and decided in the opinion on the exceptions for impertinence. But the defendant goes further, and alleges that D. H. L., after he came into possession of the land claim, ratified and confirmed said dedication by general representations, and particular ones to persons to whom he sold lots lying contiguous to said levee. This allegation is unsupported by any evidence whatever. From the fact that D. H. L., at the commencement of this suit, had been in possession of the claim only twelve years, and no proof being adduced of such confirmation, special and general representations, although, if made, they must be within the memory of many of the residents of that date, now living, and within convenient reach of the process of the court, I infer that the allegation is absolutely and unqualifiedly untrue, as well as unproved.

This disposes of the question so far as it strictly arises on the pleadings; but on the hearing, an attempt was made to show a special and original dedication by D. H. L., jointly with Chapman and Coffin, whom he had admitted into the possession with him. In considering the effect of this evidence, it may be well to premise, that the original title being shown and admitted to be in D. H. L., that the burden of proof rests on the defendant to show a dedication. It must be clear and satisfactory; and where it consists of casual conversations and remarks, frequently indifferent in themselves, and susceptible of various constructions and colorings, owing to the prepossessions of the witness, it should be closely scrutinized and unless in harmony with the admitted circum-

stances of the case, but little heeded. The security and certainty of the title to real estate are among the most important objects of the law in any civilized community. Around it the law has thrown certain solemnities and formalities, so that the fact may be known and read of all men. What a man once has he is not to be *presumed* to have parted with, but the fact must be shown beyond conjecture. And although, in the case of streets and public grounds in towns, from the nature of the case a dedication may be shown by acts resting on parol, they must be of such a public and deliberate character as makes them generally known, and not of doubtful intention. Of this character are the exhibitions, or publishing of a map of the town, with certain spaces marked as streets or public squares.

But to recur to this attempt to show an original dedication on the part of D. H. L. It is too apparent to be doubted, that this was an indirect attempt on the part of the defendant to avail itself of the release, which was decided to be invalid on the exceptions to that portion of the answer for impertinence. The only witnesses, Chapman and Norris, that speak to this alleged dedication in the summer of 1850, upon inquiry, say, that it was the controversy which resulted in the release that they spoke of. Now, the nature of that transaction appears to have been this. D. H. L., from the time of his occupation of the claim up to July, 1850, appears to have been in the undisputed possession of the strip of land east of Front-street, now called the levee, as much so as any other part of the claim undisposed of. No one has been produced who ever heard even of any dedication of it by any one, let alone him, to the public. In the fall of 1848 he is shown to have kept a private wharf upon it, and charged and received wharfage. The witness who attended the wharf swears to it. It was afterwards carried off by accident. In April, 1850, D. H. L. had the town surveyed by Short. This strip of land was then laid off into fractional blocks and lots, and openly sold to the public. By this survey, Front-street, instead of extending to the river, was bounded on the east by a line

parallel with the west side, making the street the usual width of the streets in the town and allowing the streets that crossed it at right angles to extend to the water's edge. After all this, in July of 1850, while a building was going up on one of these blocks east of Front-street, Parish commenced a suit against the builders to enjoin them. At this time, D. H. L. was in San Francisco. He came home soon after and said to Chapman, who had been acting as his agent in his absence, that he had not intended to have that piece of ground *built* upon, but intended it for wharves. This is the only word of Lownsdale's apart from the written release that the defendant has shown, *pro* or *con.*, on the subject of the dedication. Does it imply that a dedication had been made, or make one? Certainly not, even when considered by itself; but when coupled with his continued acts of ownership and occupation, before or since, it would be preposterous so to conclude. The words are those which would naturally come from the owner of the land, who found that, in his absence, his agent had in some way authorized a house to be built upon it, while he had reserved it, or set it apart, for the purpose of building a wharf upon it. The words plainly imply a private ownership on the part of D. H. L., and an intention to have used it in a special manner, which he could not do if he had dedicated it to the public. However, in the language of the witness, Chapman, for the purpose of "buying peace," and getting rid of the suit which would disparage the reputation of the new town, and prevent its settlement, a compromise was made, by which Lownsdale, Coffin and Chapman agreed to release to the public a certain portion of said strip of land, that is, between Maine and Washington streets, on condition that said suit should be dismissed. This condition was never performed, and, therefore, the release never took effect.

From that time until the fall term of the court in which the suit was pending, and could be dismissed, the understanding of all parties was, doubtless, that, according to the terms of that compromise, the above-mentioned portion of said strip of land was to be public. This period was about a month.

But the suit was not dismissed. It was kept hanging over the town, and retarding its growth, to the special injury of the releasors. Whatever the reason was, it was no fault of Lownsdale, and the public took nothing by the release. I have been induced to state what appears to be the history of the transaction which is now sought to be distorted into an absolute dedication, by keeping out of sight the release itself, and showing the general impression of the public, and the casual conduct of the releasors after it was made, and before it was not known that its conditions would not be complied with, more for the purpose of showing that the claim of the defendant is without any merit, than for the purpose of determining its legal consequences. The court has already decided, in the opinion on the exceptions, that if the release had been unconditional, being a mere quit-claim without covenants, from one having no title, nothing but the naked possession, it could not be set up against an after-acquired title from the United States. Upon this question, as a rule of law, there can be no doubt. The authorities go in one unbroken current to that effect. But not only has the defendant failed to prove a dedication to the public, as it was bound to do, but the evidence, taken together, shows quite conclusively that there never was any such dedication, or intention to make it, apart from the proceedings connected with the release, which have been disposed of. The map drawn by John Brady, from the surveys of Short, is in evidence. He recognizes and identifies, and says that it was made from his surveys. It is without date, but his surveys were made in the spring of 1850, and he says he saw the Brady map in Portland in 1850. From an inspection of that map, it plainly appears that Front-street is bounded by two parallel lines. That the strip of land between the east line of said street and the river is laid off into fractional blocks, and lots varying in depth with the meanderings of the river. This, of itself, is sufficient to decide the controversy, nothing being shown to the contrary. (*See map drawn by John B. Brady accompanying Ex. of Ev.*) But this is not all; the defendant, by its sol-

emn act, adopted and recognized this map by resolution of the common council of April 29th, 1852. (*See Ex. F. p. 9, Ev.*) In the year 1854 the corporate authorities assessed the premises in controversy as private property, and collected the tax in 1855. The same thing was done in 1858. D. H. L. has always claimed this property as private property, and constantly asserted his right to it, by notice to the public, by sales, by such acts of actual occupation from time to time as it was susceptible of, and by payment of taxes to the defendant. And again, since the commencement of this suit, the defendant, by two different ordinances of its corporate authorities, have deliberately and solemnly admitted that the levee was private property. (*See Ex. D. and E. p. 9, Ev.*)

To conclude, the complainant is the legal owner of the premises; the defendant did, and was, threatening and proceeding to do the trespasses complained of, without right or authority of law. So far as appears from the proofs and the pleadings the land was never dedicated to the public by any one, much less the grantor of the complainant. A decree will be rendered, perpetually enjoining the city of Portland, or its corporate authorities, of whatever name or kind, from asserting any right, title or interest in said premises, or in any way trespassing upon them, or molesting the complainant in the possession or occupation thereof, and that he recovers his costs of the defendant.

*Williams, Page & Gibbs, for complainant.*

*Cartter & Mitchel, for defendant.*

MOSES SELLER v. STEAMSHIP PACIFIC, SAMUEL  
J. HENSLEY, Claimant.

*In Admiralty.—Cause of Contract, Civil and Maritime.*

JULY, A. D. 1861. ADJOURNED FROM MAY TERM.

1. In an action against a common carrier, the libellant makes a *prima facie* case, on the production of the receipt of the carrier—"Received in good order." But these words do not constitute an agreement; they are a mere recital, and may be contradicted by the carrier.

2. In the federal courts, the rule of law is, that a common carrier may limit his common law liability by an *express* agreement, so far as the law makes him an insurer, but not for the negligence of himself or his servants.

3. Nothing short of an express stipulation will constitute such an agreement. It must not depend upon implication or inference, or conflicting and doubtful evidence. Mere notice to the shipper is not sufficient.

4. Where the drayman of the shipper, on the delivery of a package, takes a receipt from the freight-clerk of the ship, containing the words, "not accountable for contents;" this, of itself, does not constitute such an agreement; it is a mere *ex parte* proposition on the part of the carrier, after the receipt of the package; and, to exonerate the carrier, there must be direct or unequivocal evidence of the assent of the shipper.

5. In a suit *in rem*, it is not necessary to charge the ship as a common carrier; but the rule is otherwise where the suit is *in personam*. But, in the former case, it must appear from the evidence that the ship was employed in the business of a common carrier.

6. The burden of proof is upon the shipper, to show the value of the goods injured.

DEADY, J. The libel in this cause was filed on the 22d of April, 1861, and alleges that on or about the 25th of January, 1861, the said steamship, being about to depart from the port of San Francisco, on a voyage to the port of Portland, received from the libellant, in good order, one case containing two looking-glasses, of the value of \$450; and that the master of said steamship, in consideration of certain freight and average to be paid by said libellant, contracted with said libellant to convey said case and its contents to Portland afore-

said, and there deliver the same to the libellant in good order. That the said master caused a receipt to be given to said libellant, whereby it was acknowledged that the said case and contents, marked "M. S., Portland, looking-glasses," were received on board said steamship "in good order." That the said steamship shortly afterwards departed on the said voyage, and that by the negligence of said master, his mariners and servants under his charge, said looking-glasses were so damaged as to be wholly lost to the said libellant, to his damage \$450.

On the day the filing of the libel process was issued, upon which the steamship was arrested and afterwards, on the 27th of April, Samuel J. Hensley appeared, made a claim to the ship as sole owner, and answered the libel; alleging, substantially, that upon information and belief he denies all the allegations of the libel *in the manner and form pleaded*; but admits the receipt of the case. That the contents were in bad order at the time of delivery; that the officers of the ship observed it, and refused to give the drayman who brought the case to the wharf a receipt as for goods in good order, but gave him one containing the words, "not accountable for contents."

The receipt actually given, as appears from the deposition of the drayman, Frederick Beeson, to which it is attached, is in these words: "Received from A Frank, *in good order*, on board steamer *Pacific*, for Portland. — following packages, marked "M. S., Portland, one case of looking-glasses; not accountable for contents." (Signed,) "Philips." A. Frank, spoken of in the receipt, was the boss drayman, and Beeson was his employee.

From the testimony, it appears that a Mr. Adler, in San Francisco, a short time before the sailing of the steamship, purchased two large fancy looking-glasses, about eight feet in length and three feet in width, for the libellant. That Adler sent them to the house of R. A. Swain, a crockery and looking-glass dealer, to be packed for shipping. That they were packed in a redwood case in good condition, and in a



manner well calculated to resist the ordinary incidents of a voyage to Portland. That from the house of Swain they were taken, with ordinary care, on a spring dray to the wharf where the steamship Pacific was loading. That the case was taken from the dray by the drayman, assisted by Philips, the freight clerk of the steamship, and placed on the wharf alongside of the steamship; Philips giving the drayman the receipt above mentioned, with the words, "not accountable for contents," because the case contained *looking-glasses*, saying that it was the customary way of receipting for such articles. The case was in good order at the time, and also the contents, so far as either the drayman or clerk observed, and there does not appear to have been any suspicion by them that the fact was otherwise. The case lay on the wharf about twenty-four hours, when it was stowed between decks. On the 27th of January the ship sailed for Portland, and arrived here, after a usual voyage, on Sunday morning following. The case was discharged upon the wharf of Couch & Flanders, and upon turning it over in discharging, a rattling was heard inside as of broken glass. On Monday morning, Adolph Miller, the drayman of the libellant, went to the wharf to get the case. As soon as he got there he heard from some one on the wharf that the glasses in the case were broken. The case was standing on end on the wharf; Captain Flanders, the wharfinger, was delivering freight at the time for Philips the freight clerk, who was temporarily absent. Miller looked at the case, and observed on the side, about eighteen inches from one end, that there appeared to have been a sharp instrument, or thing like a crowbar, thrust through the boarding of the case, which splintered the board inwardly. That he saw through the crack or hole that the glass was broken; that the pieces of glass were wedge-shaped; that the cracks radiated from a common centre as if the glass had been struck by some hard, sharp-pointed instrument. Miller refused to receipt for the case in good order; Flanders proposed that it should be taken to the store of the libellant; that one of the ship's officers should go with it, and there it should be opened

and the damage ascertained. Thereupon the case was put on the dray, when Poole, the purser of the ship, came up and said, *that* case should not go until the freight was paid. This was contrary to the usual custom of the ship, with well-known consignees, resident in Portland, of whom the libellant appears to be one. The result was, that the case was taken by Miller, under the direction of Flanders, into the warehouse of the wharfinger, where it still remains. The board that had the hole in it has been produced in court by the claimant. It came in two parts, on taking it off the case. It appears to have been broken in by a blow from the outside, and upon either side of the opening is a bruise about two inches in length, as if made by some hard substance pressing between the edges, and stained of that dark iron color which iron imparts to fresh wood when pressed hard against it. The glass is between one-fourth and three-sixteenths of an inch thick; no fragments of the ornaments have been observed among the pieces of glass in the case. There is no evidence that any of the fastenings used to secure the glasses in their position, have given away.

The only witness who differs from this statement of the facts, is Burns, the first officer, and he says that he was present when the drayman brought the case to the wharf in San Francisco. That he assisted in removing it from the dray; that he heard a rattling among the contents at the time, and that the freight clerk gave the receipt, "not accountable for contents," at *his* direction and instance, because the contents appeared not to be in good order. That he superintended stowing the case; that it was done carefully, but that every time it was moved, from San Francisco to Portland, the contents rattled as if broken.

Philips, the freight clerk, and Beeson, the drayman, directly contradict Burns as to what took place upon receipt of the case. Both are interrogated upon this point directly, and both say, in unqualified terms, that he was not present; that the clerk gave the qualified receipt, not on account of the *condition* of the package or its contents, but because of their

*kind and quality.* The receipt supports the statement of the clerk and drayman, and directly contradicts that of Burns. It does not assert that the goods are damaged, but the opposite—that they are “in *good order*.” Philips heard no rattling in the case, until it was put on the wharf at Portland, when Burns called his attention to it. At the time of taking the case on board, Philips remembered that Burns called out to him, and asked him what was in it. Philips told him. Burns then said there was something rattling in it; but Philips did not hear it. The case was a large one, and seems to have been the only one of the kind shipped that voyage. It is hardly credible that if Burns had on the day before been present, when the drayman brought the case to the wharf, had assisted in taking it off the dray, had observed the words, “looking-glasses,” on the case, had heard them rattle as if broken or loose, and on that account had dictated to the clerk an unusual receipt, against the wishes of the drayman, that he should, when superintending the stowing of the case the next day, with the case before him, turn to the freight clerk on the wharf, and ask him *what was in it*.

As a rule of law, the libellant makes a *prima facie* case on the production of the receipt, containing the words, “received in good order.” It has been contended that the claimant cannot contradict this recital; but I think otherwise. The words, “in good order,” are like the recital of any fact in an ordinary receipt for money, open to contradiction or explanation. They do not constitute an agreement, although contained in one. But the burden of proof is on the claimant. He must show the fact affirmatively that the goods were *not* in good order, or he is bound by the recital in the receipt. This he has failed to do; and, on the contrary, the libellant has satisfactorily shown, *aliunde*, the receipt, that the case and its contents were in good order at the time of delivery to the ship.

But the claimant contends, that the words in the receipt, “not liable for contents,” constitute a special agreement, by which the steamship and her owners are exempted from all

liability as insurers, and requires of them only the exercise of that ordinary diligence and care which the law exacts from any ordinary bailee for hire.

The question of how far a common carrier can limit his common law liability, by special agreement with the shipper, has been thoroughly and ably argued by counsel. The authority of the courts of New-York has been relied on by the libellant for maintaining the old common law rule, that common carriers are insurers; that the law makes them so; that any agreement diminishing this liability is void, as contrary to public policy, encouraging fraud, and productive of litigation.

While I think that any innovation upon the common law rule will always be found the cause of more harm than good, yet I think this court is bound by the authority of the case of *The New-Jersey Steam Navigation Company v. M. Bank*, 6 How. R. 344. In that case the court held, that a common carrier might, by special agreement with the shipper, limit his liability as an insurer, but not for the negligence of himself or servants. But they further held, that "the burden of proof lies on the carrier" to show such an agreement, and that "nothing short of an *express* stipulation, by parol or in writing, should be permitted, to discharge him from duties which the law has annexed to his employment. The exemption from these duties should not depend upon implication or inference, founded on doubtful and conflicting evidence, but should be specific and certain, leaving no room for controversy between the parties." Tried by this rule, do the words in the receipt, under the circumstances, constitute such an agreement? If they do, then, although the case was in good order when delivered to the steamship, the shipper takes all risks, except those which arise from, or are incurred, by reason of the negligence of the carrier; and, further, the burden of proof is upon the shipper, to show that the injury resulted from such negligence, and not from accident, which ordinary care and diligence could have guarded against; or, in other words, *unavoidable* accident. No mere

notice to the shipper of such intention on the part of the carrier is sufficient to constitute such an agreement, or raise the presumption that the shipper acquiesced in, or consented to, the terms of such notice. The obligation of an insurer (acts of God and the public enemies excepted) are imposed upon the common carrier by law, and cannot be avoided by any expression of intention on his part so to do, without the express assent of the shipper to such intention. As the court says, in the case just quoted, "If any implication is to be indulged from the delivery of goods, under the general notice," (that the carrier would not be responsible,) "it is as strong that the owner intended to insist upon his rights, and the duties of the carrier, as it is that he assented to their qualification." (*N. J. S. Nav. Co. v. M. Bank*, 6 How. 344; *Hollister v. Nowlen*, 19 Wend. 284.) When the clerk (Philips) inserted in the drayman's receipt the words, "not accountable for contents," it was an *ex parte* proposition by the ship after the receipt of the goods, without the knowledge or assent of the shipper.

The drayman, Beeson, was a mere bailee for hire, to take goods to the wharf and deposit them in the charge of the ship. Such employment of *itself* gave him no authority to make any contract for the shipper, or assent to any proposition on the part of the carrier to qualify his liability. The evidence shows that the drayman informed the shipper of the terms of the receipt immediately, and because the shipper did not reclaim the case, but allowed it to remain with the carrier, it is claimed that he assented to the proposition, and is bound by it. But this would be to establish such an agreement "by implication and inference," when the "implication and inference" is just as strong that the shipper intended to insist upon his rights and the liability of the carrier.

Besides the evidence shows that the shipper was not merely passive, but that he at once expressed his dissatisfaction to the drayman in strong terms, and that the drayman communicated the fact to the clerk soon after, and while the case was on the wharf. As to the custom which Philips speaks

about, not to sign for "looking-glasses," unless the words, "not responsible for contents" were in the receipt; as a matter of fact, it appears to have depended upon the whim or caprice of the person receiving goods at the time. But if it were otherwise, it makes no difference. The law, and not such a custom, ascertains and determines the rights and liabilities of shippers and common carriers. Such *pretences* of custom as this appears to be, if allowed to modify the law of the land, would place it in the power of common carriers to make and unmake the law as they choose.

I conclude, therefore, that these words, "not responsible for contents," amount to nothing, and in no way affect the rights of the shipper or the liability of the carrier. This being the case, and it appearing that the goods were "received in good order," the burden of proof lies on the carrier to show that the injury to the goods arose from the only exceptions to his liability—that is, the act of God or the public enemies—neither of which is pretended or attempted. This view of the case makes it unnecessary to determine, as a matter of fact, how the glasses were broken. If the truth is ever known, it is not unlikely that it will be found that either by accident or wantonly, some iron instrument, as a crow-bar, was thrust through the board produced in court; that it passed through some of the openings in the top-mounting of the glass next to that side, without harming them, and then struck the *plate* of the other glass near to the base or bottom, and broke it. The glasses were packed in the case in a reverse position, and that this happened during the twenty-four hours that the case was lying on the ship's wharf at San Francisco. The case has remained in the possession of the agents of the ship and the claimant, and if they thought it would tend to establish the fact, that the package was not in good order when received, they might have opened it, and had an examination made of its condition.

A point was made in the agreement for the claimant, that the libel did not charge that the steamship was employed as

a common carrier, and that therefore the ship was only liable as a private carrier. Upon the examination of the authorities and precedents within my reach, I find the practice to be, that when the suit is *in personam*, against the master or owners of the vessel, it is necessary to charge them in the libel as *common carriers*, or they will only be held to the liability of private carriers. (*Story on Bail.* § 504.) But when the suit is *in rem*, as in this instance, the rule seems to be otherwise. Because, I suppose it would, to say the least, be inaccurate to charge an inanimate thing, as a ship, which is only the vehicle of carriage, as a common carrier.

The suit proceeds against the ship, as a ship; but, I think, to hold her to the responsibility of a common carrier, it must appear in the proof that she was employed by her owners, or those having charge of her, for that purpose at the time. No testimony appears to have been taken for this direct purpose, but incidentally it appears all through the evidence sufficiently to make the fact undoubted.

The only remaining question is the amount of the damages. Without determining at what port the value of the goods *should* be estimated, I have concluded to take the testimony of Leopold Greenbury as to the value of the glasses. He is the only person that speaks of their value, who saw them. He was the salesman of Swain, the house where the glasses were packed. Selling looking-glasses is his business. All the rest of the testimony to this point is mere guess-work of parties, without any special knowledge of the trade, or the particular articles in question. Besides, the burden of proof lies on the libellant to show the value of the goods. The carrier is not presumed to have any special knowledge or means of information on the subject. It is no hardship for the libellant to make his proof. He knows what he gave for the glasses. It would have been easy to have taken the deposition of some member of the house in San Francisco, where the glasses were purchased, or of his agent, Mr. Adler, who purchased them for him. The omission on the part of the libellant to do this, is well-calculated to make the impression

that the testimony would not support his claim for damages to the amount of \$450. Greenbury swears that the glasses were worth \$150 apiece at wholesale, and \$200 at retail, somewhat owing to the customer. Take the mean difference between the two sums—\$175 apiece—making \$350 for the two, and add interest at the rate of ten per cent. per annum for six months, \$17, making, in all, the sum of \$367, for which a decree will be entered for the libellant and for costs.

*Williams & Nugent*, for libellant.

*Shattuck*, for claimant.

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## CHARLES EDWARDS v. STEAMSHIP PANAMA.

*United States District Court, Oregon.—In Admiralty.—  
Cause, Civil and Maritime, for Pilotage.*

SEPTEMBER TERM, A. D. 1861.

1. In a suit between third person, the validity of a branch warrant to act as pilot cannot be inquired into, where the same appears upon its face to have been regularly issued.
2. The possession and exhibition of the warrant authorize the master of a ship to treat the holder as a regularly constituted pilot, and, between third persons, is conclusive evidence that the conditions which the law attached to the appointment have been complied with.
3. The territory of Washington has power to pass pilot laws, pilotage being "a rightful subject of legislation."
4. The act of Congress, August 7th, 1789, is not a grant of power to the States to pass pilot laws, but merely a legislative recognition that the power is concurrent in the States and the United States.
5. Does the act of Congress, March 2d, 1837, include a territory? *Quere?*
6. Whenever Congress exercises the power of passing pilot laws, so far the power becomes exclusive in Congress. All prior laws of the States, within the purview of such enactments, are abrogated, and cease to have effect.
7. The act of Congress, August 30th, 1852, provides for the employ-



ments of pilots on vessels, propelled in whole or in part by steam, engaged in carrying passengers in any of the bays, lakes, rivers, or other navigable waters of the United States.

8. This act, as to such vessels and to that extent, supersedes all State laws as to the employment of pilots.
9. In the construction of the law of Congress, its operation is not to be restrained because of the existence of State laws regulating the employment of pilots on such bays, lakes or rivers. There is no presumption that Congress did not intend to abrogate the State law. On the contrary, the power being primarily in Congress, and only exercised by the States by the sufferance of the former in case of conflict, the presumption is rather the other way.

DEADY, J. The libel in this cause was filed on the 27th of March, 1861, and, after the formal allegations avers that the libellant, on the 17th of March, 1861, and thereafter, was a duly licensed pilot, for the Columbia River bar, according to the laws of Oregon, and attached to the pilot-boat California, on said bar. That on the said 17th day of March, the libellant boarded the said steamship Panama "just outside" said bar, and offered his services as pilot to conduct said steamer over said bar to the port of Astoria, in Oregon. That the said steamship at the time was bound in, and the said libellant was the only duly authorized pilot on board said steamship on the said day, and the first pilot who offered his services to her that day outside the bar.

That on the 22d of March, in the year aforesaid, the said steamship being bound outward, the said libellant hailed said steamship at the port of Astoria, and offered his services to conduct said steamship as pilot, across said bar to the sea. That libellant was the first pilot who offered his services to said steamship on said "occasion," and that there was no pilot on said steamship "at the time." That said steamship, when inward bound, on said 17th of March, drew fourteen feet of water, and that libellant is entitled to full pilotage therefor, the same being twelve dollars per foot, in all, the sum of \$168. That when outward bound, on the said 22d of March, she drew thirteen feet of water, and that libellant is entitled to half pilotage therefor, the same being six dollars per foot, in all, the sum of \$78. That said sums of money remain due and unpaid to libellant.

Upon the filing of the libel, process was issued upon which the steamship was arrested, and on the same day she was discharged, on the stipulation of John H. Couch and C. H. Lewis. Afterwards, on May the first, of the year aforesaid, Benjamin Halladay and E. Flint filed a claim and answer as owners of said steamship, and admit the allegations of the libel, except as follows: They deny that the libellant "was duly authorized according to law, that is, according to the laws of the State of Oregon *and the statutes of the United States*, in such case made and provided, to pilot ocean-going steamships carrying passengers. They deny that the libellant was the first pilot who offered his services to said steamship on the 17th day of March, or on the 22d day of March aforesaid, and therefore that the libellant is not entitled to receive the said sums of money for pilotage. The answer then avers, "that at the time the libellant boarded the steamship outside the bar, Moses Rogers, a pilot duly authorized and licensed, in accordance with the statutes of the United States as *first* pilot on steamboats, to pilot steamboats carrying passengers on the waters of the Columbia bar, coast and Puget Sound, and to San Francisco, California, was on board the said steamship Panama, and had charge and control of her as pilot," and "that said Moses Rogers did pilot said ship on the above occasion, from the high sea over the Columbia bar to the port of Astoria." That at the date aforesaid, said "Rogers was a duly licensed bar pilot, according to the laws of the territory of Washington," regulating "pilotage on the Columbia River bar and Shoalwater Bay, passed February 28th, 1854." That on the 22d of March, 1861, said "Moses Rogers was the first duly authorized and licensed pilot according to law, to take charge of and pilot an ocean-going steamboat carrying passengers, who offered his services to the master of the Panama, and that said Rogers did on that day go on board of said steamship, take charge of, and pilot her across the bar to sea." That said vessel is an ocean-going steamship, propelled, in whole or in part, by steam; and that on the said 17th and 22d of March, the said steamship was

prosecuting a voyage from the port of San Francisco to the port of Portland, and that on such voyage she was employed in carrying freight and passengers.

On the first of July thereafter, the libellant filed an amended libel, and admits that on the said 17th of March said Rogers, "a person pretending to be a duly authorized pilot, was on board said steamship Panama," and piloted her across the bar to the port of Astoria, but avers that libellant offered his services before Rogers did. Admits the same as to the voyage out on the 22d of March and avers that libellant "hailed the said steamship, and offered his services as pilot," before Rogers did. That said Rogers pretends to be an authorized pilot by virtue of a license from one Pitfield, "a person pretending to be a supervising inspector of the fourth district of the United States." That "if said license is genuine," it does not authorize said Rogers to pilot steamships over the Columbia River bar. Admits that Rogers, at the dates aforesaid, had a license as pilot on the Columbia River bar from the board of pilot commissioners of Washington Territory, by virtue of the said act of 1854, of said territory; but avers that Rogers never performed the conditions imposed by said law, and on that account said license never took effect. That said act of 1854 has long since been repealed, and that all licenses issued under it became void on such repeal. Admits that the steamship Panama is an ocean-going vessel, propelled, in whole or in part, by steam, engaged at the dates aforesaid in carrying freight and passengers between San Francisco and Portland, and avers that she also sails to the port of Victoria, in British Columbia, and that she was registered as a "vessel trading to and with a foreign port."

From the evidence, it appears that the libellant was constituted a bar pilot of the Columbia River bar, under a law of the State of Oregon, "approved October 17th, 1860," by a warrant from the "board of pilot commissioners," bearing date January 22, 1861. That Moses Rogers was constituted a bar pilot of the Columbia River bar under a law of Washington Territory, passed February 28, 1854, by a warrant of

the "board of pilot commissioners" of that territory, bearing date "January 13th, 1860." In the argument for libellant it is contended, that this warrant is without legal effect, because it is *said* that Rogers did not give bond, or keep a suitable boat on the bar. Rogers is not a party to this suit, and the steamship cannot be held liable for any want of authority on his part as pilot, which is not apparent. The exhibition of his warrant entitled him to be treated, and requires the ship to receive him, as *prima facie* a pilot. By the law of Washington Territory he "is authorized to take charge of any vessel requiring his services, but shall first show the master his warrant." Upon the production of the warrant by Rogers the master had a right to presume that the conditions of his appointment (if any were made) had been complied with to the satisfaction of the commissioners, who, by law, have complete control of the subject, and may suspend or remove any pilot, "and appoint another in his place." It is true, that the law of 1854 requires a pilot, "before entering upon the duties of his office, to give bond to the commissioners." But it does not require, or allow, that *he* shall keep the bond to exhibit, or that the warrant shall show upon its face that the bond is given. The law does not expressly say that the bond shall be given before the warrant issues, or at the time; but it is fair to presume that it so intends, and the commissioners who take the bond would require that it be so done. Besides, the pleadings, on the part of the libellant, do not allege any specific condition or act that Rogers failed to perform. The amended libel avers, that the libellant "is informed and believes said Rogers never fulfilled the conditions imposed by said law, and upon the fulfilment of which said license was to take effect." This allegation is altogether too indefinite and uncertain to put the claimants upon the proof of any thing in relation to such conditions. The amended libel also alleges, that the pilot act of Washington Territory of 1854 "has long since been repealed, "and that said warrant, on that account, "is now utterly void, and of no effect." The fact appears to be, that on January 31st, 1861, the fourth section of the act

of 1854 was repealed, and another section enacted in its place requiring each pilot to keep a boat on the bar "of not less than fifty tons burden," while the fourth section of the act of 1854 only requires the pilot to keep such boat "as the commissioners might approve." This was no repeal of *the law* as such, and in no way makes the warrant before granted to Rogers "void, and of no effect." It only imposed a fixed rule on the pilot in relation to the kind of boat he should keep, instead of leaving it to the discretion of the commissioners as before. But it is further insisted, on the part of the libellant that a territory has no authority to pass pilot laws, and that the warrant to Rogers is invalid on that account. The argument proceeds upon the assumption that the act of Congress, August 7th, 1789, *grants* the power to *States* to pass pilot laws and that as territories are not included in the word *States*, they have no power to legislate on the subject. Admitting this position, for the sake of argument, I do not think the conclusion follows. The power to govern the territories subject to the constitution is in Congress. It may do it mediately or immediately; either by the creation of a territorial government, with power to legislate for the territory, subject to such limitations and restraints as Congress may impose upon it, or by the passage of laws directly operating upon the territory without the intervention of the subordinate government. The act organizing a government for Washington Territory declares, that "the legislative power of the territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States." A *rightful subject* of legislation is a *subject* which from the nature of things the course of experience, and the genius of our government, properly belongs to the legislation to regulate and control, as distinguished from those *subjects* which properly pertain to the judicial and executive departments of the government. Pilots and pilotage are as peculiarly the subjects of legislation and have been from their earliest history, as any subject ever embraced in the laws of a territory. Unless Congress has specially prohibited the territory from the passage of such

laws, it may pass them under that grant of power. No such prohibition is shown or pointed out, nor can it be. But the act of 1789 was not a grant of power from Congress to the States to legislate on the subject of pilots and pilotage. The power is concurrent in the State and Federal government until exercised by the latter, and then, and to the extent exercised, it becomes exclusive. If the power was exclusively in the Federal government, Congress *could* not grant it to the States, and being concurrent, there is no need of it. Accordingly, it has been substantially held, that the act of 1789 is a mere legislative recognition of the concurrent power of the State. (*Cooley v. Board of Wardens*, 12 How. 299.) The warrant of Rogers is further objected to, because it is headed, "Temporary." The word is superfluous; but if it have any legal effect, it is the same that the law would attach to the warrant without it, that is, that the party held it during the pleasure of the commissioners. It has never been revoked as far as appears.

I conclude, from these premises, that the pilot laws of Washington Territory are valid and binding, and that Moses Rogers was a duly authorized pilot for the Columbia bar, on the 17th of March, 1861, when the libellant boarded the Panama. By the law of Oregon, the first pilot that "offers his services outside of the bar" to a vessel bound inward is entitled to full pilotage, whether his services are accepted or not, and to one bound outward, half pilotage. Did the libellant or Rogers first offer his services on the 17th of March? It is substantially admitted by the pleadings that the libellant was the first pilot that *boarded* the Panama outside the bar, and from the evidence, it satisfactorily appears that Rogers was on board at the time, hired by the month, to run on board as pilot between the ports of San Francisco and Portland, and that he brought the steamship over the bar as pilot on the occasion in question. Under these circumstances, is Rogers to be considered as a bar pilot, tendering his services to the Panama before the libellant. I think while Rogers holds the warrant, in a suit between third persons, he must

be considered. If he were a party to the suit claiming compensation as pilot, it might possibly be shown that he does not remain on the bar and cruise for vessels, with a sufficient boat, &c. But even then the rule would be of doubtful propriety. The legislature has confided the administration of the law in these matters to the commissioners. Whenever they are satisfied that the pilot is evading the law, and using his authority to the detriment of the pilot service they can and should remove him. This conclusion renders it unnecessary to consider whether the act of Congress of 2d of March, 1837, applies to this case. By that act, the master of a vessel is authorized, upon waters that form the common boundary between two *States*, to take a pilot from either; and in that case he is not bound to take the first pilot that offers, but may take one authorized by the other State, although he offer his services subsequently. Whether the word *State*, as used in the statute, should be construed to include a territory, is not free from doubt. The case is certainly within the *mischiefs* intended to be remedied by that act, and, I can conceive, might, without any violation of principle, be held within its purview. But waiving this question, the libellant not being the first pilot to offer his services to the *Panama*, as she was bound inward, as he alleges in his libel, is, therefore, not entitled to recover any thing on that account.

The next question is, the claim of the libellant for half pilotage on the outward-bound voyage. I find from the evidence, that on the 22d of March, between upper and lower Astoria, and below the custom-house, as the *Panama* was proceeding to sea, the libellant rowed out into the stream, hailed the *Panama*, and offered his services as pilot. That the master of the *Panama* paid no attention to him, but proceeded with the vessel some three or four hundred yards down the stream, and opposite the wharf at lower Astoria. There the vessel was stopped, and Rogers, who appears to have been on the shore waiting for the vessel, came on board *immediately*, and took charge of her as pilot, and took her out to sea. This all occurred on what is understood among navigators

who frequent the harbor, as pilot-ground. It does not appear that the boundaries or limits of the pilot-ground have ever been defined by any authority, and are only known from usage. As a question of fact, I find that the libellant first offered his services, and, as between himself and Rogers, considered as a Washington Territory pilot, was entitled to be employed, or paid half pilotage. But it further appears from the evidence and the admission of the pleadings, that Moses Rogers was duly licensed as a first class pilot of steamboats on the 3d day of July, A. D. 1860, under the act of Congress "approved August 30, 1852," by "O. A. Pitfield, supervising inspector for the fourth supervising district." This license, by the provisions of the law and its own terms, is to continue one year from its date. It is admitted by the pleadings, that the Panama is a steamship engaged in carrying passengers, and this brings her within the description or class of vessels provided for in the act of Congress, entitled "An act to provide for the better security of the lives of passengers of vessels, propelled, in whole or in part, by steam." "Approved July 7, 1838," and the "Act to modify" the same, "approved March 3, 1843," and the act amendatory thereof, entitled, "And act to amend an act, entitled an act to provide for the better security of the lives of passengers on board of vessels, propelled, in whole or in part, by steam, *and for other purposes.*" The act of 1838 provides for the inspection of hulls and boilers. The act of 1843 provides, in addition, that such vessels shall be provided with means of steering that may be available in cases of fire. The act of 1852 completely supplies the provisions of both acts on these subjects, and then provides for the "other purposes" suggested in the title of the act. Among these appear to be the employment of engineers and pilots on board such vessels, "instead of the *present system* of pilotage and mode of *employing engineers.*" The act provides for a board of inspectors who shall examine, classify and license accordingly, "all engineers and pilots of steamers carrying passengers."

That "it shall be unlawful for any person to *employ, or any*



person to serve, as engineer or pilot on any such vessel, who is not licensed by the inspectors; and any one so offending shall forfeit one hundred dollars for each offence." For the libellant, it is contended, that Congress did not intend, by the provisions of this act, to supersede the existing State laws on the subject of pilotage; because, it is said, the act does not expressly so declare; because of the inconvenience that would result from such construction; and, because it being eminently proper and necessary that the States should control this subject themselves, it is not to be supposed that Congress would interfere with it.

The constitution gives Congress power to regulate commerce. (*Art.I., sec. 8.*) This includes the power to regulate navigation, and pilot laws are regulations of navigation. In the case of *Cooley v. Board of Wardens*, 12 How. 315-16, the Supreme Court says: "That the power to regulate commerce includes the regulation of navigation, we consider settled. And when we look to the nature of the service performed by pilots, to the relation which that service and its compensations bear to navigation between the several States, and between the ports of the United States and foreign countries, we are brought to the conclusion, that the regulation of the qualification of pilots, of the modes and times of offering and rendering their services, of the responsibilities which shall rest upon them, of the powers they shall possess, of the compensation they may demand, and of the penalties by which their rights and duties may be enforced, do constitute regulations of navigation, and consequently of commerce, within the just meaning of this clause of the constitution." The power of Congress in the premises cannot be questioned. As to its intent, there is no limitation in the words of the act. It speaks of all "such vessels," wherever they may be, whether upon bars, bays, rivers or inlets. As to the argument from inconvenience and the impropriety of superseding the State laws, I cannot agree with it. The acts of Congress within its power are not to be restrained in their import, or limited in their operation, because it can be supposed or shown that

some State law is thereby rendered inoperative, or that the State prefers some other system, which she thinks preferable. The law of Congress is paramount, and all State legislation which is inconsistent with its terms, liberally and fairly construed, must yield to it. Nor is it true that there is any presumption in favor of the State law and against the law of Congress, which, in doubtful cases, would determine the question in favor of the State law. But on the contrary, where, as in this case, the power is primarily and inherently in Congress, and is only allowed to the State by the sufferance of Congress, the presumption should be the other way. The wisdom of the law was a question for Congress, and not for the court or the State, to determine. I think the act intended just what it says, "to *change the system* of pilotage for vessels spoken of, so that *instead* of the present *system*, the following regulations shall be observed." That is, one to take the place of the other. What was the *present system* at the date of the law? It was the pilot laws of the States regulating pilots and pilotage upon the bays, lakes and rivers within their several jurisdiction. It did not extend to the high seas. This was the system which the regulations of the act of 1852 as to steamboats were to be "*instead*" of, that is, in lieu of, to take the place of. Is the Columbia River bar exempted in any way from the operation of these general words? If so, I cannot see it. The new regulations are to take the place of the then existing system throughout the United States. Because the State has a system of pilotage there with which this "regulation" interferes, so far as steam-vessels are concerned, is no reason why the bar should be exempt from the law. If it were, the proposition would be reversed, and the act of 1852 should read, the "following regulations" shall be observed, *instead* of the present system, (that is, State pilot laws,) *only where the present system does not exist*. There can be no question but that the act of 1852 applies to the whole *route*, and every part of it. It is made a crime for the master of any such vessel to employ any one as a pilot unless licensed by the United States inspectors, or for any one not having

such a license to be so employed. For the greater security of life, it seems to have been the intention of Congress to no longer leave the subject to the conflicting, contradictory and inefficient legislation of the several States, but to provide a uniform authority for examining and licensing steamboat pilots; men who were not merely acquainted with the channels, rocks and shoals of a particular route, but who were well acquainted with the machinery, motion and motive power of steam-vessels, and knew how to control them and guide them under any and all emergencies. A bar pilot may be a good seaman, and intimately acquainted with the currents, tides and shoals of a particular pilotage ground, but this alone does not render him a competent or safe person to take charge of a vessel propelled by steam. Again, the difficulty suggested by counsel for libellant, that pilots licensed by the inspectors might be ignorant of the channels on particular pilotgrounds, is possible, but not very probable. The inspectors are to inquire diligently into the qualification of the applicant, and may call third persons before them as witnesses. The inspectors are appointed for collection districts, and their licenses are for routes within that district, where they may reasonably be supposed to have as much local knowledge and means of information as a board of pilot commissioners of the State. No inspectors have been appointed for this State, and the duty has devolved upon the supervising inspector living upon the Atlantic coast. Under this state of things, it is not to be expected that the law would be very thoroughly administered in the examination of pilots and engineers; but doubtless Congress will provide for inspectors in this collection district, and that difficulty will be obviated. The law only so far abrogates the State law as to require that a steam-vessel carrying passengers shall have a pilot licensed by its authority, and to prohibit any pilot without such license from serving as pilot on such vessel. The compensation of pilots, the mode and manner of offering their services, until Congress sees proper to provide for them, still remain legitimate subjects of State legislation. The bar pilot, licensed by the State, may apply

to the United States inspectors for license to pilot steam-vessels, and, if found competent, and licensed, may pilot such vessel. The libellant, then, although he first offered his services to the Panama, as she was outward bound, is not entitled to recover his claim of half-pilotage. The law of the State under which he claims, as to the Panama, was void. He was prohibited, under a penalty of one hundred dollars, from being employed on the Panama as pilot, and the master in the like sum from employing. The decree of the court will be, that the libel be dismissed, and that claimants recover of the libellant and his sureties their costs.

*G. H. Cartter*, for libellant.

*D. Logan*, for claimants.

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### DAVID WALING v. THE SLOOP CHRISTINA.

*United States District Court for the District of Oregon—  
Cause, Civil and Maritime, for the Subtraction of Wages.*

SPECIAL TERM, FEBRUARY 8, 1862.

DEADY, J. The libel in this cause alleges, that the libellant shipped as a seaman on the sloop Christina, at Port Townsend, in W. T., on the 28th of October, 1861, on a voyage from said port to Bellingham Bay; thence to Portland, in Oregon, and back to the port of departure. That the contract of shipment between the libellant and the master, George Thompson, was, that the schooner should proceed to Portland, and that there the said master should purchase a cargo of apples, and return with the same to Port Townsend, and that libellant should have one-third of the profits of said cargo of apples for his wages. That no shipping articles

were signed. That the vessel proceeded to Bellingham Bay and Portland, in ballast, and arrived at the last-named port about the 20th of November, 1861. That the master did not purchase the cargo of apples, but kept the sloop lying at Portland until the 17th of December, 1861, when she left on a voyage to Shoalwater and elsewhere, without notice to the libellant, and without the payment of his wages. That the libellant remained on the sloop from the 28th of October aforesaid, until the 17th of December, 1861, and during that time was obedient to the orders of the master, and performed his duty as a seaman.

The answer of the master, intervening for the owner, J. K. Thorndyke, alleges, that it is not true that the sloop, at the time of her departure, was bound on a voyage to the ports mentioned in the libel, or either of them. That it is not true that the master agreed with libellant to purchase a cargo of apples at Portland, and return with them to Port Townsend, and give libellant one-third of the profits for his wages. That the sloop left the port of Portland, as alleged by libellant, for Shoalwater Bay; but that the master gave libellant notice of such sailing, and libellant refused to go. That the sloop sailed from Port Townsend, on a general coasting voyage, to go wherever the interest of trade might require. That libellant was to have one-third of the profits for his wages, and that it was not stipulated between the master and libellant otherwise than this. That up to the time the libellant left the sloop, the freight had not paid the expenses, and the libellant is not entitled to anything. That the sloop is a coasting vessel, of thirteen and  $\frac{3}{4}$  tons burden.

The master and two seamen of the sloop, Quaile and Fisher, were examined on behalf of the libellant. No witnesses were examined on behalf of the claimant. Quaile sailed in the sloop from Port Townsend, and Fisher was shipped just before the sloop left Portland for Shoalwater Bay. The master is the principal witness. His statements, on the stand, do not harmonize, in some material respects, with the allegations of his answer. Besides, the transaction

involves his own conduct, and the motives therefor, to that extent, that the court is inclined to take his statements more strongly against himself, where they admit of doubt. In the answer, he denies, unequivocally, that the libellant shipped for a voyage to Bellingham Bay; thence to Portland; and thence back to the port of departure, *or either of them*. On the stand, he admits that the sloop sailed for Portland, to touch at Bellingham Bay, and that he expected to load with coal, at the latter port, for Portland; but did not obtain it, and proceeded in ballast to Portland. Also, that he expected to meet a draft at Portland, with which he intended to buy a cargo of apples, or something else, and return with them to Port Townsend or Victoria. That the draft was not sent to him at Portland, or he would have done so. It appears from the testimony of the master and Quaile, that when the sloop was about to sail, the libellant was at Port Townsend, and the master asked him if he would go with him on the sloop to Portland. The libellant replied in the affirmative, and went aboard, as far as appears, without stipulation as to the terminus of the voyage, other than that implied in the engagement to go to Portland, and without any stipulation as to the rate or mode of payment of his wages. The master further says, that after being at sea four or five days, he told Waling that he expected money at Portland, to buy a cargo of apples; that he expected to take them to Port Townsend; and that he was to have one-third of the profits of the voyage; and that he would give Waling the same; which was assented to; but insists that this understanding was subject to his own discretion to go anywhere else upon a general trading voyage on the coast, and that there was no understanding how long libellant should remain on board. Quaile says, that after the first hiring at Port Townsend, he heard the master tell Waling that he would give him the same wages that he got himself. That he heard nothing about apples; but did hear the draft mentioned. *When* this took place he does not state; but it is fair to presume that, so far as it goes, it refers to the

conversation mentioned by the master four or five days at sea.

The master testifies that he did not get the draft at Portland, and in consequence did not purchase the cargo of apples, and sail with them to Port Townsend, as he contemplated, or might have done. That after remaining at Portland until the 17th of December, 1861, he took a cargo on freight for Shoalwater Bay, with the intention to return to Portland with a cargo of oysters. That on that day, in the afternoon, he told Waling of the intended voyage, and that he might sail in ten minutes, or three days, and that when the sloop was ready he intended to sail, if he went alone. That Waling might go if he wanted to, but that Waling refused to make the voyage. In the course of the evening of that day, it appears that a conversation occurred at Shelly's store, between the libellant, his proctor, the master and Mr. Shelly's clerk; from which, although it does not distinctly appear, it is pretty evident that the libellant contemplated arresting the sloop for his wages, and that the master and Mr. Shelly's clerk were aware of it, or suspected it. At that time the master said, in the presence of the libellant, that he would sail in the morning. Afterwards, he says, that the clerk advised him to sail that night, and he did sail about eight o'clock in the evening. The wind was very light, and they sailed and drifted down that night to Sauvie's Island, a distance of about eight miles, and there laid by until the forenoon of the next day, when they proceeded down the Columbia River to sea, with a light wind, and pulling and drifting part of the way. There was a strong current in the river, and no perceptible tide. The libellant's clothes were on board the sloop at the time of sailing, and were left with some one on a steamboat alongside. The libellant was not aboard the sloop that afternoon.

From all the evidence—the nature of the circumstances considered—I think the fact is, that while it appears to be true that the sloop left in the night, without wind or tide, or other ordinary inducement for such time of sailing, it was not to prevent Waling from going on the contemplated voyage

to Shoalwater, but to avoid being arrested at the suit of Waling for his wages from Port Townsend to Portland. I think it appears sufficiently that Waling had already declined to make the particular voyage. Assuming this to be the fact, what effect does it have upon the libellant's claim for wages? This depends upon the nature of the hiring. It appears that the first contract, on shore, at Port Townsend, was simply a shipping as a sailor, to go to Portland, without any agreement as to the mode of payment, or the amount of the wages.

Upon this state of facts alone, the libellant was not bound to proceed with the sloop any further than Portland, and was entitled to the customary wages for the voyage performed. The maxim, "that freight is the mother of wages," would not apply, because having sailed in ballast for Portland, no freight could have been expected to be earned. It is true that the sloop touched at Bellingham Bay, with the intention of taking on coal for Portland, *if to be had*; but I think this was a mere incident of the voyage, without changing substantially its general direction or character. It is most reasonable and just, in the application of this rigid maxim, to regard the voyage as one to Portland in ballast.

The only remaining question to consider, is the agreement, said to have been at sea, by which the libellant was to have one-third of the profits of the voyage to Portland and back to Port Townsend, in lieu of wages. It is very evident that whatever might have been the ultimate intention of the master, as to the nature and limit of the voyage, that the impression made on the mind of Waling by his representations was, that he, Waling, would make and receive one-third of the profits of a specific voyage, after reaching Portland; that is, from that port to Port Townsend, with a cargo of apples, to be purchased by the master on account of the sloop; and in this sense it must be understood and taken against the master. And notwithstanding the statements of the master, in his evidence, it is hardly probable that *he* had any other intention at the time.



Such being the case, the voyage and the venture were alike broken up, by the failure to purchase the cargo of apples, and carry them to Port Townsend. The libellant was not bound to proceed on the new voyage, or take a share in the new venture to Shoalwater Bay. Neither does the maxim, "that freight is the mother of wages," apply to this aspect of the case; because, although no wages were earned up to the time that libellant left the sloop, there *might* have been, had the agreement been carried out by the master, and the cargo of apples purchased. The master also says, that the libellant was at liberty to leave when he pleased. This statement is hard to reconcile with the statement that he (Waling) agreed to go on a specific voyage, on shares.

But, if this contract at sea was really made, as claimed to have been *intended* by the master, then it may be said, that it is a very indefinite edition of a class of shipping contracts, which have been severely animadverted upon by the English and American courts of admiralty. For instance, where the shipping articles specify a voyage from a certain port to another, "*and elsewhere.*" In some instances, where justice to the sailor required it, such a provision has been held to be void. The master, in this case, says, that notwithstanding the designation of certain ports, and the representations of specific arrangements for cargo, he was at liberty to go wherever the interests of trade might require. If this be so, and valid, then the libellant was tied to the deck of this particular vessel, as long as she remained above water, if the master saw proper to keep on coasting wherever the general interests of trade might require, unless he should desert, and thereby forfeit his earnings. Besides, this contract is open to another objection. It does not appear to be regular or proper for a master to enter into new and special contracts with his seamen, after the voyage has been commenced, and while at sea. The relation between master and seamen, on board ship at sea, is such, that the parties do not deal upon equal terms. Such contracts, if not absolutely void, should be closely scrutinized, and if seriously prejudicial to the interests of the mariner, be disregarded.

The libellant, then, in any view of the case, is entitled to recover the customary wages, from the time of sailing from Port Townsend, the 28th of October, 1861, until the sloop departed on the new voyage to Shoalwater Bay, on the 17th of December, 1861. The customary wages, as shown by the proof, is thirty dollars per month. For a period of one month, and two-thirds, this would be fifty dollars.

Decree accordingly.

*McGraw*, for libellant.

*Mitchel*, for claimant.

EXTRA ANNOTATION  
TO  
PRECEDING VOLUME



# NOTES

## ON THE

# OREGON REPORTS.

### CASES IN 1 OREGON.

**1 Or. 17-19, THOMPSON v. BACKENSTOS.**

**Appeal.**—Motions are No Part of the record, p. 18.

Cited in *Scott v. Cook*, 1 Or. 85, reaffirming the rule.

Denied in *Leavenworth etc. R. R. v. Commissioners*, 18 Kan. 177, holding rule contra in Kansas.

**1 Or. 19-24, STEPHENS v. DENNISON.**

**Execution Sale.**—When Plaintiff in Execution buys the property of defendant he is chargeable with all irregularities, p. 23.

Cited in *Collins v. Smith*, 57 Wis. 288, 15 N. W. 194, holding that plaintiff is presumed to have notice of all defects in the record and is not a bona fide purchaser. Cited in note in 21 L. R. A. 39, on purchaser at execution or judicial sale as bona fide purchaser.

**1 Or. 24-26, SCOTT v. COOK.**

**Appeal.**—In Absence of Bill of Exceptions, court will examine only errors apparent on face of record, p. 25.

Cited in *People v. Hunt*, 1 Idaho, 436, and *Owens v. United States*, 130 Fed. 286, 64 C. C. A. 525, both approving the rule; *Farrell v. Oregon Gold Min. Co.*, 31 Or. 473, 49 Pac. 879, holding that affidavits filed in support of a motion must be brought up by bill of exceptions; *Taylor v. Peterson*, 1 Idaho, 517, holding that exception must be taken to order overruling motion for new trial and preserved in the record.

**Appeal.**—Error not Excepted to when made is waived, pp. 25, 26.

Cited in *Bogue River Min. Co. v. Walker*, 1 Or. 343, following the rule; *Lampkin v. Sterling*, 1 Idaho, 126, holding that error must be excepted to when made or is waived.

**1 Or. 26-31, UNITED STATES v. TOM.**

**States.**—Oregon did not Become a Part of the United States until 1846, and the provisions of the act of Congress of 1834 did not originally apply to it, p. 27.

Cited in *United States v. Bridleman*, 7 Fed. 896, 7 Saw. 248, and *Robinson v. Caldwell*, 67 Fed. 395, 14 C. C. A. 448, approvingly.

**States.—Oregon is No Part of the Indian country** named in act of Congress of 1834, p. 27.

Cited in *United States v. Seveloff*, Fed. Cas. No. 16,252, 2 Saw. 311, holding that "Indian country" is only that part of the country declared by Congress to be such; *United States v. Leathers*, Fed. Cas. No. 15,581, 6 Saw. 17, holding that Utah did not become Indian country by act of Congress of 1834; *Hoyt v. United States*, 38 Ct. of Cl. 460, holding that New Mexico was not Indian country.

**Indians.—Act of Congress Regulating Sale of liquor to Indians** applies to Oregon, p. 27.

Cited in *United States v. Shaw-Mux*, Fed. Cas. No. 16,268, 2 Saw. 364, holding that Congress may regulate intercourse between Indian tribes and their members; *United States v. Winslow*, Fed. Cas. No. 16,742, 3 Saw. 337, reaffirming the rule.

**1 Or. 31-35, McLAUGHLIN v. HOOVER.**

**Statutes.—A Second Law Does not Repeal a former** without a repealing clause or negative words unless so clearly repugnant as to imply a negative, p. 32.

Cited in *Barr v. Columbia Southern Ry. Co.*, 117 Fed. 34, 54 C. C. A. 407, sustaining and applying the rule; *Sandys v. Williams*, 46 Or. 332, 80 Pac. 644, stating that repeals by implication are allowed only where the repugnancy between the first and last act on the same subject are plain and unavoidable. Cited in note to 88 Am. St. Rep. 274, on implied repeal of statutes.

**Statutes.—Where Two Acts on Same Subject do not conflict** they must be taken together as one act, p. 33.

Cited in *Winter v. Norton*, 1 Or. 44, approving and applying the rule.

**Limitation Laws.—Courts must Apply the Remedy by limitation** in all cases except where it would cut off the right, and then it should give the party a reasonable time to escape the effect of such remedy, p. 35.

Quoted in *Ketchum v. State*, 2 Or. 107, approvingly.

**Limitation Laws are Statutes of Repose** promoting peace and harmony in society and closing the door to litigation; they should be favored by the courts, p. 35.

Cited in *Ketchum v. State*, 2 Or. 106, to point that parties must enforce their legal rights within a reasonable time.

**1 Or. 35-39, GANT v. DREW.**

**Ferries.—Riparian Owner has no exclusive right to keep a ferry**, pp. 37-39.

Cited in *Mills v. Learn*, 2 Or. 217, holding that riparian owner has no exclusive right to ferry, though a statute give him the preference; *Beckley v. Learn*, 3 Or. 545, giving riparian owner a preferred right to exclusion of others, except after notice to him of application for

license; *State v. Faudre*, 54 W. Va. 134, 102 Am. St. Rep. 927, 46 S. E. 274, 63 L. R. A. 877, to point that granting ferry franchise does not carry with it a right to a landing. Cited in note in 59 L. R. A. 529, 533, on establishment, regulations and protection of ferries.

**1 Or. 39-42, OASON v. STONE.**

**Ferries.**—There can Only be Permanent Ferries and county commissioners cannot establish a ferry for a year, pp. 40, 41.

Cited in *Drew v. Gant*, 1 Or. 199, approving and applying the rule; *Beckley v. Learn*, 3 Or. 471, holding that by statute ferry franchises were changed and limited to five years.

**1 Or. 42-46, WINTER v. NORTON.**

**Statutes.**—Where Later Act Modifies prior one, the two stand as one act, p. 44.

Cited in *Sandys v. Williams*, 46 Or. 332, 80 Pac. 644, approving and following the rule.

**Abatement.**—Matter in Abatement is waived by pleading to the merits, p. 44.

Cited in *Chamberlin v. Hibbard*, 26 Or. 433, 38 Pac. 438, *Lassas v. McCarty*, 47 Or. 477, 84 Pac. 78, and *McClung v. McPherson*, 47 Or. 86, 32 Pac. 13, all upholding and following the rule.

**Trial.**—When the Meaning of a Writing is to be judged by extrinsic facts, etc., it is for the jury to say whether the language was used in the sense imputed, p. 46.

Cited in *Germania Fire Ins. Co. v. Stone*, 21 Fla. 569, sustaining verdict based on conflicting evidence.

**1 Or. 47-49, 62 Am. Dec. 297, NORTON v. WINTER.**

**Garnishment.**—Defendant in One Judgment cannot be subjected to another under garnishee process, p. 48.

Cited in *Despain v. Crow*, 14 Or. 404, 12 Pac. 806, adhering to the rule on the principle of *stare decisis*; *Hamill v. Peck*, 11 Colo. App. 4, 52 Pac. 217, holding that judgment debtor cannot be held under garnishee process issued from another court. Cited in note to 54 Am. St. Rep. 793.

**1 Or. 49-51, PRATT v. KING.**

**Judgment.**—Requisites of Certificate of authentication of foreign judgment, p. 50.

Cited in *Keyes v. Mooney*, 13 Or. 182, 9 Pac. 401, overlooking discrepancies in certificate to transcript of foreign judgment. Cited in note in 5 L. R. A., N. S., 963, 964, on admissibility in evidence of copies of records of other states.

**1 Or. 51-59, O'KELLY v. TERRITORY.**

**Appeal.**—Error not Objected to below will not be reviewed, p. 54.

Cited in *Owens v. United States*, 130 Fed. 286, 64 C. C. A. 525, holding exceptions on day following giving of instructions timely; *State*

v. Foot You, 24 Or. 68, 32 Pac. 1033, holding that there must be an objection, exception and bill of exceptions.

**Homicide.—Murder is a Statutory Offense, and the indictment is sufficient if it follow the statute, p. 55.**

Cited in State v. Duvall, 26 Wis. 421, holding indictment in language of statute sufficient.

**Appeal.—Error is not Presumed, p. 58.**

Cited in State v. Garrand, 5 Or. 221, 228, and State v. Cody, 18 Or. 539, 24 Pac. 900, both following the rule; Durkee v. Carr, 38 Or. 196, 63 Pac. 119, reaffirming the rule, but adding that when error is manifest, prejudice is presumed, unless the bill of exceptions negative it. Cited in note in 28 L. R. A. 205, on qualification of grand jurors.

**1 Or. 59-73, PARRISH v. STEPHENS (No. 1).**

Appeal dismissed in 21 How. 290, 16 L. ed. 80.

**Dedication.—Public Streets, p. 61.**

Cited in Davies v. Epstein, 77 Ark. 225, 92 S. W. 20, and Coffin v. City of Portland, 27 Fed. 416, both supporting the rule. Cited in note in 23 L. R. A., N. S., 812, on leaving blank in plat as dedication.

**1 Or. 73-76, PARRISH v. STEPHENS (No. 2).**

Appeal dismissed in 21 How. 290, 16 L. ed. 80.

**Nuisance.—Enjoining Private Nuisance, p. 73.**

Cited in Fleischner v. Citizens' Real Estate etc. Co., 25 Or. 129, 35 Pac. 176, Van Buskirk v. Bond, 52 Or. 237, 96 Pac. 1104, and Coffin v. City of Portland, 27 Fed. 416, all supporting the rule.

**1 Or. 77-86, MARLIN v. T'VAULT.**

**Public Lands.—Federal Townsite Act of 1844 was not applicable to Oregon, pp. 83-85.**

Cited in Stark v. Starr, 6 Wall. (U. S.) 417, 18 L. ed. 929, holding that townsite act of 1844 was not extended to Oregon until 1854; Lamb v. Davenport, Fed. Cas. No. 8015, 1 Saw. 620, referring to the case in reviewing condition of Oregon townsites historically.

**Public Lands.—Donation Act of 1850 construed to apply to town lands, pp. 80-82.**

Cited in Lownsdale v. City of Portland, 1 Or. 393, and Lownsdale v. Portland Fed. Cas. No. 8578, 1 Deady, 14, upholding the rule.

**1 Or. 86-89, 62 Am. Dec. 299, WATTS v. WARD.**

Cited in notes to 129 Am. St. Rep. 408, on lost property and its finder and owner; 25 Am. Dec. 189, 190, on right of finder of lost property to reward; 26 Am. Rep. 9, on performance entitling one to reward; 37 L. R. A. 119, on rights and liabilities of finder of property.

**1 Or. 89-90, CLINE v. BROY.**

**New Trial.—Affidavit of Juror will not be received to impeach verdict, p. 90.**



Cited in *State v. Smith*, 43 Or. 118, 71 Pac. 976, reaffirming and applying the rule.

**New Trial.**—Trial Court, in Its Sound Discretion, may refuse a new trial when it would not be advantageous to grant it, p. 90.

Cited in *State v. Fitzhugh*, 2 Or. 236, holding such discretion not subject to review.

**1 Or. 90-91, SHORTESS v. WIET.**

Cited in note to 121 Am. St. Rep. 406, on right to civil action for forcible entry and detainer.

**1 Or. 92-93, ZACHARY v. SWANGER.**

**Witnesses.**—Expert Evidence of productivity of soil, p. 93.

Cited in *Farmers' & Traders' Nat. Bank v. Woodell*, 38 Or. 304, 61 Pac. 839, allowing witness to testify to suitability of land to produce sugar beets.

**1 Or. 95-97, TOLMIE v. OTCHIN.**

This case has not been cited.

**1 Or. 97-99, NORTON v. WINTER.**

**Attachment.**—Defenses, p. 98.

Cited in *Stark v. Starr*, Fed. Cas. No. 13,307, 1 Saw. 15, not in point.

**1 Or. 99, HANNER v. COFFIN.**

**Reference.**—Judgment cannot be Based on an award of a referee made after time for making it expired, p. 99.

Cited in *De Long v. Stahl*, 18 Kan. 563, reaffirming the rule.

**1 Or. 100-101, STONE v. CASON.**

**Injunction.**—Dissolution is Technical Breach of bond, p. 100.

Cited in *Howard v. Lindeberg*, 2 Alaska, 302, reaffirming the rule.

**1 Or. 101-105, OUTLER v. COLUMBIA, THE.**

**Admiralty.**—Jurisdiction of Territorial Courts, p. 101.

Cited in *The City of Panama v. Phelps*, 101 U. S. 461, 25 L. ed. 1064, holding that territorial district courts have admiralty jurisdiction; *Nickele v. Griffin*, 1 Wash. Ter. 379, to point that admiralty cases must come to supreme court in accordance with the territorial law.

**New Trial.**—Newly Discovered Evidence must be material, p. 102.

Cited in *State v. Hill*, 39 Or. 95, 65 Pac. 520, denying new trial for newly discovered evidence tending only to impeach witness.

**1 Or. 106, TERRITORY v. KING.**

This case has not been cited.

**1 Or. 107, TERRITORY v. NORRIS.**

This case has not been cited.

**1 Or. 108-111, WOODSIDES v. RICKHY.**

Public Lands.—Jurisdiction of Courts to protect rights of settlers, though boundary line be incidentally involved, p. 109.

Cited in *Lee v. Simonds*, 1 Or. 162, and *Zimmerman v. McCurdy*, 15 N. D. 84, 106 N. W. 126, both following and upholding the decision.

**1 Or. 112, WILLAMETTE FALLS C., M. & TRANSP. CO. v. WILLIAMS.**

Process.—Service on Corporation, p. 112.

Cited in *Lonkey v. Keyes Silver Min. Co.*, 21 Nev. 317, 31 Pac. 59, 17 L. R. A. 351, to same effect. Cited in note in 23 L. R. A. 500, as to who may be served with process in suit against foreign corporation.

**1 Or. 113-114, WILLAMETTE FALLS C., M. & TRANSP. CO. v. CLARK.**

Process.—Service on Corporation, p. 113.

Cited in *Lonkey v. Keyes Silver Min. Co.*, 21 Nev. 317, 31 Pac. 59, 17 L. R. A. 351, to same effect.

**1 Or. 115-119, COLEMAN v. STARK.**

Principal and Agent.—Scope of Power of attorney, p. 117.

Cited in *Wilson v. McEwan*, 7 Or. 105, holding that power to sell included power to warrant.

Principal and Agent.—Principal must Adopt or reject act of agent as an entirety, p. 118.

Cited in *Le Grande Nat. Bank v. Blum*, 27 Or. 218, 41 Pac. 660, *McLeod v. Despain*, 49 Or. 563, 565, 124 Am. St. Rep. 1066, 92 Pac. 1091, 1092, 19 L. R. A., N. S., 276, *Dillard v. Olalla Min. Co.*, 52 Or. 137, 96 Pac. 679, *McGraw v. Germania Fire Ins. Co.*, 54 Mich. 165, 19 N. W. 936, *Busch v. Wilcox*, 82 Mich. 340, 21 Am. St. Rep. 563, 47 N. W. 329, *Budasill v. Falls*, 92 N. C. 226, and *Mundorff v. Wickersham*, 63 Pa. 89, 3 Am. Rep. 531, all reiterating the rule and holding that acceptance of benefits carries with it the burdens of the transaction.

**1 Or. 119-122, GAZELLE, THE, v. LAKE.**

Maritime Liens.—Change of Lien Law does not deprive lienor of his remedy, pp. 120, 121.

Cited in *Skyrme v. Occidental etc. Min. Co.*, 8 Nev. 233, holding lien not lost by change of law; *Garneau v. Port Blakeley Mill Co.*, 8 Wash. 470, 36 Pac. 463, holding the right to a logger's lien vested and not affected by a subsequent repeal of the lien law.

Deviated from in *Wilson v. Simon*, 91 Md. 6, 80 Am. St. Rep. 427, 45 Atl. 1023, reviewing conflicting authorities and holding mechanic's lien lost by repeal of statute.

**1 Or. 122-123, HART v. TERRITORY.**

This case has not been cited.

**1 Or. 123-140, DAY v. KENT.**

**Election.**—Who Receives the Majority is elected, and his election cannot be affected by the means used to ascertain the fact, pp. 128, 129.

Cited in *State v. Smith*, 15 Or. 115, 14 Pac. 823, reaffirming and applying the rule; *Cresap v. Gray*, 10 Or. 248, applying rule where votes of a precinct did not reach the clerk for fourteen days after election; *O'Laughlin v. City of Kirkwood*, 107 Mo. App. 320, 81 S. W. 518, applying the rule where the judges and clerks refused to certify the poll-books. Cited in note to 90 Am. St. Rep. 91.

**1 Or. 140-145, LATSHAW v. TERRITORY.**

**Criminal Law.**—Instruction must be Confined to facts proved, p. 143.

Cited in *Smith v. United States*, 1 Wash. Ter. 273, reaffirming and applying the rule.

**Criminal Law.**—Codefendant is not Competent Witness, though tried separately, p. 144.

Cited in *State v. Jennings*, 48 Or. 493, 87 Pac. 538, upholding the rule.

**1 Or. 146-147, TERRITORY v. LATSHAW.**

**New Trial.**—Newly Discovered Evidence must be material to the issue, go to the merits and not to the discredit of a witness, p. 147.

Cited in *State v. Hill*, 39 Or. 95, 65 Pac. 520, and *State v. Gardner*, 38 Or. 153, 54 Pac. 811, both applying the rule to evidence tending to impeach.

**1 Or. 147-148, MOSS v. CULLY.**

**Bills and Notes.**—Allegation That Defendant promised to pay plaintiff sufficiently alleges ownership, p. 148.

Cited in *Dorothy v. Pierce*, 27 Or. 376, 41 Pac. 669, applying the rule to allegation that county warrants were issued and delivered to plaintiff.

**1 Or. 149-152, TERRITORY EX REL. KENNEDY v. PYLE.**

**Officers.**—Legislature has Power to change term of office during incumbency, p. 151.

Cited in *State v. Simon*, 20 Or. 372, 26 Pac. 172, reaffirming the rule; *Reynolds v. State*, 61 Ind. 409, to point that quo warranto is triable by jury. Cited in note in 7 Am. Rep. 90, on control of legislature over statutory office.

**1 Or. 153-157, VANDOLF v. OTIS.**

**Public Lands.**—Under Donation Act, Indian wife of settler takes the same as a white wife would, p. 156.

Cited in *Murray v. Murray*, 6 Or. 30, holding that wife has nothing to do to secure her donation except to be a wife; *Lamb v. Starr*, Fed. Cas. No. 8,021, 1 Dedy, 350, 362, to point that the woman takes on account of her wifeship, not as a settler; *Stevens v. Sharp*, Fed. Cas. No. 13,410, 6 Saw. 113, 117, to point that the donation act gave

the wife one-half of the grant in her own right as the "wife" of a settler.

1 Or. 158-162, **LEE v. SIMONDS.**

This case has not been cited.

1 Or. 163-166, **NEWBY v. TERRITORY.**

New Trial.—Review of Order refusing, p. 164.

Cited in *State v. Fitzhugh*, 2 Or. 236, declining to review new trial order.

Unlawful Assembly.—What Constitutes under Oregon statutes, p. 165.

Explained in *State v. Stephanus*, 53 Or. 129, 99 Pac. 430, distinguishing riot and unlawful assembly.

1 Or. 166-168, **FORD v. KENNEDY.**

Public Lands.—Heirs of Settler who died prior to taking effect of donation act, pp. 167, 168.

Cited in *Newton v. Spencer*, 3 Or. 550, *Lamb v. Starr*, Fed. Cas. No. 8,021, 1 Deady, 350, 361, and *Fields v. Squires*, Fed. Cas. No. 4776, 1 Deady, 366, all reaffirming the rule; *Dalles City v. Missionary Society*, 6 Fed. 370, 6 Saw. 126, applying the rule to missionary stations not occupied as such before the grant; *White v. Allen*, 3 Or. 111, 112, distinguishing the facts but upholding the rule as stare decisis.

1 Or. 169-170, **WILLAMETTE FALLS TRANSP. & M. CO. v. REMICK.**

Mechanic's Liens.—Persons Entitled and property subject to lien, pp. 169, 170.

Cited in *Dalles Lumber etc. Co. v. Wasco Woolen etc. Co.*, 3 Or. 531, holding that where there are several structures, lien is confined to buildings on which material was used or labor done; *Willamette Steam Mills etc. Co. v. Shea*, 24 Or. 47, 32 Pac. 761, holding that one furnishing material to be used in several structures has a lien on all of them; *Lockhart v. Rollins*, 2 Idaho, 511, 548, 21 Pac. 415, to aid in construing words "labor upon mines"; *Andrews v. St. Louis etc. R. R. Co.*, 16 Mo. App. 303, giving lien for labor and materials not actually incorporated in the structure; *Hayden v. Wulffing*, 19 Mo. App. 357, giving mechanic's lien law a liberal construction; *Badger Lumber Co. v. Marion Water Supply etc. Co.*, 48 Kan. 186, 30 Am. St. Rep. 301, 29 Pac. 477, 15 L. R. A. 652, giving materialman a lien on poles and wires of electric light company; *Wetzel & T. Ry. Co. v. Tennis Bros. Co.*, 145 Fed. 463, 75 C. C. A. 266, 7 Ann. Cas. 426, giving lien to corporation hired to supervise the construction of a railroad; *Flagstaff Silver Min. Co. v. Collins*, 104 U. S. 179, 26 L. ed. 705, giving mine superintendent, who did some manual labor, a lien on the mine. Cited in notes in 18 L. R. A. 306, as to who are laborers, employees, or servants within statutes giving them preferences; 16 L. R. A. 601, on right of architect to mechanic's lien.

**Mechanics' Liens.**—Claims for Anything but labor and material are nonlienable, p. 170.

Cited in *Boyle v. Mountain Key Min. Co.*, 9 N. M. 252, 50 Pac. 352, holding that mine superintendent performing no labor is not entitled to a lien.

**1 Or. 171-173, WILLAMETTE FALLS TRANSP. & M. CO. v. SMITH.**

This case has not been cited.

**1 Or. 173-175, YAMHILL BRIDGE CO. v. NEWBY.**

**Tenancy in Common.**—One Tenant who sells or destroys the property may be sued by his cotenant, p. 174.

Cited in *Benjamin Schwartz & Sons v. Kennedy*, 142 Fed. 1031, and *Wood v. Steinau*, 9 S. D. 114, 68 N. W. 162, both supporting and applying the rule. Cited in note to 24 Am. St. Rep. 818, on conversion of chattels by mortgage or mortgagee.

**1 Or. 176-179, BALDEO v. TOLMIE.**

**Limitation of Actions.**—When a Statute which has barred a cause of action is repealed, such repeal does not revive the cause of action, p. 177.

Cited in *Ketchum v. State*, 2 Or. 106, *Board of Education v. Blodgett*, 155 Ill. 448, 46 Am. St. Rep. 348, 40 N. E. 1027, 31 L. R. A. 70, *McCracken Co. v. Mercantile Trust Co.*, 84 Ky. 352, 1 S. W. 588, and *Campbell v. Holt*, 115 U. S. 632, 6 Sup. Ct. Rep. 209, 29 L. ed. 488, all reaffirming and applying the rule. Cited in notes to 95 Am. St. Rep. 659, on effect of bar of statute of limitations; 45 L. R. A. 612, on vested right in defense of statute of limitations.

**1 Or. 179-180, MOORE, IN RE.**

This case has not been cited.

**1 Or. 181, WILLAMETTE FALLS ETC. CO. v. SMITH.**

**Judgment.**—Default Judgment cannot be entered while a demurrer remains undisposed of, p. 181.

Cited in *State v. Dougherty*, 4 Or. 202, reaffirming the rule; *Curtis v. Sestanovich*, 26 Or. 118, 37 Pac. 69, to point that complaint to foreclose mechanic's lien should show dates when material was furnished.

**1 Or. 182, WILLAMETTE FALLS TRANSP. ETC. CO. v. FERRIN.**

This case has not been cited.

**1 Or. 183-188, WILLAMETTE FALLS TRANSP. & M. CO. v. RILEY.**

**Mechanics' Liens.**—Rights of Parties are determined by law in force when contract was made, p. 186.

Cited in *Waters v. Dixie Lumber & Mfg. Co.*, 106 Ga. 595, 71 Am. St. Rep. 281, 32 S. E. 637, holding that lien once fixed is not affected

by change of law; *Mahon v. Suresus*, 9 N. D. 59, 81 N. W. 65, holding that rights of parties are determined by law in force when goods were delivered, remedies by laws in force at time of suit; *Tufts v. Tufts*, 8 Utah, 147, 30 Pac. 310, 18 L. R. A. 482, holding that the repeal of a divorce law does not take away rights accrued under former law; *Goodbub v. Hornung's Estate*, 127 Ind. 192, 26 N. E. 773, holding that rights are to be fixed by law in force when contract for labor or material was made.

Questioned in *National Bank v. Williams*, 38 Fla. 313, 20 South. 933, holding mechanic's lien law remedial and conferring no substantive right.

**Mechanics' Liens.**—Lien of Mechanic relates back to commencement of building, pp. 186, 187.

Cited in *Re Hoyt*, Fed. Cas. No. 6,805, 3 Biss. 436, reaffirming the rule; *Thomas & Co. v. Mowers*, 27 Kan. 268, giving mechanic's lien priority over subsequent creditors.

**Mechanic's Lien.**—Interest on Amount Claimed may be added from date of maturity of claim, p. 187.

Cited in *The Victorian No. 2*, *Sutton v. The Victorian*, 26 Or. 198, 46 Am. St. Rep. 616, 41 Pac. 1104, and *Pacific Mut. Life Ins. Co. v. Fisher*, 106 Cal. 283, 89 Pac. 760, both allowing interest; *Forbes v. Willamette etc. Co.*, 19 Or. 63, 20 Am. St. Rep. 793, 23 Pac. 670, allowing interest on each claim from date of filing notice.

**1 Or. 188-191, MONROE v. HUSSEY.**

Cited in notes to 29 Am. St. Rep. 115; 24 L. R. A., N. S., 1154, as to whether presumption of fraud flowing from retention of chattel by vendor may be overcome.

**1 Or. 191-192, 75 Am. Dec. 554, TERRITORY v. COLEMAN.**

**Criminal Law.**—One may be Punished for the same act under the law of the territory and the federal law, p. 192.

Cited in *State v. Brown*, 2 Or. 224, *Young v. Frazier*, 36 Or. 250, 78 Am. St. Rep. 772, 59 Pac. 708, 48 L. R. A. 153, and *Smith v. United States*, 1 Wash. Ter. 270, all upholding the rule. Cited in note to 92 Am. St. Rep. 96, on identity of offenses on plea of former jeopardy.

**1 Or. 193-194, ARTHUR v. MOSS.**

**Sales.**—Measure of Damages for breach of warranty of title in price paid for the goods, p. 193.

Cited in *Morgan v. Hendrie Bros. & Bolthoff*, 34 Colo. 29, 81 Pac. 701, applying the rule to suit for breach of warranty of title.

Distinguished in *Shultis v. Rice*, 114 Mo. App. 282, 89 S. W. 360, holding value of goods measure of damages for breach of warranty of title.

**1 Or. 194-196, CAROTHERS v. WHEELER.**

**Time.**—First Day is Excluded and last day included except when it falls on Sunday, in which event time runs till Monday, p. 196.

Cited in *Dwelling House Ins. Co. v. Osborn*, 1 Kan. App. 203, 40 Pac. 1101, reaffirming the rule; *Horn v. United States Min. Co.*, 47 Or. 126, 81 Pac. 1009, computing time to file mechanic's lien by excluding last day of service on the building and including last day of period prescribed; *Evans v. Chicago etc. Ry. Co.*, 76 Mo. App. 470, following the rule and applying it to bill of exceptions.

Distinguished in *Miner v. Tilley*, 54 Mo. App. 629, and *Patrick v. Faulke*, 45 Mo. 313, holding statutory act to be performed on Saturday when last day is Sunday. Cited in notes to 78 Am. St. Rep. 373, on computation of time; 14 L. R. A. 122, on time, extension of, when last day falls on Sunday; 49 L. R. A. 198, on first and last days in computation of time.

**1 Or. 197-200, DREW v. GANT.**

*Ferries.*—Posting Notice of Application for license substantially in compliance with statute is sufficient, pp. 198, 199.

Cited in *Lutgen v. Board of Commrs.*, 99 Minn. 501, 110 N. W. 2, to point that notice laws are liberally construed. Cited in note in 59 L. R. A. 552, on establishment, regulation and protection of ferries.

**1 Or. 201-205, MOORE v. THOMAS.**

*Deeds.*—Unacknowledged Deed is Valid between the immediate parties to it, p. 202.

Cited in *Security Savings etc. Co. v. Loewenberg*, 38 Or. 168, 62 Pac. 649, *Eadie v. Chambers*, 172 Fed. 75, 96 C. O. A. 561, and *Good-enough v. Warren*, Fed. Cas. No. 5534, 5 Saw. 494, 498, all reaffirming and applying the rule; *Gest v. Packwood*, 34 Fed. 372, 13 Saw. 202, holding deed valid as against subsequent purchasers with actual notice; *McIntyre v. Kamm*, 12 Or. 259, 7 Pac. 80, to point that burden is on party claiming invalidity.

**1 Or. 207-212, 75 Am. Dec. 555, ARMSTRONG v. ARMSTRONG.**

This case has not been cited.

**1 Or. 213-214, YOUNG v. TERRITORY.**

This case has not been cited.

**1 Or. 215-218, GOODWIN v. BARNHART.**

This case has not been cited.

**1 Or. 216-218, NAYLOR v. BEEKS.**

*Highways.*—Existence is not Proved by recorded plat but by order of establishment, p. 217.

Cited in *State v. Myer*, 20 Or. 445, 26 Pac. 308, reaffirming the rule.

**1 Or. 218-219, PORTLAND v. O'NEILL.**

*Brokers.*—Salaried Agents are not brokers, p. 219.

Cited in *Rodman v. Manning*, 53 Or. 339, 99 Pac. 657, 20 L. R. A., N. S., 1158, defining brokers. Cited in notes to 129 Am. St. Rep. 282,

on constitutional limitations on power to impose license or occupation taxes; 98 Am. Dec. 171, 175, on rights, duties and liabilities of brokers.

**1 Or. 220-222, HOLMES v. FERGUSON.**

Cited in note to 49 Am. Dec. 387, on estoppel of persons claiming under common source of title.

**1 Or. 223-224, WOOD v. TERRITORY.**

Intoxicating Liquors.—Giving Away Liquor is not disposing of it within meaning of statute, p. 224.

Distinguished in Litch v. People, 19 Colo. App. 424, 75 Pac. 1080, where ordinance prohibited the giving away of liquor.

**1 Or. 224-225, AIKIN v. LEONARD.**

This case has not been cited.

**1 Or. 226-227, ORANDALL v. PIETTE.**

Judgment.—Opening of Default is discretionary, p. 226.

Cited in White v. Northwest Stage Co., 5 Or. 103, refusing to review order in absence of abuse of discretion.

**1 Or. 227-229, BAKER v. STOUGHTON.**

Contracts.—Where Contract is to be Performed by delivery of goods of a kind to be selected by obligee, obligor is not bound to perform until selection is made, p. 229.

Cited in Newburn v. Hyde, 132 Iowa, 94, 107 N. W. 606, applying the rule.

**1 Or. 230-231, PIN v. MORRIS.**

Public Lands.—Conclusiveness of Decision of land officer, p. 231.

Cited in Corpe v. Brooks, 8 Or. 224, and Robertson v. Geer, 42 Or. 187, 79 Pac. 616, refusing to review decision of state land board.

**1 Or. 234, WILLIAMS v. KNIGHTON.**

Bills and Notes.—Complaint must Show that note is due, p. 234.

Cited in Wright & Son v. Bankers' etc. Fire Ins. Co., 73 Mo. App. 367, applying the rule to a complaint on an insurance policy.

Pleading must State the Facts which the pleader thinks constitute his cause of action and not state his opinion, p. 234.

Cited in Dame v. Cochiti Reduction & Improvement Co., 13 N. M. 17, 18, 79 Pac. 299, reaffirming and applying the rule.

**1 Or. 236, COFFIN v. HANNER.**

This case has not been cited.

**1 Or. 241-245, HOWELL v. STATE.**

Larceny.—Verdict of Guilty Need not Assess value of stolen property when indictment specifies the value, p. 243.



Cited in *State v. Kelliher*, 32 Or. 244, 50 Pac. 583, reaffirming the rule.

**Criminal Law.**—Appellate Court has No Power to take from, add to, or modify, the judgment; it must affirm or reverse, p. 245.

Cited in *Simpson v. State*, 56 Ark. 21, 19 S. W. 103, dissenting opinion, majority modifying judgment.

**Criminal Law.**—Where the Judgment of the lower court is unauthorized the appellate court must reverse, p. 245.

Distinguished in *State v. Fitzhugh*, 2 Or. 226, where the error in the judgment favored the appellant. Cited in note in 45 L. R. A. 158, on effect of excessive sentence.

**1 Or. 246-247, JACKSON v. SHARFF.**

This case has not been cited.

**1 Or. 248-249, FRISBIE v. STATE.**

This case has not been cited.

**1 Or. 250-251, STATE v. SMITH.**

This case has not been cited.

**1 Or. 251-254, HOXIE v. HODGES.**

**Evidence.**—Parol Contemporaneous Evidence is inadmissible to vary the terms of a writing, p. 252.

Cited in *Portland Nat. Bank v. Scott*, 20 Or. 424, 26 Pac. 277; applying the rule to a promissory note; *Ruckman v. Imbler Lumber Co.*, 42 Or. 238, 70 Pac. 814, applying the rule to a lease; *Martin v. Hamlin*, 18 Mich. 365, 100 Am. Dec. 181, applying the rule to a note and mortgage.

**1 Or. 254-258, WHITE v. DELSCHNEIDER.**

This case has not been cited.

**1 Or. 258-259, McMULLAN v. ABBOTT.**

**Bills and Notes.**—Negotiable Notes are entitled to days of grace, non-negotiable notes are not, p. 259.

Cited in *Allen v. O'Donald*, 28 Fed. 25, allowing days of grace on note payable one year from date.

**1 Or. 259-262, HUFFMAN v. McDANIEL.**

**Pleading.**—Demurrer is Waived by pleading over, p. 261.

Cited in *Johnston v. Oregon eta. Ry. Co.*, 23 Or. 101, 31 Pac. 233, adhering to the rule.

**1 Or. 262-264, FARGO v. BENTON COUNTY COMMER.**

This case has not been cited.

**1 Or. 264-267, FRISBIE v. STATE.**

Cited in notes to 121 Am. St. Rep. 702, on gambling games and devices; 33 Am. Dec. 185, on what is gaming; 17 L. R. A., N. S., 1211, on card-game paraphernalia as "gaming device."

1 Or. 267-268, **HOENNER v. STATE.**

Criminal Law.—Where Statute Imposes imprisonment for not more than one year it does not authorize confinement in the penitentiary, p. 268.

Cited in *Ex parte Cain*, 20 Okl. 132, 93 Pac. 976, 1 Okl. Cr. 13, holding that "imprisonment" means confinement in the common jail.

Statutes.—Criminal Statutes are strictly construed, p. 268.

Cited in *Brooks v. People*, 14 Colo. 415, 24 Pac. 553, and *United States v. Powers*, 1 Alaska, 186, approving and applying the rule.

Explained in *State v. Dana*, 53 Or. 308, 99 Pac. 280, as having been since modified by statute.

1 Or. 269-270, **SHIRLEY v. STATE.**

This case has not been cited.

1 Or. 270-272, **BOWEN v. STATE.**

Appeal.—The Overruling of a New Trial is not reviewable, p. 271.

Cited in *State v. Wilson*, 6 Or. 429, *State v. Foot You*, 24 Or. 70, 32 Pac. 1034, and *State v. Gardner*, 33 Or. 152, 54 Pac. 810, all following the rule.

Modified in *State v. Hill*, 39 Or. 96, 66 Pac. 590, holding that when anything occurs after the case is submitted giving cause for new trial, action of court on motion based on such matters will be reviewed; *Ruckman v. Ormond*, 42 Or. 212, 70 Pac. 708, to the same effect. Cited in note, in 3 L. B. A., N. S., 1023, on change of time and place in indictment for homicide.

1 Or. 272-273, **DENNISON v. STOREY.**

Oaths.—It must appear in Some Way that officer administering oath had authority, p. 273.

Cited in *Blanchard v. Bennett*, 1 Or. 330, applying the rule where it did not appear who administered the oath.

Evidence.—Courts Take Judicial Notice of existence and qualifications of persons authorized to administer oaths, p. 273.

Cited in *Roy v. Horsley*, 6 Or. 271, and *Meldrum v. United States*, 151 Fed. 192, 80 C. C. A. 545, 10 Ann. Cas. 324, both following the rule; *Bell v. Stevens*, 116 Iowa, 455, 90 N. W. 88, taking notice that certain person was county treasurer. Cited in note to 106 Am. St. Rep. 826, 827, on persons in whose name deputy should act.

1 Or. 274-275, **SEBORITA, THE, v. SIMONDS.**

This case has not been cited.

1 Or. 276-279, **KNIGHTON v. SMITH.**

Cited in note to 41 Am. Dec. 168, on sufficiency of acknowledgment of deeds.

1 Or. 281-282, **HEMINGTON v. STATE.**

Statutes.—Criminal Statutes must be Constructed according to their natural and grammatical meaning, p. 282.

Cited in *State v. Chapman*, 22 KAN. 136, 5 Pac. 799, to point that, penal statutes must be strictly construed; *United States v. Garretson*, 42 Fed. 25, holding that penal statutes cannot be extended beyond their obvious meaning.

**1 Or. 283-285, STEPHENS v. POWELL.**

Cited in notes in 59 L. R. A. 543, on establishment, regulation and protection of ferries; 83 L. R. A. 180, on legislative power to fix tolls, rates, or prices.

**1 Or. 285-287, KEITH v. GREENY.**

**Public Lands.—Donation Certificate is proof of residence and cultivation, p. 287.**

Cited in *Willamette Falls etc. Co. v. Gordon*, 6 Or. 177, reaffirming the rule.

**Ejectment.—Donee of Public Land holding a certificate may maintain an action against one who shows no color of title, p. 287.**

Cited in *Tyee Consol. Min. Co. v. Langstead*, 136 Fed. 127, 69 C. C. A. 548, approving the rule and considering it as basis for competing statute of limitations.

**1 Or. 288-289, McCLANE v. THOMAS.**

This case has not been cited.

**1 Or. 290-292, JENNINGS v. STATE.**

This case has not been cited.

**1 Or. 292-294, JOHNSON v. MCGINNESS.**

**Payment.—Money Paid Without Fraud, under mistake of law, cannot be recovered back, p. 294.**

Cited in *Evans v. Hughes County*, 3 S. D. 252, 52 N. W. 1065, reaffirming and applying the rule; *Scott v. Ford*, 45 Or. 543, 78 Pac. 746, 68 L. R. A. 469, holding that money so paid may be recovered in assumpsit.

**1 Or. 295-299, WELLS, FARGO & CO. v. WALL.**

**Equity.—Adequate Remedy at Law bars equitable relief, p. 296.**

Cited in *Willis v. Crawford*, 38 Or. 530, 63 Pac. 988, 53 L. R. A. 904, following the rule. Cited in notes to 53 Am. St. Rep. 447, on negligence as bar to equitable relief against judgments; 31 L. R. A. 38, on negligence as cause for, and as bar to, injunctions against judgments; 32 L. R. A. 326, 328, on equitable jurisdiction in regard to injunctions against judgments; 30 L. R. A. 787, on injunctions against judgments obtained by fraud, accident, mistake, surprise and duress.

**1 Or. 300-306, McEWEN v. PORTLAND.**

**Ejectment.—Plaintiff must prevail upon the strength of his own title, p. 302.**

Cited in *Sommer v. Compton*, 52 Or. 178, 96 Pac. 126, reaffirming the rule.

**1 Or. 307-308, ROCHESTER v. ROCHESTER.**

This case has not been cited.

**1 Or. 308-312, GIRD v. STATE.**

This case has not been cited.

**1 Or. 312-314, STRANG v. KEITH.**

This case has not been cited.

**1 Or. 314-317, DUNCAN v. THOMAS.**

**Attachment.—Redelivery Bond is Discharged by a seizure of the property under another attachment, p. 316.**

Cited in *Drake v. Sworts*, 24 Or. 202, 33 Pac. 564, holding that the giving of a redelivery bond does not discharge the attachment or waive the right of action on the attachment bond.

**1 Or. 317-320, MOORE v. FIELDS.**

**Public Lands.—Courts will Entertain no proceedings arising out of facts still pending before the federal land department, p. 319.**

Cited in *Frink v. Thomas*, 20 Or. 272, 25 Pac. 720, 13 L. R. A. 239, and *Robertson v. Geer*, 42 Or. 189, 70 Pac. 617, both reaffirming and applying the rule.

**1 Or. 321-325, ZACHARY v. CHAMBERS.**

**Executors and Administrators.—“Presentation” of Claim necessarily includes every ingredient the law imposes, and if the claimant fail in the legal requirements there is no presentation, p. 324.**

Cited in *Douglass v. Folsom*, 21 Nev. 449, 38 Pac. 663, holding presentation to attorney for the estate insufficient. Cited in note in 130 Am. St. Rep. 322, on statement of claims against estate of deceased persons.

**Executors and Administrators.—Where the Claim is not properly presented and is rejected, there can be no suit on it, pp. 324, 325.**

Cited in *Wilkes v. Cornelius*, 21 Or. 352, 28 Pac. 136, holding the rule applicable to proceedings under Hill's Code, section 1134.

**1 Or. 325-328, GRAHAM v. MEEK.**

**Estoppel.—The Doctrine of Estoppel applies to deeds without warranty and extends to married women, pp. 327, 328.**

Cited in *Hallyburton v. Slagle*, 132 N. C. 952, 44 S. E. 657, holding grantor estopped by deed with covenant of warranty; *King v. Bear*, 56 Ind. 18, holding married woman estopped by deed to assert even after-acquired title. Cited in notes in 28 Am. Rep. 374, on estoppel of married woman; 22 L. R. A. 781, on effect of covenants of married women and their estoppel by deed or mortgage.

**1 Or. 328-330, BLANCHARD v. BENNETT.**

**Pleadings.—Verification may be Amended in form or substance in sound discretion of court, p. 329.**

Cited in *McMath v. Parsons*, 26 Minn. 247, 2 N. W. 704, holding defective verification of complaint no ground for dismissal.

**Appeal.**—**Appeal Lies from All Final Decisions of Justices of the peace and the remedy by certiorari is concurrent**, p. 330.

Cited in *Schirott v. Phillippi*, 3 Or. 486, holding writ of review and appeal concurrent remedies; *Feller v. Feller*, 40 Or. 77, 66 Pac. 470, holding that after a person has commenced an appeal he may abandon it before it is perfected and sue out a writ of review.

Apparently overruled in *Ramsey v. Pittingill*, 14 Or. 208, 12 Pac. 440, holding review barred by loss of right to appeal by lapse of time.

#### 1 Or. 332-333, **ROBERTS v. CARLAND.**

**Costs.**—**Where Plaintiff's Claim is Reduced below fifty dollars by setoff he may recover costs**, p. 333.

Cited in *Rayburn v. Hard*, 19 Or. 60, 23 Pac. 669, reaffirming and applying the rule.

#### 1 Or. 333-339, 80 Am. Dec. 396, **GOODALL v. STATE.**

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Cited in *State v. O'Shea*, 60 Kan. 781, 57 Pac. 973, holding that dying declarations may be contradicted or discredited like other testimony; *Carver v. United States*, 164 U. S. 697, 17 Sup. Ct. Rep. 228, 41 L. ed. 603, holding that such declarations may be impeached; *State v. Doris*, 51 Or. 152, 94 Pac. 49, 16 L. R. A., N. S., 660, holding that dying declarations must be confined to circumstances immediately connected with the fatal injury. Cited in notes to 86 Am. St. Rep. 642, 665, on admissibility of dying declarations; 56 L. R. A. 420, on dying declarations as evidence.

**Witnesses.**—**Evidence Introduced to Lay Foundation for impeachment must be relevant to the issue**, p. 335.

Cited in *Williams v. Oulver*, 39 Or. 341, 64 Pac. 764, reaffirming the rule.

**Homicide.**—**When, from the Nature of the Attack, made by deceased, there is reasonable ground to believe there is a design to take life or commit a felony, the killing is excusable**, p. 337.

Cited in *State v. Gibson*, 43 Or. 193, 73 Pac. 336, reaffirming and applying the rule; *State v. Doty*, 5 Or. 495, distinguishing the facts; *State v. Smith*, 43 Or. 118, 71 Pac. 976, and *State v. Miller*, 43 Or. 333, 174 Pac. 660, both holding homicide justifiable only when death or great bodily harm is imminent. Cited in notes in 19 L. R. A., N. S., 495, on applicability of rule of reasonable doubt to self-defense in homicide; 3 L. R. A., N. S., 547, on standpoint of determination as to danger and necessity to kill in self-defense.

**Homicide.**—**Malice is not Proved from mere proof of killing**, p. 338.

Cited in *State v. Whitney*, 7 Or. 392, further illustrating the rule; *State v. Gibson*, 43 Or. 190, 73 Pac. 335, holding that the burden of proof never shifts from state to accused.

Miscellaneous.—*R. v. Woodcock*, *R. v. Reddingfield*, 21 Eng. Bul. Cas. 308, and *Harris v. Tippet*, *Bax v. Watson*, 11 Eng. Bul. Cas. 153, are not accessible.

1 Or. 339-341, **CHARMAN v. McLANE**.

This case has not been cited.

1 Or. 341-343, **ROGUE RIVER MIN. CO. v. WALKER**.

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Distinguished in *Kinkade v. Myers*, 17 Or. 471, 21 Pac. 558, where defendant appeared specially to have the service set aside.

1 Or. 394-396, **SNYDER v. VANNOY**.

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Cited in *Muse v. Wafer*, 29 Kan. 282, holding that judgment will not be enjoined unless it appear that it was wrong and against equity and good conscience to enforce it.

1 Or. 347-350, **BUCKLES v. STATE EX REL FULLERTON**.

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1 Or. 350-352, **ALTREE v. MOORE**.

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1 Or. 353-357, **GUTHRIE v. THOMPSON**.

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**Vendor and Purchaser.**—Written Contract to convey may be abandoned by parol, p. 356.

Cited in *Elliott v. Bozorth*, 52 Or. 403, 97 Pac. 636, reaffirming and applying the rule; *Wulschner v. Ward*, 115 Ind. 223, 17 N. E. 275, upholding oral rescission of incomplete sale of chattel. Cited in notes to 56 Am. St. Rep. 662, on modification of written contract by subsequent parol agreement; 100 Am. Dec. 172, parol alteration of contracts within statute of frauds.

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**Taxation.**—When State Assesses County with its proportion of state revenue, the county and state stand in the relation of debtor and creditor, p. 359.

Cited in *Hume v. Kelly*, 28 Or. 405, 43 Pac. 381, approving the rule; *State v. Baker County*, 24 Or. 143, 33 Pac. 530, applying the rule in a similar case; *Gilliam Co. v. Wasco Co.*, 14 Or. 525, 13 Pac. 324, applying the rule on division of county, and assumption of debt.

**1 Or. 360-363, CAIN v. HARDEN.**

This case has not been cited.

**1 Or. 364-367, KEITH v. QUINNEY.**

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**1 Or. 381-396, LOWNSDALE v. PORTLAND (No. 1).**

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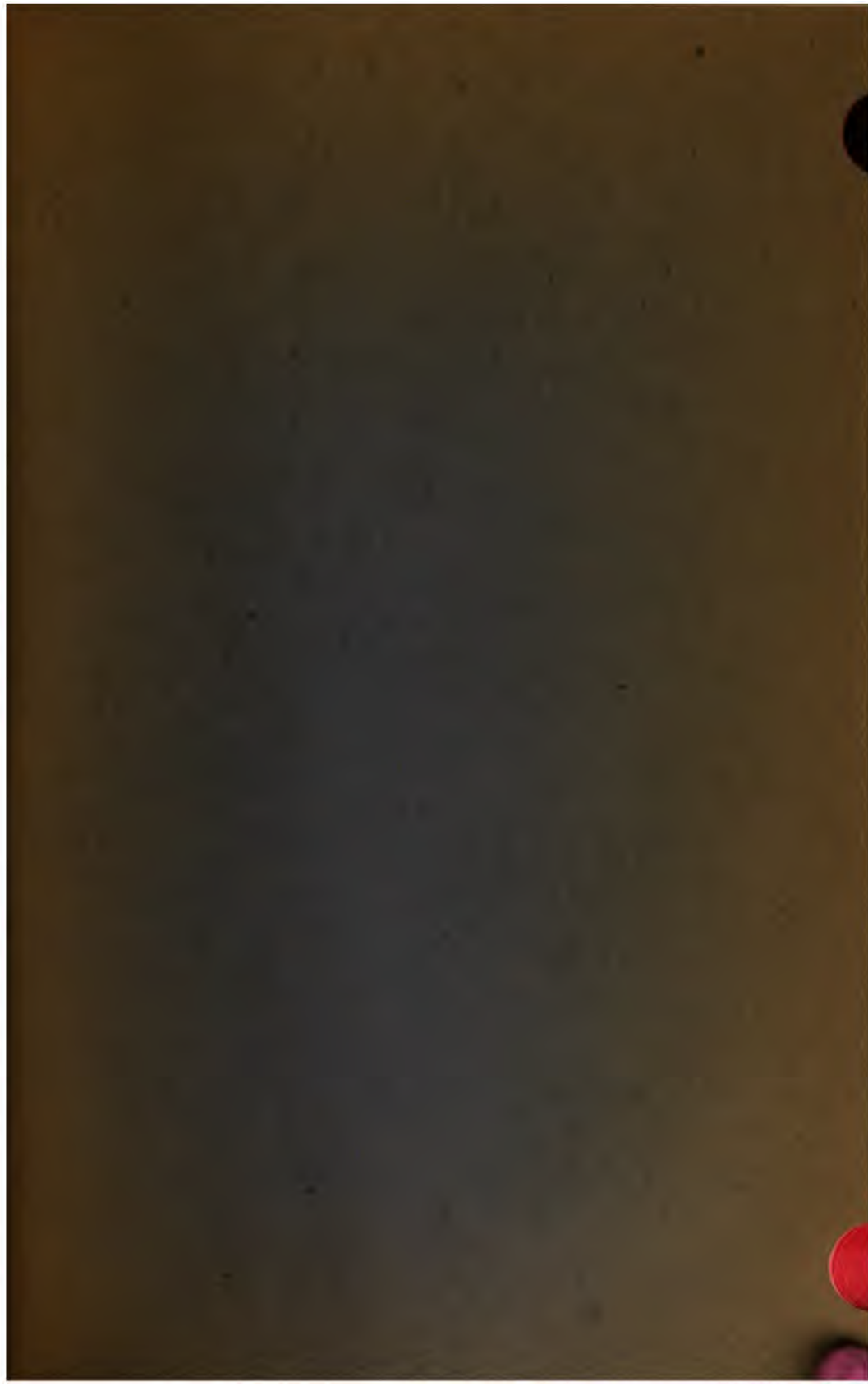
**1 Or. 418-430, EDWARDS v. PANAMA, THE.**

This case has not been cited.

**1 Or. 430-436, WALING v. CHRISTINE, THE.**

This case has not been cited.







**EXTRA ANNOTATED EDITION.**

**REPORTS OF CASES**

**DECIDED IN**

**THE SUPREME COURT**

**OF THE**

**STATE OF OREGON.**

**FROM 1862 TO 1869.**

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**BY JOSEPH G. WILSON,**

**JUSTICE OF THE SUPREME COURT, AND OFFICIAL REPORTER.**

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**VOLUME 2.**

**SAN FRANCISCO:  
BANCROFT-WHITNEY COMPANY,  
LAW PUBLISHERS AND LAW BOOKSELLERS.  
1911.**

Entered according to the Act of Congress, in the year eighteen hundred  
and sixty-nine.

By JOS. G. WILSON,  
in the Clerk's Office of the District Court of the United States for the  
District of Oregon.

[2 Oregon]

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## PREFACE.

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THE anomalous position of some cases in this volume requires some explanation. The Constitution, article 7, section 7, provides that "at the close of each term the judges shall file with the Secretary of State concise written statements of the decisions made at that term." The two-fold duties of the justices, in Supreme and Circuit Courts, and the times for holding the latter render the time for holding the former so brief, that it was only sufficient for hearing the arguments and deciding the cases, and afforded no leisure for the preparation of written opinions during the term. At the close of that term it has been the custom to determine what cases were of sufficient importance to warrant written decisions and allot them to the respective justices for preparation. In some cases opinions were filed more than two years after the decision was rendered. The first volume of Oregon Reports was published early in 1862; and the first five opinions in this volume were not then ready, but are now published in their respective order.

Until the term of 1865, there was no rule as to the filing of briefs, except at the option of the attorney, and until that term the reporter has made no immediate reference to briefs; and in no case since had he deemed it necessary to incumber the volume with the long printed briefs. Only such parts thereof as embrace the real points in issue, and the particu-

lar authorities bearing upon the same, have been introduced in this volume, and only then in certain causes. The aim is to make the volumes books of *decisions* rather than of *briefs*, otherwise the Oregon Reports might have been respectable in *number*, containing occasional pages of what is of real value. Some cases are reported which contain questions of practice, in which the justices have written no opinions, but which have been prepared by the reporter. None of these occur prior to the term of 1867, as until that time there was no official reporter of the court.

J. G. WILSON, *Reporter*

DALLAS CITY, OREGON, *April*, 1869.

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**JUSTICES**  
**OF THE**  
**SUPREME COURT OF THE STATE OF OREGON.**

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SALARY, \$2,000.

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AARON E. WAITT, *Chief Justice* from 1859 to 1862. ELECTED, 1858;  
RESIGNED MAY, 1862.  
MATTHEW PAUL DEADY, ELECTED, 1858; RESIGNED, 1859.  
PAINE PAIGE PRIM, *Chief Justice* from 1864 to 1866. APPOINTED  
1859 (*vice* DEADY); ELECTED, 1860—RE-ELECTED, 1866.  
WILLIAM WILMER PAGE, APPOINTED from May to September, 1862  
(*vice* WAITT).  
REUBEN P. BOISE, *Chief Justice* from 1862 to 1864. ELECTED 1858;  
RE-ELECTED, 1864. *Chief Justice*, from 1861 to —.  
RILEY EVANS STRATTON,\* ELECTED, 1858; RE-ELECTED, 1864 —  
Died December 26, 1866.  
ALONZO A. SKINNER, APPOINTED, 1866 (*vice* STRATTON).  
ERASMUS D. SHATTUCK, *Chief Justice* from 1866 to 1867. ELECTED,  
1862; RESIGNED December, 1867.  
WILLIAM W. UPTON, APPOINTED December, 1867 (*vice* SHATTUCK);  
ELECTED, 1868.  
JOSEPH GARDNER WILSON, APPOINTED October 17, 1862 to 5th Ju-  
dicial District. ELECTED, 1864.  
JOHN KELSAY, ELECTED, 1868 (to fill vacancy, for two years, *vice*  
STRATTON).

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CLERKS.

JOSEPH G. WILSON, appointed 1859; resigned October 17, 1862.  
LUCIEN HEATH, appointed 1862; resigned 1864.  
RICHARD WILLIAMS, appointed 1864.

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\*Deceased.

## DISTRICTS IN 1868, AND JUDGES TO THAT TIME.

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**FIRST DISTRICT**—Counties of Jackson and Josephine.

M. P. DEADY, 1859.

P. P. PRIM, 1859.

**SECOND DISTRICT**—Counties of Coos, Curry, Douglas, Lane and Benton.

R. E. STRATTON, 1859.

A. A. SKINNER, 1867.

J. KELSAY, 1868.

**THIRD DISTRICT**—Counties of Marion, Polk, Linn, Tillamook and Yam Hill.

R. P. BOISE, 1859.

**FOURTH DISTRICT**—Counties of Washington, Clackamas, Multnomah Columbia and Clatsop.

A. E. WAIT, 1859.

W. W. PAIGE, 1862.

E. D. SHATTUCK, 1862.

W. W. UPTON, 1868.

**FIFTH DISTRICT**—Counties of Baker, Grant, Union, Umatilla and Wasco.

J. G. WILSON, 1862.

**SUPREME COURT OF THE TERRITORY OF  
OREGON.**

**ROLL OF ATTORNEYS**

**CORRECTED AND ENLARGED—WHEN ADMITTED—NOTES.**

**DECEMBER TERM, 1851.**

COLUMBIA LANCASTER,  
ARMORY HOLBROOK, 1866,\*  
AARON E. WAIT,  
EDWARD HAMILTON,  
JOHN B. PRESTON, 1865,\*  
ALEXANDER CAMPBELL,†  
WILLIAM W. CHAPMAN,  
WILLIAM T. MATTOCK,  
JESSE QUIN THORNTON,  
SIMON B. MARYE,\*  
DAVID B. BRENNAN,\*  
CYRUS OLNEY,  
JOHN B. CHAPMAN.\*

**DECEMBER TERM, 1852.**

JAMES K. KELLY,  
JOSEPH G. WILSON,  
REUBEN P. BOISE,  
DAVID LOGAN,  
MILTON ELLIOTT,  
JAMES McCABE,†  
GEORGE McCONAHA, 1855,\*  
MATTHEW P. DEADY,  
ADDISON C. GIBBS,  
A. B. P. WOOD,†  
A. LAWRENCE LOVEJOY,\*\*  
W. STUART BROCK.†

**JUNE TERM, 1853.**

BENJAMIN STARK,†  
P. Q. MARQUAM.

**DECEMBER TERM, 1853.**

LAFAYETTE GROVER,\*\*  
ELI M. BARNUM,†  
BENJAMIN F. HARDING,  
RILEY E. STRATTON, 1866.\*

**JUNE TERM, 1854.**

JAMES C. STRONG,†  
MARK P. CHINN, 1857.\*

**DECEMBER TERM, 1854.**

LAFAYETTE MOSHER,  
STEPHEN F. CHADWICK,  
COLUMBUS C. SIMS,†  
GEORGE K. SHEIL,  
DELAZON SMITH, 1860,\*  
NOAH HUBER, 1857,\*  
STUKELY ELLSWORTH.

**JUNE TERM, 1856.**

THOMAS H. SMITH,†  
SYLVESTER PENNOYER.

\*Resigned. †Removed from the State. \*\*Retired from practice.

DECEMBER TERM, 1856.

BENJAMIN F. BONHAM,  
ANDREW J. THAYER,  
JOHN KELSAY.

AUGUST TERM, 1857.

WILLIAM W. PAGE,  
LANSING STOUT,  
GEORGE H. WILLIAMS.

AUGUST TERM, 1858.

R. B. SNELLING,†  
BENJAMIN F. DOWELL,  
CHESTER N. TERRY,  
GEORGE B. CURRY,  
JOHN R. McBRIDE.†

**SUPREME COURT OF THE STATE OF OREGON.**

DECEMBER TERM, 1859.

JAMES M. PYLE, 1867,\*  
JOHN H. REED,  
DAVID W. DOUTHITT,†  
GEORGE L. WOODS.

JULY TERM, 1860.

GEORGE H. CARTTER, 1861,\*  
ERASMUS D. SHATTUCK,  
WILLIAM C. JOHNSON,  
WILLIAM S. BUCKLEY,†  
JAMES A. ODELL,  
JOHN H. MITCHELL,  
EDWARD C. NUGENT,†

DECEMBER TERM, 1860.

NELSON H. CRANOR,  
HARTWELL C. PRESTON,†  
HYER JACKSON,  
JOSEPH C. POWELL,  
JAMES D. FAY,  
JOHN C. CARTWRIGHT,  
CLARK P. CRANDALL.\*\*

JULY TERM, 1861.

NATHAN T. CATON,†  
WILLIAM LAIR HILL,  
GEORGE R. HELM,

OWEN N. DENNY,†  
HENRY A. GEHR,  
WILLIAM WALDO,\*\*  
CORNELIUS C. CURL.

JULY TERM, 1862.

WILLIAM T. WELCKER,†  
RUFUS MALLORY,  
JOHN CUMMINS.

SEPTEMBER TERM, 1863.

JOSEPH GASTON,  
L. P. HIGBY,†  
F. O. McCOWN,  
N. H. GATES,  
JAMES S. REYNOLDS,†  
JESSE A. APPLGATE,  
E. F. RUSSELL,  
JAMES F. WATSON,  
P. S. KNIGHT,\*\*  
JOSEPH D. LOCEY,  
DAVID W. LICHTENTHALER,  
J. J. WALTON, JR.  
CHARLES B. BELLINGER,  
HUGH N. GEORGE,  
ORLANDO HUMASON,  
LEOPOLD WOLFF,  
E. N. TANDY,  
EUGENE SEMPLE,

\*Deceased. †Removed from the State. \*\*Retired from practice.

DAVID FRIEDENRICH,  
D. M. RISDON,  
M. W. MITCHELL, †  
JOSEPH N. DOLPH,  
RICHARD WILLIAMS,  
EBENEZER E. HAFT, †  
J. B. MEDOKUM. †

SEPTEMBER TERM, 1864.

E. W. HODGKINSON,  
JOHN H. STINSON,  
JOHN T. DALY, \*  
WILLIAM W. UPTON,  
WILLIAM R. WILLIS,  
ISAAC D. HAINES,  
GEORGE B. DORRIS,  
JAMES R. NEILL,  
EDWARD C. ROSS, \*  
LUCIAN EVERTS,  
D. A. QUICK,  
ALBERT G. HOVEY, \*\*  
JOHN W. WHALLEY,  
ISAAC STIERS, \*  
CHARLES R. MEIGS, †  
R. H. BOOTH, \*  
WM. F. BRENAN, \*  
GEORGE H. STEWARD,  
THOMAS D. WINCHESTER,

SEPTEMBER TERM, 1865.

ANDREW J. LAWRENCE, †  
JOHN J. SHAW,  
WM. F. TRIMBLE,  
CHARLES H. LARABEE, †  
SAMUEL A. MORELAND,  
HENRY W. SCOTT, \*\*  
M. H. ADAMS, \*  
L. FLINN,  
JOHN F. MCCOY,  
RUSSELL B. MORFORD,

SEPTEMBER TERM, 1866.

ORANGE JACOBS, †  
L. O. STERNS,  
GEORGE P. HOLMAN,

JAMES H. SLATER,  
JASPER W. JOHNSON,  
GEORGE V. SMITH, †  
WILLIAM D. HARE,  
P. C. SULLIVAN,  
M. P. BULL.  
C. P. MASON,  
ROYAL A. PIERCE,  
P. L. WILLIS,  
B. WHITTEN,  
ROBERT C. BYBEE,  
THOMAS H. BRENTZ, †  
JAMES G. CHAPMAN,  
E. M. ENGLE,  
BINGER HERMAN,  
JAMES GUTHRIE,  
CYRUS A. DOLPH,  
T. B. HANDLY,  
SYLVESTER C. SIMPSON,  
C. BEALL,  
JOHN CATLIN,  
S. HURLBURT,  
JAMES B. UPTON,

SEPTEMBER TERM, 1867.

DAVID M. McKENNY,  
FREDERIC ADAMS, †  
N. B. KNIGHT,  
M. W. FECHHEIMER,  
CHARLES N. B. UPTON,  
WILLIAM C. WHITSON,  
ALBERT F. FORBES,  
WILLIAM W. BANCROFT,  
HEZEKIAH Y. THOMPSON,  
SAMUEL C. SIMPSON,  
G. WEBSTER,  
BENTON KILLEN,  
DANIEL GABY,  
CHARLES W. PARRISH,  
E. E. BRADSHAW,  
WILLIAM W. DRUMMOND.

SEPTEMBER TERM, 1868.

LYCURGUS VINEYARD,  
JAMES W. PARKER,  
WILLIAM W. BOON,

\*Deceased. † Removed from the State. \*\* Retired from practice.

JOHN M. THOMPSON,  
J. E. ROSE,  
JOSEPH HANNON,  
CHARLES W. KAHLER,  
C. W. FITCH,  
J. H. TURNER,  
J. H. MEYER,  
E. R. WATSON,  
J. M. CAIN,  
D. L. WATSON,  
HENRY MOOR,  
H. HURLEY,  
W. M. RAMSEY,

N. L. BUTLER,  
W. P. LORD,  
ALANSON SMITH,  
WALTER W. THAYER,  
D. M. C. GAULT,  
WILLIAM G. TVAULT, 1869,\*  
JAMES F. GAZLEY,  
JOHN F. GAFFLE,  
E. A. CRONIN,  
R. F. HENSILL,  
SETH WELDY,  
J. C. WORK,

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### ACTS PASSED WITH REFERENCE TO THE SUPREME COURT.

*An Act to create the Fifth Judicial District, and increase the number of Justices of the Supreme Court.*

SECTION 1. To provide for the emergency created by the rapid settlement of the State east of the Cascade mountains, the number of justices of the Supreme Court is hereby increased to five.

§2. The county of Wasco, together with all the counties and territory east of the Cascade mountains, are hereby erected into a separate judicial district, to be called the fifth district.

Approved October 11, 1869.

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*An act to fix the time and place for holding the Supreme Court.*

SECTION 1. That a term of the Supreme Court shall be held at the seat of government on the first Monday in September, annually.

Approved October 17, 1869.

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\* Deceased.

## Rules Adopted by the Supreme Court.

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24. December Term, 1859. That the clerk be authorized to tax, as a part of the costs against the losing party, the sum of three dollars in each cause, as fees for recording the opinion of the court therein.

25. July Term, 1861. That the second day of each term of this Supreme Court be set apart as the time when persons, desiring admission to practice as attorneys and counselors in the courts of this State, may appear and present their applications; and having been examined in open court, touching their qualifications for admission to practice, if found duly qualified, may be admitted; and that such admission shall entitle such attorney and counselor to practice in all the courts of this State; and that applications for admission as such officers can only be made in this court.

26. July Term, 1861. That the fee for such admission be fixed at five dollars, which shall entitle the attorney to a certificate of admission.

27. September Term, 1865. That the examination of applicants for admission as attorneys, shall be conducted by the justices, and that the examination be divided into the following branches, viz.: Pleading, evidence, contracts, real



property and equity, and that each applicant must be prepared for examination in the following books, viz.: Chitty, on Pleadings, Wharton's Criminal Law, Greenleaf on Evidence, Blackstone's Commentaries, Kent's Commentaries, Story's Equity Jurisprudence, or Willard's Equity Jurisprudence. Each applicant must produce the affidavit of some attorney in good standing, as to the time the applicant may have been engaged in the study of the law; and also the affidavit of two attorneys as to the applicant's moral character.

28. That in all cases heard in this court the counsel on both sides shall present a printed brief containing an abstract of the pleadings, the points relied on by counsel, references to the authorities cited, arranged under the proper heads, and shall serve copies of such briefs on the opposite counsel at least one day before the hearing; and at the hearing shall furnish a copy of such brief to each of the judges, and file a copy with the papers in the case.

29. That the causes from each judicial district be docketed together, and be heard in the order in which they stand: those from the first district first, then those from the second district, and so on in numerical order.

30. Rule 27th is amended, and the last clause made to read as follows: "That each applicant must produce the affidavit of some attorney of good standing in this court that such applicant, if a graduate of a literary institution, has read law at least two years. If not such graduate, then at least three years, and has been critically examined in the books prescribed in Rule 27.

31. An applicant, producing proper evidence of graduation at law school, by the laws and customs of the State in which such school is situated, entitling him to admission in its courts of equal jurisdiction with this court, may be admitted without further examination.



CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of the State of Oregon,

ADDITIONAL TO THOSE IN VOLUME ONE.

DECEMBER TERM, A. D. 1860.

AARON E. WAIT, *Chief Justice*,  
REUBEN P. BOISE,  
RILEY E. STRATTON, } *Justices*.  
PAINE P. PHIM,

J. G. WILSON, *Clerk*.

SCHLUSSEL & ROSEN, Plaintiffs in Error, v. DANIEL  
B. WARREN, Defendant in Error.

*Error to Linn County.*

After the assignment of a negotiable promissory note by the payee, the maker having, without the knowledge of the indorsers, stipulated in writing, on the note, that he would pay a higher rate of interest thereon from that time—*Held*, That it was a contract without any consideration, and of no effect to discharge the indorsers from liability.

This action was brought by defendant in error against Schlusssel & Rosen, as indorsers on a promissory note, executed by N. Wright to them, which is in these words:

"ALBANY, February 1st, 1855.

"On demand, I promise to pay to Schlusssel & Rosen the  
"sum of sixty dollars and sixty-three cents, with interest.

"N. WRIGHT.

"(Indorsed.) SCHLUSSEL & ROSEN."

On the back of which are indorsed these words:

"I agree to pay two per cent interest per month on the principal and interest, from this date till paid on the within note.

"NELSON WRIGHT.

"ALBANY, *January 24th*, 1857."

Among other defenses, the plaintiffs in error set up that they were discharged from any further liability as indorsers upon the note, by reason of the holder and maker thereof having entered into an agreement to extend the time of payment, and increase the rate of interest specified in the note, without their knowledge or consent. To sustain this defense on the trial, they offered in evidence the writing heretofore set out as endorsed on the note, and it being excluded by the circuit judge from the consideration of the jury, exceptions were taken by plaintiffs in error to the ruling, and the cause is brought here for review.

*Williams & Powell*, of counsel for plaintiffs.

*N. H. Cranor, Esq.*, of counsel for defendant.

PRIM, J. The principal question raised in this record is whether the circuit judge erred in excluding the writing indorsed on the note from the consideration of the jury. The answer claims that there was an agreement, entered into between the maker and the holder of the note after the indorsement by plaintiffs, that the time of payment should be extended and the rate of interest increased. On the trial this writing, indorsed on the note, was offered in evidence to sustain this answer. Does it amount to a contract, or an agreement between these parties on this subject? If so, it would be evidence and ought to have been admitted to the jury, for their determination of its sufficiency, but, by examination of this writing, we find it a mere naked promise on the part of the maker of the note, to pay a greater rate of interest than was specified in it, without any consideration whatever to

sustain it, for the time of payment is not extended one day or one hour. It was then a void promise, for the want of a consideration, and was not evidence in the case, and was therefore very properly excluded by the judge from consideration by the jury. It is also claimed by the plaintiffs in error that this cause ought to be reversed, because the complaint does not contain facts sufficient to constitute a cause of action; but, on examination of it, we are of the opinion that it does contain sufficient ground, and, therefore, a further consideration of this point is unnecessary. There is no error in this cause for which it should be reversed, and *judgment is therefore affirmed.*

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GEORGE P. WREN, Plaintiff in Error, v. SHELDON B.  
FARGO, Defendant in Error.

*Benton County.*

1. When it is apparent that an alteration has been made in an executed instrument, parol evidence is admissible to show under what circumstances the alteration was made, and by whom, and when.
2. The Board of County Commissioners is a body of limited jurisdiction, and having approved of the sheriff's bond, the commissioners could not afterward, on their own motion disapprove the same, and thus change the vested rights of parties in the bond.

THIS action was commenced by Fargo against Wren, for the usurpation of the office of sheriff of Benton county, and for the recovery of the fees and emoluments of the office during the usurpation thereof. Fargo alleges that on the 7th day of June, 1858, he was duly elected sheriff of the county, and on the 6th day of July thereafter, at the July session of the Board of County Commissioners, he presented his official bond, which was accepted and approved by the commissioners, and he was then and there duly installed in the office of sheriff, and that afterwards the office was usurped by Wren. The answer of Wren traverses all

these allegations, and claims that the official bond tendered by Fargo was disapproved by the commissioners, instead of approved, as alleged. These issues were submitted to a jury, and, at the trial, Fargo offered in evidence his original official bond, which he claimed had been accepted by the commissioners, and it appearing by inspection thereof that the indorsement on the bond had been materially changed or altered, the Circuit Court admitted parol evidence to account for the apparent change or alteration of the indorsement on the bond. Plaintiff in error objected to the admission of parol evidence, and his objection being overruled by the judge, and the evidence admitted, he took exception to the ruling. The parol evidence in substance shows that, on the 6th day of July, 1858, at the July session of the board, the official bond of Fargo was presented by him for approval. The clerk of the Board of Commissioners received it, and showed it to each of the commissioners, and they having pronounced it a good bond, he indorsed on it "Approved," and administered the oath of office to Fargo. On the next day of the same session, in the absence of Fargo and without his knowledge the commissioners sent for two of the sureties on the bond and informed them that Fargo was in arrears to the county to the amount of twenty-eight hundred dollars, and thus they were induced to have their names erased from the bond, which had already been approved and filed on the day before. The commissioners then immediately disapproved the bond and ordered the syllable "dis" to be prefixed to the word "approved" indorsed on the bond on the previous day. The office of sheriff was declared vacant by the commissioners, and Wren was appointed to fill the vacancy. In the court below the decision was in favor of Fargo, and the cause was taken to Supreme Court by Wren for error.

*Curry & Powell*, counsel for plaintiff.

*G. H. Williams, Esq.*, counsel for defendant.

PRIM, J. The plaintiff in error contends that the court below improperly admitted parol evidence to account for the apparent alteration of the indorsement made on the official bond of Fargo by the Board of County Commissioners; because, he says, it contradicts the written terms of the record. If that were true, the objection would be a good one; but, we think, such was not the effect, or the purpose of its admission; but it was to ascertain what the written terms of the record were, by ascertaining when, by whom, and under what circumstances the alteration, apparent by inspection, was made. Our statute, on page 138, section 46, provides that "any party producing a writing as genuine, which has been altered after its execution in a part material to the question in dispute, and such alteration is not noted in the writing, shall account for the alteration or appearance." Also, in the case of *Speake et al v. United States*, 8 Curtis, p. 246, Justice Story, in delivering the opinion of the court, used these words: "But it is to be considered that the parol evidence is not admitted to explain or contradict the terms of the written contract, but only to ascertain what those written terms are. On *non est factum*, the present validity of the deed or contract is in issue; and every circumstance that goes to show that it is not the deed or contract of the party is provable by parol evidence. It is of necessity therefore that the other party should support it by the same evidence. The fact that there is an erasure, or interlineation, apparent on the face of the deed, does not of itself avoid it. To produce this effect, it must be shown to have been made under circumstances that the law does not warrant. Parol evidence is let in for this purpose; and the mischief, if any, would equally press on both sides."

If it could not be admitted for such purposes, under such circumstances, it would be in the power of any one, who might have charge of the records, or who might obtain access to them, to make material alterations in them, and thus make them read entirely different from the way they were

originally made. On the 6th day of July, 1858, the official bond of Fargo was accepted, approved, and the approval indorsed thereon and filed, and the oath of office taken. Now, had the commissioners any power or authority, on the next day in the absence of Fargo, and without his knowledge, to cause two of the sureties to come before them, and have their names erased from the bond, and order it disapproved, after they had once acted upon it? We think not. Their powers and jurisdiction are limited by statute; and any official act of theirs, not thus authorized, is void. When the official bond of Fargo was presented, it was their duty to see that it was such an one as the law required, and if so, to approve it and cause their approval to be indorsed thereon, and it filed away among the public records; and the rights of the county became vested in the bond, and the sureties thereon responsible for the official acts of the sheriff; and after that, any act of the commissioners, interfering with those vested rights, was without authority, and, therefore, void. We are of the opinion that there is no error in this cause for which it should be reversed, and *judgment is affirmed.*



CASES  
ARGUED AND DETERMINED  
IN THE  
Supreme Court of the State of Oregon,  
ADDITIONAL TO THOSE IN VOLUME ONE.

DECEMBER TERM, A. D. 1861.

AARON B. WAIT, *Chief Justice.*

RILEY E. STRATTON,

REUBEN P. BOISE,

} *Justices.*

J. G. WILSON, *Clerk.*

\*A. FAHIE, Appellant, v. E. B. and PENNA PRESSEY,  
Respondents.

*Appeal from Multnomah County.*

1. Equity affords no relief to a party who has lost his remedy at law through ignorance of a fact, which he might have obtained by proper diligence; unless there has been some mistake, accident or fraud.
2. Under a decree of foreclosure at a sale of a lot supposed to belong to P. but in fact to his wife, who was not served in the suit.—*Held*, 1. That the wife by her mere silence was not estopped from afterwards asserting her rights. 2. That, although she received a part of the purchase money of the sale, she must be taken to have acted as agent for, or subject to her husband. 3. That the legal title of mortgaged property being in the wife, she is a necessary party to the foreclosure suit.

THE complainant filed his bill in chancery in the Circuit Court for Multnomah county, and shows the following state of facts:

The respondents, E. B. Pressey and Penna Pressey, his wife in 1859, executed a mortgage upon lot number four in

\* See 80 Am. Dec. 401.

block number —, in the city of Portland, Oregon, to one William O'Neill, to secure the payment of five hundred dollars with interest, for which there was also a note executed by E. B. Pressey and one Lathrop. In case of default of payment the mortgage empowered the mortgagee to sell the premises in manner as prescribed by law, pay the debt, and pay the surplus if any to E. B. and P. Pressey. The bill states that default was made in payment of the note; that suit was commenced for foreclosure of mortgage, and that E. B. and Penna Pressey and Lathrop were made defendants, but that service was had upon E. B. Pressey only. At the November term of the court, 1860, a decree of foreclosure was entered against E. B. Pressey, and an order made for the sale of the premises; and the cause continued as to the other defendants. Under the order of sale, the premises were regularly sold at public auction to the complainant, for the sum of one thousand four hundred and seventy-five dollars. It is alleged that, after the payment of the debt, interest and costs, there was a balance of some six hundred dollars paid over to and received by Penna Pressey. The bill avers that at the time of the sale all parties looked upon the proceedings as foreclosing the rights and interests of both E. B. and Penna Pressey. That some time after the sale, complainant discovered that the title of the property was in Penna Pressey, but avers upon information and belief that the lot is in fact the property of E. B. Pressey, that the same was purchased and improved with his money, and that the right of Penna Pressey is merely nominal; that she had full knowledge of all the proceedings as aforesaid, and that the property was advertised as the property of E. B. Pressey; that she suffered the same to be sold as such, and that, with a full knowledge that the property had been so sold, she received a part of the proceeds of said sale and ratified the same; but afterward she set up a claim to the property, and refused to recognize the right of the complainant thereto, thereby rendering the property of little value in the hands of the complainant. To

foreclose this alleged nominal interest was the purpose of the bill. The respondents demurred, the demurrer was sustained, and the complainant appealed.

*Geo. H. Williams, Esq.*, of counsel for appellant.

*Smith & Page*, of counsel for appellees.

STRATTON, J. As the case stands on demurrer to the bill, it must be determined by such interpretations as by law ought to be given to the allegations of complainant; and, upon these allegations, not controverted, is he entitled to relief upon his own showing? It may be remarked in passing, as a well settled rule of pleading, that every question of accident, surprise, mistake or fraud, must rest, not upon the mere statement of the pleader, *eo nomine*, but upon such a showing of facts and circumstances, if taken as true, as must lead to that legal conclusion. (*Story, Eq. Pl.*, 251.)

Upon similar principle and for like reasons, the legal relations of persons and property are not to be affected by mere allegations, unsupported by facts, such as would justify a court in pronouncing judgment for the alleged upon such a showing of facts on the record.

These rules follow in a great measure from the character of the demurrer, as well as from the necessity and justice of putting the respondents upon notice of the particular case which he has to meet. Tested by these rules, no question of mistake or fraud could legally arise upon the complaint before us. We will consider each question more in detail. While it is the peculiar province of a court of equity to inquire into, and relieve against the consequences of mistake of facts, into which a complainant may have fallen to his damage, it by no means follows that every mistake of facts which has worked an injury is relievable against. A large proportion of the misfortunes of life are not so much attributable to the superior sagacity or over-reaching unscrupulousness of one class, as to

the blind folly and negligence of another. Litigation would never end were courts to undertake to restore the equilibrium of right between all such parties. To entitle a party to relief in such cases, the facts must not only be material, but must be such that he could not with reasonable diligence have obtained knowledge of them. Where there is neither accident nor mistake, fraud nor misrepresentation, equity affords no relief to a party on the ground that he has lost his remedy at law through mere ignorance of a fact, the knowledge of which might have been obtained by due diligence and inquiry. (*Willard's Eq. Jur.*, 70.) How then, it may be asked, has the complainant shown himself entitled to relief?

After the sale, so the bill states, he discovered that the title was in the name of Penna Pressey. How or when this discovery was made is not stated, and, in the absence of such information, we must presume that the deed was found on record where the law requires it to be placed; and we must further presume that it was recorded in due time and was notice to the complainant and all the world. The information was as accessible before as after the sale. ("*Vigilantibus, non Dormientibus, jura Subvenient.*")

It is sought to charge Penna Pressey with fraud, actual or constructive. Two principal facts in the bill are relied on to support the charge—first, that Penna Pressey had knowledge of the proceedings in the premises, the advertisement and sale of the property as the property of her husband, and that by her silence she is estopped from saying to the contrary; and second, that after the sale, the surplus, some six hundred dollars, was paid to and received by her, and that, by so receiving the money, she ratified the proceedings. The first proposition must proceed upon a fact which appears on the face of the bill, that Penna Pressey was never served with process for the purpose of bringing her before the court, but that her knowledge and her silence must operate precisely in the same manner as if her husband and a third party had been dealing with her separate property, instead of a court.

The fallacy of this proposition must be apparent at a glance, but of that we shall presently say more. If true, however, would she be estopped from asserting her title? It is as true in law as consonant with reason, that he who remains silent when he should have spoken, and permits his property to be dealt with by a stranger as his own, is estopped from asserting that right to the damage of another, when the latter, from his silence, might fairly infer that he had no interest in the thing. It is further true, that, when a party under a misapprehension of his legal rights, by his word or act places another party in an attitude of hostility to those rights, he must submit to the loss. This was the case of *Storrs and Brooks v. Baker*, 6 *John. Ch. R.*, 166, cited by the counsel of appellant as in his favor. In the view we have taken of this case, the authority is not in point. We are asked to deal with Penna Pressey as if she were a third person, and not affected by the marital relation. Is there no presumption operating in favor of her silence as to her husband's dealings, when the very relation of wife is said to merge her legal existence in that of the husband, and to excuse her from punishment for the gravest of crimes because of that subjection under which the law places her in the nuptial compact? If that is not to be regarded as any excuse, is that confidence which should subsist between husband and wife, the harmony of the household, which it has always been the policy of the law to maintain and encourage, not to be regarded? Or is this court to say that a wife, instead of remaining silent, should advertise her husband's act at every street corner? If he were dealing with her separate property, and by so doing perpetrating a fraud upon others, we have the highest authority for saying that she was not bound to speak, though she knew the fact. *Crenshaw v. Anthony, Martin & Yerger*, 110; *Bank of the United States v. Lee*, 13 *Peters*, 107. The Tennessee case was much stronger than the present, for there the trust deed in favor of the wife of personal property, on the faith of which Crenshaw was given credit, was

recorded in Virginia, and certainly not as accessible as in the case where the record was in the county; nay, in the same town where the proceedings were had. In the case in 13 *Pet.*, Justice Catron, who delivered the opinion, said that "R. B. Lee did deal with and use the property in controversy, as if it had been his own, while he resided in this city (Washington), and that the community did believe him the true owner, and gave him credit on the faith of the property, is no doubt true; and it is very probable that Mrs. Lee knew the fact, but continued passive and silent on the subject."

In both of these cases the obligation of the wife to disclose her interest in the property being dealt with by the husband as his own, came directly under review, and in both, her *silence* was approved on the express ground of her marital relation; and that she had done no affirmative act to mislead or draw in a creditor to trust her husband. But it is said that Penna Pressey, having notice of all these proceedings, by receiving a part of the proceeds of the sale, ratified it, and it would be a fraud on her part now to gainsay it. It might be answered to this—if it were in connection with other than a legal proceeding—that she must be presumed to have acted as the agent of and subject to the control of her husband. We are of the opinion that she, having no legal notice, had no notice at all, and as to any interest, nominal or real of hers, the proceedings of the court and the sale under the decree was a nullity. There is no attempt to show that, at the time the deed was made to the wife, the husband was in debt, and the deed in fraud of creditors; and, if he were not, he might well procure a conveyance to her for her separate use, and the law will uphold it until fraud is shown. The most important and decisive question remains to be considered. The bill expressly states that, after the sale, the title to the premises sold was found to be in the name of Penna Pressey, who was made a party to the original suit. Was she rightfully joined? If so, then service upon her was a necessity to confer any power on the court

to deal with her interest in the controversy. If she were not a necessary party to the suit, and had no interest to bind, although more a party to the bill, the service might be omitted. But it is stated that the legal title was in the wife, nor does it change the result to say that her interest is merely nominal. She being the legal owner of the estate, which by law she might be, the legal title could be divested out of her only in two ways, by her own act, and by act of law; that is, the proceeding of a court having competent jurisdiction of the subject of the suit. She, being the legal owner of the property, before any proceeding could affect her interests, nominal or real, must have been made a party to the bill, have been duly served with process, and thus given the opportunity, by legal forms, of showing her rights, whatever they were. Not having been served in the foreclosure suit, the proceedings as to her were a nullity.

Judgment is affirmed.

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**SAMUEL FARNUM, Plaintiff in Error, v. SARAH  
LOOMIS, Defendant in Error.**

*Error to Multnomah County.*

1. The grantee, under a quit-claim deed, against whom suit is brought for assignment of dower, is not estopped from showing that the husband, through whom he derives title, never was seized of such an estate as entitled the demandant to dower.
2. Under the law of Oregon, dower cannot attach to an equity.

SARAH LOOMIS sued the plaintiff in error, for an assignment of dower in a lot in Portland, claiming that her late husband, James Loomis, was seized of an estate of inheritance in the lot during coverture.

The lot is embraced in the donation land claim of Benjamin Stark, who entered upon his claim in September, 1849.

completing his necessary four years' residence and cultivation in September, 1853.

On the 5th of September, 1850, Stark conveyed the lot to Molthrop, who went into possession under an instrument, which, upon the trial, was excluded from the jury as no deed. On the 6th of March, 1851, Molthrop conveyed to Loomis, the husband of demandant, by a quit-claim deed, which the demandant offered in evidence on the trial, and to which Farnum objected, there being no seal to the instrument, and, therefore, claimed to be no deed.

The objection was overruled, and defendant excepted. On the 11th of May, 1853, Loomis sold the lot to Huntingdon, who afterwards conveyed it to Farnum, whose possession has never been disturbed.

Upon the trial the court gave some instructions, and refused others, to which the defendant, Farnum, by his counsel, excepted. There was a verdict for the demandant. Under this state of facts the cause comes here upon errors assigned.

*Williams & Gibbs*, counsel for plaintiff in error.

*E. D. Shattuck, Esq.*, counsel for defendant in error.

STRATTON, J. The first exception of importance, taken at the trial, was to the instruction of the judge to the jury in the following words: "That the plaintiff was entitled to recover upon proving that she and her husband took possession of the property under a *deed*, unless the defendant showed he had a better title." In this instruction there was error. Farnum was in possession, deriving his title through Loomis, who conveyed to him by a quit-claim deed, and this instruction of the court, to the effect that the defendant, Farnum, must show a better title than the husband of the demandant, or the demandant must recover, was to decide in effect that the defendant was estopped from showing that Loomis was never seized of an estate of which the demand-



ant was dowered. Let it be assumed for the present that the pretended deed to Loomis was well executed. This deed was in the ordinary form of a release without the covenants of warranty, conveying such an interest as the grantor then had, and no more. By such an instrument the grantor himself would not have been estopped. (2 Sm. Lead. Cas., 624; *Sparrow v. Kingman*, 1 Const., 242.) Nor would the grantee be estopped from denying the title of the grantor, as all estoppels must be mutual. (*Com. Dig., Estoppel B.*)

It is to be borne in mind that, in this form of conveyance, the grantor does not assume to convey the *land*; only his interest in it. He did not undertake to convey an indefeasible estate, nor did he obligate himself to warrant or defend it against any claims or demands, except those derived through himself. Looking at the plain and obvious meaning of such an instrument, the grantor must be deemed to have referred only to existing claims or incumbrances, and not to any title he might afterwards acquire by purchase or otherwise from a stranger. (*Comstock v. Smith*, 13 Pick., 116; *Wright et al. v. Shaw*, 5 Cush., 56; *Watkins v. Holman*, 16 Peters, 25.)

There is another reason equally conclusive of this particular question. It is the widow of Loomis who brings this action; and had Loomis conveyed to Huntingdon, and Huntingdon to Farnum, the defendant, by deeds of general warranty, and by which Loomis would have been estopped from denying that he ever had any such estate, or that title passed by his deed, the widow could not have been affected by it. His covenants would not have bound her, nor would she have been estopped by them. She would have been neither a party nor a privy, but a stranger to the deed. It follows that she would not have been concluded, though her husband was; and by the rules of mutuality, if she would not have been bound by it, neither should it estop the grantee.

Upon every principle of mutual right, then, the defendant below ought not to be estopped from showing what estate, if

any, or what interest did pass by the deed; and upon the proof being made, should it appear that the demandant's husband was never seized of such an estate in the lot in controversy, as of which she might be dowered, she ought not to recover in this action, for the subject matter on which she bases her claim was never *in esse*. For these reasons we conclude that there was error in the first instruction given for which the judgment should be reversed.

As the title of Loomis, the husband of the demandant, is fully set out in the record, it becomes necessary to consider another question which was raised in the argument and pressed upon the attention of the court. The question has been considered with some care, for the reason that it is not only decisive of the whole cause under consideration, but fixes a rule of adjudication for the courts of this State upon a point, about which there has been much controversy and no little uncertainty.

By the first section of an act relating to estates in dower (*Oregon Statutes of 1855, p. 405*), it is provided, "that a widow shall be dowered of all the lands whereof her husband *was seized of an estate of inheritance*, at any time during the marriage, &c." Was Loomis in his life time, and during his coverture, clothed with an estate of inheritance in the lot, out of which the demandant claims dower? "Every estate of inheritance is fee simple or fee tail." (4 *Com. Dig., Estates, A.*, 1; 1 *Bouv. Law, D.; Inheritance*, 679.)

"The highest estate in lands known to the American law is a fee simple. A fee simple is a pure inheritance or absolute ownership, clear of any qualification or condition, or a time in the land without end, and upon the death of the proprietor gives a right of succession to all his heirs." (1 *Hilliard, R. P.*, pp. 35-8.)

For several reasons it is impossible that Loomis possessed such a title as to fill the terms of these definitions. Stark, the original claimant of the land under the donation act, held but an inchoate title, liable to be defeated by non-compliance

with the terms of the grant. So far as the titles of Loomis, and all others holding under Stark are concerned, they were completely at his mercy. He might perfect the title; they could not, nor could they compel him to do so. Had the deed from Stark, and all the subsequent ones been regular, no higher title could have been transmitted than this original contingent interest of the donation claimant. "The stream cannot rise higher than its fountain."

The deed from Stark to Molthrop was never acknowledged, and the deed from Molthrop to Loomis was not sealed. This deed, under the most favorable circumstances, would convey no more than an equity; liable to be defeated by sale to an innocent purchaser, by deed duly executed and recorded. Hilhiard, in giving the common law definition of dower, says: "When a man is seized during coverture of an inheritance in lands and tenements, which by possibility any issue of his wife might inherit, such wife shall hold after his death one-third part of these lands and tenements for her natural life, as an estate in dower." It will be perceived that the statute of this state before quoted is very much in harmony with this definition. Much of the apparent confusion in the authorities has arisen from the innovation of the statute laws of the several States upon this rule of the common law.

So Chancellor Kent: "The husband must be seized of a freehold in possession and of an estate of immediate inheritance in remainder or reversion to create a title to dower. The freehold and the inheritance must be consolidated, and be in the husband *simul et semel*, during the marriage, to render the wife dowable." (4 Kent Com., 39.)

In England by statutes 3 and 4, Wm. IV, c. 105, dower was extended to equitable inheritances, and mere right of entry without seizin. As before stated, similar statutes have been passed in many of the States, and the decisions of their courts have been in conformity therewith. In *Hamilton v. Hughs*, 6 J. J. Marshall, 531, in a case much like the present, the court, in deciding the principal point, remarked: "but we

have met with no adjudged case in which it has been determined that a wife is dowable of an equity, or use, resulting by implication of law, from an executory contract, held by the husband at some period of the coverture, and transferred by him in his lifetime. Such is the present case, and should it be decided in favor of Mrs. Hughes, a precedent would be set calculated to have a most important bearing upon the interests of society."

Upon the general question, then, we are of the opinion that the defendant is not entitled to dower in the lot mentioned in the complaint; and we are further of the opinion that, under the statute of this State, dower will not attach to a mere equity.

Judgment is reversed.

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**J. THOMPSON et al., Plaintiffs in Error, v. MULTNOMAH COUNTY, Defendant in Error.**

*Error to Multnomah County.*

1. The Circuit Court having supervisory control of all inferior tribunals, in the absence of a specific law, a reasonable time will be allowed to bring up their proceedings by certiorari.
2. Certiorari lies in the county court to bring up and review its proceedings in laying out a public highway.
3. Certiorari lies only to review judicial and not ministerial acts.
4. In the proceedings of all inferior tribunals, every jurisdictional fact must appear affirmatively upon the face of the record.
5. In applications to the county court for laying out highways, the petition of twelve householders, and the public notice required by law, are jurisdictional facts.
6. An inferior tribunal having once acquired jurisdiction, the same intendment of regularity will be made as for the proceedings of superior courts.
7. A person who signs a petition for a highway is not a "disinterested" householder in the meaning of the "act," and therefore incompetent to act as a reviewer.

**THE statement of the case is sufficiently made in the opinion of the Court.**

*Geo. H. Cartter, Esq.*, counsel for plaintiffs in error.

*D. Logan, Esq.*, counsel for defendant in error.

STREATTON, J. This cause was argued at the July Term, 1861, of this Court, and the Court expressing an opinion which in effect decided the matter in controversy, but which was not touched by the counsel for the plaintiff in error, an application was made for a further hearing. The motion was allowed and the cause continued. At this term the matter was again more fully considered upon the written argument of the plaintiffs' counsel. From the record, it appears that James Johns, and others, at the April Term of the County Court of Multnomah County, petitioned for the laying out and opening a road on the east bank of the Willamette river, between certain points in said county, specified in the petition. A view of the routes was ordered, which was returned favorable to the proposed road. At a subsequent term a strong remonstrance and protest was presented to the Court, upon which the Court appointed three persons to review the road and assess the damage. Their report was against the claim of some of the remonstrators for damages, and at the December Term of the Court, 1860, the county surveyor was ordered to survey and mark out the road, preparatory to opening the same.

The counsel of some of the defendants now gave notice of an appeal, but this appeal was never prosecuted. In March, 1861, the plaintiffs in error sued out a writ of certiorari from the circuit court to bring up the record and proceedings of the board of county commissioners for that county, and, upon hearing, the case was dismissed on the motion of the district attorney, appearing in behalf of the county; to which motion the plaintiffs in error excepted, and brings his exceptions here for review. The motion assigned as a reason that the writ was not brought within twenty days, the time allowed for such writ to issue to a justice of the peace, and this was the

reason as we understand for the dismissal. The questions raised in the argument are quite numerous, and some of them important as matters of practice.

First. As to the time in which the writ should be sued out. Under the Act of eighteen hundred and fifty-four, Statutes of 1855, p. 290, defining the duties and powers of justices of the peace, it was provided, that a party to a proceeding before such officers feeling aggrieved by any process, proceeding, judgment, etc., might remove the same into the district court within twenty days, as therein provided, and it is said that by analogy the writ issued within the same time to remove any record from the county court. This act was specific, and applied only to parties and proceedings before justices of the peace, and the reason for extending it to other courts, by implication, is not very apparent. If it be a remedial writ, by which a superior court is enabled to bring up and revise the proceedings of all inferior tribunals, it would be easy to imagine many cases in which it would utterly fail to accomplish the end of the law, if it could not be brought after twenty days.

On examining the authorities upon common law proceedings, it does not seem by the practice of the courts that any particular time has ever been fixed in which the writ must issue.

The case in 25 Wend., 293, cited by counsel for defendant in error, is not an authority in his favor. Nelson, C. J., in delivering the opinion of the court, said, "I place my refusal to allow the certiorari upon the unreasonable delay in the application for it. Even writs of error cannot be issued after two years from the rendition of the judgment, and in analogy to this statute we should refuse a certiorari after the lapse of this period, in ordinary; much more ought we to refuse it in a case like the present."

In the case of the people ex rel., Agnew v. the Mayor of New York, 2 Hill, 9; Bronson, J., remarked: "The time for bringing an error from a final judgment is limited by law to

two years, and I think a case can rarely happen where it would be proper to allow a certiorari after the lapse of a longer time." In both these cases the application was made when more than two years had elapsed. Though this writ differs from a writ of error, we are inclined to the opinion that it should be allowed in all meritorious cases brought up within two years, the time limited by the statutes of this State for bringing writs of error. That disposes of the only point made in the court below; but the whole case being upon the record, it becomes necessary to consider and pass upon other questions which that record presents—*First*. It is said that certiorari does not lie to review acts of the County Courts or commissioners in laying out roads. *Second*. That a certiorari does not lie to review a naked ministerial act, nor the act of a ministerial officer, but only judicial acts. These questions may be considered together. The prime difficulty seems to be the distinguishing between acts which are judicial and those which are clearly ministerial or executive. There is certainly great uncertainty, and many conflicting opinions in the books upon this point. It may be approximately true to say that a jurisdiction clothed with discretionary power to deal with the person, property or interest of third persons, or to change the relation of such property or interest, is a judicial act. In *Rice et al. v. Parkman*, 16 *Mass.*, 326, the question arose whether an act of the legislature was judicial in its nature, and therefore in conflict with the Constitution. The court remarked: "That it did not seem to be of this description of power," for it was not a case of controversy between party and party, nor was there any decree or judgment affecting the title to the property. So in *Regina v. Overseers of Salvord*, 14 *E. L.*, and *E. R.*, 145, which was a certiorari to a board of inland revenue that had issued a license for the sale of beer. Coleridge, J., remarked: "The cases cited are manifestly distinguishable. The county rate is made by the Court of Quarter Sessions, assembled and acting as a court, and exercising its judgment

as to the necessary amount, and other matters. So the church building commissioners, although not acting as a judicial body, were invested with judicial powers in the matters in question; they hold an inquiry and hear objections, and their order stopping a foot-path through a church yard is clearly judicial, like the order of justices for stopping foot-paths, and were more so, because, in the former case, there is no appeal."

Though not very full, there is sufficient expressed in these decisions to give a pretty clear notion of what these courts considered a judicial proceeding.

It is not controverted that both English and American courts recognize the boundary of judicial proceedings as the limit of inquiry to which a certiorari will reach, though very many modern cases have gone much further, and innovated upon a rule well understood before judicial functions were cast upon an almost infinite number of corporate bodies and associations of men. Admitting this to be the true distinction, the question recurs, are the proceedings of a Board of County Commissioners, under the statute of this State, to lay out, open or vacate public roads, ministerial or judicial proceedings? We are clearly of the opinion that they belong to the latter class, and are examinable in the Circuit Courts in this form of proceeding. There is, in Massachusetts, an uninterrupted series of decisions affirming this power of the Superior Courts of law over the Boards of County Commissioners in laying out highways. The jurisdiction, as far as the reports of the court indicate, has never been questioned. Nor has the distinction between acts ministerial and judicial been lost sight of, or disregarded, as a number of writs have been dismissed on the express ground that the proceeding brought up was not judicial. (2 *Mass.*, 249; 11 *Mass.*, 158; 18 *Pick.*, 195; 8 *Pick.*, 440.) The same practice has prevailed in Pennsylvania, Vermont and Ohio.

In New York the general doctrine has been fully recognized, but there has been considerable fluctuation in the



application of the rule to particular cases, but we find no one that directly sustains the proposition that a certiorari does not lie to a Board of County Commissioners in laying out a highway. The case in 1 *Hill*, 647, is very brief. The four or five points decided are summed up in about ten lines and no reasons are assigned; but it appears that the record disclosed no error in law upon which the court could act, and in dismissing the writ was clearly right.

But it is said that where there is an appeal given by statute a writ of certiorari ought not to be allowed. To this it may be answered: There is no appeal given from any proceeding of the Board of County Commissioners in laying out roads, except in the single question of the assessment of damages; but no damages could be assessed unless the person damaged made application for the assessment before the second day of the next term succeeding the locating of the road, and he could not make such application unless he had notice of the proceedings. Now it might happen, as in the present case, that no legal notice was ever given; and it must be presumed that there was no notice unless it appears upon the face of the record.

This would be a very strong additional reason why this writ should go in cases like the present.

One of the most common and important offices, performed by this writ at common law, was to enable the Superior Courts to supervise the proceedings of inferior tribunals and see that they did not exceed their jurisdiction or proceed wholly without authority.

Section nine of article seven of the Constitution of this State provides that "All judicial power, authority and jurisdiction, not vested by this Constitution, or by laws consistent therewith, exclusively in some other court, shall belong to the Circuit Courts; and they shall have appellate jurisdiction, and supervisory control over the County Courts and all other inferior courts, officers and tribunals." It may be said that

this section simply affirms the common law, but as the fundamental law of this State, governing the legislature as well as the court, and looking to the peculiar phraseology of the last clause, it may be matter of grave doubt whether the legislature could so far abridge the power of the Circuit Courts as to confine them to examination of cases brought upon an appeal only. In support of this view it has been held where, by the act creating an inferior tribunal, its adjudications were declared to be final, nevertheless a writ of certiorari would lie. (*Ex parte, Mayor of Albany*, 22 Wend., 287.)

The last question to be considered brings the inquiry, does the record show facts sufficiently regular to confer jurisdiction upon the County Court and warrant its proceedings? and if so, was the subsequent action of the court sufficiently regular to support the judgment? It is admitted that the County Court, or Board of County Commissioners, so far as it exercises judicial power, is a court of special and limited jurisdiction. The facts, therefore, necessary to confer jurisdiction, must appear upon the face of the record. If they do not so appear, nor were proved *aliunde*, the proceedings were null and void.

By third section of the act relating to roads and highways (*Session Laws 1859*, p. 11), it is provided that "when any petition shall be presented for the action of said board for the laying out, alteration or vacation of any county road, it shall be accompanied by satisfactory proof that the notice has been given by advertisement posted up at the place of holding the Commissioners' Court, and also in three public places in the vicinity of the said road or proposed road, thirty days previous to the presentation of said petition to the said board, notifying all persons," &c.

The first clause of section four of the same act further provides, that, "Upon the presentation of such petition (signed by twelve householders), and proof that the notice has been given, as provided in the last section, the Board of Commis-

stioners shall appoint three *disinterested* householders of the county, &c.

Before the court could take a step or acquire any authority, two things must plainly have been done: *First*. A petition of twelve householders; *Second*. Notice, as provided above. Without these facts the court was no more than a stranger to every person or interest involved in the proceeding, and until the jurisdiction was acquired, no intendment of regularity or power operates in its favor. It nowhere appears in the record, by way of allegation or recital, that any such notice was given, either at the court house door or in the vicinity of the road. The omission was fatal to the proceedings of the Board of County Commissioners, as clearly showing that no jurisdiction was at any time gained over the subject matter to be adjudicated upon.

The fourth section, above quoted, also provides, that, upon the presentation of the petition and proof of the notice, &c., that the board shall appoint three *disinterested* householders to view the said road and report upon the same. By inspecting the record, it seems that the court appointed three of the *petitioners* such viewers. This was clearly irregular, as the petitioners for the road could in no sense be said to be disinterested, and therefore competent under the act. For this, also, the cause should be reversed, for an error apparent upon the face of the record, after the court might have acquired jurisdiction. This error appears affirmatively, and stands on a different footing from other objections urged at the bar, which it is proper to refer to. It is objected that the record does not show that the reviewers, or surveyor, were sworn before entering upon their duties, or that the report of said viewers was publicly read on two different days, as the law required. The answer to these objections is that it was not necessary that these facts should appear. It is settled law as to inferior tribunals, that once having acquired jurisdiction, and that appearing, every intendment will be made in favor of the

proceedings of superior courts, or courts of general jurisdiction. (1 *Sm. Lead, Cas.*, 817), and cases there cited.

Judgment reversed.

NOTE.—The writ of certiorari is now unknown to the practice in Oregon. Title 1 of Chap. VII of the Code, substitutes, in its stead, the "writ of review," and defines its limitation both in time and efficiency.

Sec. 875, p. 367 of the Code specially applies the writ of review to matters of county business. (*Rap.* 1867.)

**CASES**  
**ARGUED AND DECIDED**  
**IN THE**  
**Supreme Court of the State of Oregon.**

**JULY TERM, A. D. 1862.**

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**REUBEN P. BOISE, *Chief Justice.***  
**PAINE P. PRIM,**  
**WILLIAM W. PAGE, } *Justices.***

**J. G. WILSON, *Clerk.***

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**B. F. SMITH, Plaintiff in Error, v. D. C. INGLES, W.  
S. INGLES, B. R. INGLES, and HUGH BURNS,**  
**Defendants in error.**

*Error to Multnomah County.*

1. A judgment at law is not a lien upon an equitable title in land.
2. Such title cannot be sold under execution at law, while the legal title is clearly in another.

On the 9th day of October, 1857, D. C. Ingles, being insolvent and largely indebted, purchased of one Perkins, lots 7 and 8 in block 25, in Portland, and caused them to be conveyed by deed to W. S. and B. R. Ingles, his sons, at that time minors. He paid part of the purchase money out of his own funds, and borrowed the balance—five hundred and fifty dollars—from one Davenport, to whom he executed a note, and mortgage on said lots; and afterwards, on the 24th of May, 1858, he borrowed eight hundred dollars of plaintiff, Smith, to pay said Davenport; and to secure that sum he executed to Smith a note, and mortgage on said lots, in the

names of W. S. and B. R. Ingles, fraudulently representing himself to Smith to be B. R. Ingles, and to be the agent of W. S. Ingles; and Smith knew nothing to the contrary until long afterwards. The mortgage purported to have been acknowledged by B. R. Ingles for himself, and as the agent of W. S. Ingles, and was recorded on the 25th of May, 1858.

It is admitted that D. C. Ingles was the real owner of these lots, and that he caused them to be conveyed to his sons for his own benefit, with intent to defraud his creditors and to prevent the lots from being sold for his debts.

Defendant Hugh Burns obtained a judgment at law against D. C. Ingles, on the 16th of October, 1857, for ninety-four dollars and twelve cents, and costs; and execution was duly issued thereon and levied on said lots, which were sold on sheriff's sale to Burns, for the sum of one hundred and thirty-eight dollars; and plaintiff filed his bill in chancery to have the equitable title of D. C. Ingles subjected to the payment of his note and mortgage to plaintiff Smith.

*G. H. Williams, Esq., for plaintiff in error.*

*E. D. Shattuck, Esq., for defendants in error.*

PRIM, J. The legal title to the lots in question was in W. S. and B. R. Ingles, who were minor sons of D. C. Ingles. The facts proven and admitted show that D. C. Ingles made the purchase, advanced the money and caused the conveyance to be made to them for his own use and benefit, and with intent to place said property beyond the reach of his creditors.

The main question to be decided here is, whether the judgment at law of Burns against D. C. Ingles became a lien on these lots, while there was nothing of record to show that he had any interest in them whatever. In other words, is a judgment at law a lien on an equitable title in land, and can such a title be sold on an execution at law, while the legal title is clearly in another? If so, Smith was without remedy; for Burns' judgment existed prior to his mortgage, and Burns

has since reduced his lien, "if he had any," to an absolute ownership, by purchase under execution. The question seems plain enough. The *Statute*, page 119, section 62, on this subject provides, in substance, "that a judgment shall be a lien on real property of the judgment debtor, not exempt from execution, owned by him in the county at the time of docketing the judgment," or that which he may afterwards require. The statute intended to make a judgment a lien on the legal title of real property, and not on some hidden equitable title, which could only be brought to light and made available by the extraordinary powers and proceedings of a court of equity. (*Roads v. Symmes*, 1 Ohio, 314.)

Then D. C. Ingles had no such title in these lots as a judgment at law could reach, consequently, Burns had no lien, and took nothing by his purchase, but stands on the same footing with other judgment creditors. His remedy was in equity and not at law.

Smith parted with his money in good faith on the credit of these lots. It was obtained and used to pay off the note and mortgage given for a part of the purchase money, and was obtained by the fraudulent acts and representations of D. C. Ingles, whom a court of equity, under all the circumstances, is bound to treat as the equitable owner of these lots.

Then we think that the court below was correct in arriving at the conclusion that this mortgage, although fraudulent and void, gave plaintiff such a lien on said lots as could be enforced in equity; and that whatever rights Burns had in the premises they were subject thereto.

Decree is affirmed.

NOTE.—As to the extent of the effect of the lien of a judgment see present Statute Code, page 211, section 279, reading thus: "All property, or right, or interest therein of the judgment debtor, shall be liable to execution" except statutory exemptions. S. C. reported, 1869.

ALONZO LELAND et al., Plaintiffs in Error, v. CITY OF  
PORTLAND, Defendant in Error.

*Multnomah County.*

1. To prove the dedication of a square to public use, when a map is relied on as a proof of such dedication, it must appear to the jury that the donors either made or recognized the map as correct, and assented to it.
2. A dedication of a square for the purpose of a market square in the city of Portland, to be binding on the proprietors of the town site of said city, must have been made since the act of Congress of the 27th of September, 1850.

THIS cause tried in the Circuit Court of Clackamas county at the March term, A. D. 1861, was a proceeding on behalf of the city of Portland, to recover from the plaintiffs in error a certain block of lots in said city, which is claimed by the city as a public market square dedicated by the proprietors of the town site of said city for that purpose. The plaintiffs in error claim title by virtue of a deed executed to them by D. H. Lownsdale, one of the town proprietors, and whose heirs at law now hold the patent for the land, on which the block is situated, from the government of the United States. The issue presented to the jury was as to whether there had been a dedication, and the jury found that there had been, and judgment was given for the city; and the defendants in the court below assign as error certain rulings of that court, on the introduction of evidence, which was objected to; and exceptions were also taken to the instructions which the court gave to the jury on the trial, all of which appear in the bill of exceptions.

This block of lots is situated on the town site of Portland, and the plaintiff in the court below claims that, when the said town site was laid off into lots and blocks, this block was designated on the map of the town then made, exhibiting said



survey of the site into blocks and lots, as a market square, and dedicated by said Lownsdale, and the other proprietors of the town site, for a public square for the use of the city. The town was laid off prior to the passage by Congress of the act commonly known as the "Donation Law," granting lands to the settlers in Oregon, which was approved and became a law September 27th, 1850, and so far as the marking on the map is concerned, it was also prior to that date. It appears by the bill of exceptions, that the evidence on the trial tended to show that prior to June, 1850, Lownsdale, Coffin and Chapman claimed to be the owners of the town site of the city of Portland, and that their joint ownership continued until about the latter part of the year 1852; that about May, 1852, Coffin and Chapman, two of the proprietors, employed one Short, as a surveyor, to survey and map said town site; that Short made such survey and map, and that on said map the block in dispute was colored and designated on the margin as "market square." The plaintiff below also offered evidence tending to show that Lownsdale recognized and approved that map, and other evidence tending to show that in June, 1850, Lownsdale, Coffin and Chapman, acting as joint proprietors, made a public sale of lots and blocks according to said map, and that persons purchased at said sale understanding that the block in question was set apart for public use as a market square, and paid the purchase prices and received deeds for the lots and blocks so purchased. There was also some evidence to show that subsequently, and after the passage of the act of 1850, Lownsdale, the grantor of said defendants, recognized that Short map. There was also evidence to show that another map, called the Brady map, had been made, copied from the Short map, which was also offered in evidence. Plaintiff proffered still another map, made by authority of the city in 1855 by one A. G. Henry. To the introduction of these maps the defendants objected, but the court overruled the objections, and admitted the maps in evidence to the jury; to which ruling of the court the defendants excepted.

*G. H. Williams, Esq.*, for plaintiffs in error.

*D. Logan, Esq.*, for city.

BOISE, C. J. So much of the evidence, reported in this case, has been given as above in order to a more full and clear understanding of the question of the propriety of admitting the maps to the jury. As to the Short map it is impossible to tell from the evidence furnished in the bill of exceptions, whether or not it was recognized and acted on by Lownsdale, subsequent to September 27, 1850. If it were so recognized and acted upon, it was properly admitted; if not, then I think its admission improper—and the question whether or not Lownsdale did recognize and approve said map was a proper question for the jury under the instructions of the court. If the map was relied on to show a dedication, that dedication must be shown to have been made since the act of September 27th, 1850, for any acts before that time affecting the disposal of lands in Oregon, were simply void, for the want of any title to them at that time in the citizens of the then territory of Oregon, the title yet being in the United States, and consequently unaffected by the acts of private citizens. (*Parrish v. Lownsdale et al.*, 21 *Howard, U. S. S. C.*, p. 290.) As to the Brady map I think it was improperly admitted, unless there was evidence tending to show that Lownsdale examined and approved of it in respect to its designation of the block, which does not appear. The map made by Henry, as far as appears, was never acknowledged by Lownsdale, or the defendants, to be correct, and was simply evidence which plaintiff made for itself, and should not have been admitted. The next question presented is, did the court below err in refusing to instruct the jury, that a dedication of the property in question to be binding, and to divert the title from the donor to the public, must have been since the 27th of September, 1850. I regard this question as settled by the case in 21 *Howard*, above, which case

arose on the question of the dedication of the levee in this same city of Portland, and by these same proprietors of the town site, and was governed by the same considerations in this respect, as governs this case, where it was held that a dedication, made prior to the act of 27th September, 1850, was void for want of any title in the donors at the time of dedication, the title then being in the United States.

There is one other question in the assignment of errors, which is, can the city of Portland recover in this form of action, the possession of this property, *provided*, the same was dedicated as claimed? It is insisted that the city should go into chancery to vindicate the claim of the city corporation to the public squares of the city. The statutes, under which this suit was brought, provides in the first section "that any person having a valid subsisting interest in real property, and a right to the immediate possession thereof, may recover, &c., in this form of action." It seems to me there can be no question but the corporate authorities of the city of Portland are the proper possessors of its public squares, and may maintain suit for the recovery thereof; and the allegations that the plaintiff has a fee in the premises is qualified by the statement in the complaint of the uses for which the city authorities claim the land.

Judgment is reversed, and new trial ordered.

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THOMAS HOPWOOD, Plaintiff in Error v. JAMES H. PATTERSON, Defendant in Error.

*Error to Jackson County.*

1. An answer, in the nature of a plea in abatement, should be pleaded separately, and disposed of before an answer to the merits is considered.
2. An answer, which sets up for defense the pendency of a former suit for the same cause of action, should state that such former suit is still pending at the time the answer is interposed.

THE facts of this case are these: It was an action for work and labor; the answer of the defendant sets up a defense to the merits, and also, in the same answer sets up as a farther defense, that, at the time of the commencement of this action, there was another suit pending for the same cause of action; but does not state that said former suit was still pending at the time of filing the answer. The plaintiff in the court below demurred to that part of the answer which sets up the pendency of a former suit, and as causes of demurrer, assigns as follows:

1st. That this part of the answer being in the nature of a plea in abatement, cannot be pleaded in conjunction with an answer to the merits.

2d. That this part of the answer does not state that the said former suit was still pending at the time of filing the answer.

The court below sustained the demurrer, and gave judgment for the plaintiff. To which decision and judgment of the court the defendant objected, and the case stands in this court on demurrer, as it is below.

*B. F. Powell, Esq., for plaintiff in error.*

*G. H. Williams, Esq., for defendant in error.*

BOISE, C. J. The first question raised by this demurrer is, can an answer, in the nature of a plea in abatement, be joined with an answer to the merits?

It is a question of practice under the Code; and its determination either way will not particularly affect the absolute rights of litigants; for they have a right to avail themselves of this defense, either in conjunction with the answer to the merits, or in a separate answer in the nature of a plea in abatement; and the question is, does the Code change the order in which such question should be presented and determined. The *Statute page, 90, sec. 47*, provides that "The defendant may set forth by answer as many defenses as he may have."

This contemplates that the style of the defense shall be by answer, and does away with the names of technical pleas, but does not, I apprehend, contemplate the joining in the same answer matter of defense, which create issues that cannot properly be tried together. Answers in the nature of pleas in abatement are dilatory, and create issues which cannot properly be tried with issues on the merits. Issues in dilatory pleas should always be disposed of before issues on the merits are made; for in some cases the determination of such dilatory issues may change the issues on the merits.

A practice that would allow answers in the nature of a plea in abatement to be joined with answers to the merits would be very inconvenient and lead to much confusion in judicial proceedings; and I cannot believe that it was the intention of the legislature to require all defenses to be joined in one answer; but that the proper construction of the Statute is, that the nominal or technical form of pleading shall be by answer. While those defenses shall only be joined which will create issues that may be properly tried together; and, that answers in the nature of pleas in abatement should now as formerly be pleaded and determined before an answer to the merits is interposed. The practice in the State of New York under the Code has not been uniform; see *Van Santvord, Pleadings* 385, and cases there cited; but I understand, the better opinion in that State now is that answers in the nature of pleas in abatement should be pleaded before an answer to the merits; and such is the opinion of this court, since we deem such a course more in accordance with the settled practice of the courts, and more convenient, and not in contravention of the Statutes.

There is another objection to the answer or plea in this case, specified in the demurrer, which is, that the answer does not state that said former suit was still pending at the time of filing the answer, and I think the demurrer is well taken in this respect; for if the former suit had been withdrawn at

the time of answering, I cannot see what injury it could work to the defendant.

Judgment is affirmed.

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GEORGE C. ROBBINS, Plaintiff in Error, v. D. S. BAKER, Defendant in Error.

*Error to Multnomah County.*

When a defendant in an answer uses the words "defendant for answer, &c., says that he has not knowledge or information sufficient to form a belief as to whether, &c., the matters charged in the complaint are true." Held, that the answer was a sufficient denial.

THIS was an action on a promissory note, given by one F. N. Blanchet to the defendant, G. C. Robbins, and afterwards indorsed by the defendant, Robbins, to the plaintiff, Baker, who brings this suit against Blanchet and Robbins, charging Robbins as indorser. Robbins answers, denying due demand for payment of the note from the maker, Blanchet, and also denying due notice to himself of non-payment. The answer was excepted to in the court below as being insufficient, and the portion excepted to is in these words: "Defendant for answer says that he has not knowledge or information sufficient to form a belief as to whether, &c." The court below held that this was not a sufficient denial of knowledge or information to comply with the statute; and gave judgment against defendant, Robbins, as for want of an answer.

*G. H. Williams, Esq.*, plaintiff in error.

*D. Logan, Esq.*, for defendant in error.

BOISE, C. J. The *Statute*, page 90, sec. 46, provides that "the answer of a defendant shall contain a specific denial of each material allegation in the complaint according to his knowledge, information or belief, or of any knowledge or

information sufficient to form a belief." The answer in this case does not declare absolutely that the defendant has no knowledge of the matter controverted, but denies that he has sufficient knowledge to make up an opinion or form a belief. If the answer had contained the word *any*, used in the statute and stated that he had not *any* knowledge or information sufficient to form a belief it would not have been a declaration that defendant had no knowledge whatever on the subject matter; it would have been a declaration briefly denying that any knowledge or information which he did possess was sufficient to enable him to form a belief. I think the form of expression used in the answer conveys the same meaning as though the language of the statute had been followed, and that the answer is sufficient.

Judgment reversed.

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WILLIAM GIRD, Plaintiff in Error, v. DANIEL MOREHOUSE, Defendant in Error.

*Error to Benton County.*

Under the Statute which required the inferior courts to stay proceedings, and certify a cause to the Circuit Courts, in which a question or issue of title to real estate arose. The County Court failed so to do, and proceeded to final judgment, and defendant appealed to Circuit Court. *Held*, 1. That the judgment in the County Court was not wholly void. 2. That the sending, under certificate, of the cause on appeal from judgment was a substantial compliance with the requisition of statute.

MOREHOUSE sued Gird in the County Court for a balance due on a promissory note. Gird filed an answer in the nature of recoupment, setting up that the note had been executed by him to one Stark for a piece of land, which Stark had sold and conveyed to Gird, representing himself as owner thereof in fee simple, whereas a part of the land belonged then to

another person. Plaintiff below joined issue on the question of title, and on trial in that court, verdict and judgment resulted for plaintiff. Gird appealed, and in the Circuit Court moved to dismiss the case on the ground that the judgment of the County Court was void, that court having no jurisdiction warranting the rendition of judgment on a question involving an issue of title to real estate.

The motion was overruled by the Circuit Court, and Gird excepted.

*J. Kelsay, Esq.*, counsel for plaintiff in error.

*G. H. Williams, Esq.*, counsel for defendant in error.

PRIM, J. Plaintiff in error made no objection in the County Court to its jurisdiction to try the cause; but on verdict and judgment against him he appealed, and in the Circuit Court moved for dismissal for want of jurisdiction in County Court. The refusal of the Circuit Court to dismiss the cause is the error alleged. If the County Court had no jurisdiction of the subject matter, then, on appeal, it would have been proper to dismiss the action; since upon appeal the case stands for trial *de novo*, and if the County Court had no jurisdiction in the first instance, then the Circuit Court had none. The act of 1859, page 10, sec. 10, excepts civil cases from the jurisdiction of the County Courts when title to real estate is in issue; and sec. 23 of same act provides that County Courts shall be governed by the same rules and regulations that govern justices of the peace in similar cases.

The *Revised Statutes*, page 300, sec. 54, provide that "in cases where the title to real estate shall be put in dispute by the evidence on the trial before a justice of the peace, he shall make an entry thereof in his docket; cease all further proceedings and certify the cause to the Circuit Court in the same time as upon appeal." The statute then was substantially complied with by the County Court in sending up the



papers and proceedings *on appeal*. The only difference between the proceeding, and the requirement of statute was that the court proceed to judgment, and then sent the case up. Gird contends that the judgment in County Court was void and admitted of no appeal. If so, how was he to prevent its enforcement without reversing it, unless it appeared void upon its face. (*Striker v. Mott*, 6 *Wend.*, 465; *Koon v. Maruzan*, 6 *Hill*, 44.) We see no substantial error.

**Judgment is affirmed.**



## CASES

ARGUED AND DECIDED

IN THE

# Supreme Court of the State of Oregon.

SEPTEMBER TERM, A. D. 1863.

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REUBEN P. BOISE, <i>Chief Justice</i> , RILEY E. STRATTON, PAINE P. PRIM, ERASMUS D. SHATTUCK, JOSEPH G. WILSON,	} <i>Justices</i> .
LUCIEN HEATH, <i>Clerk</i> .	

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C. NOLAND, Plaintiff, Respondent, v. J. COSTELLO, Defendant, Appellant.

### *Appeal from Multnomah County.*

1. The act of October 11th, 1862, increasing the jurisdiction in justices' courts from one hundred to two hundred and fifty dollars, is constitutional.
2. That act being an amending or revising act, is substantially in form as required by the Constitution.

NOLAND sued Costello on contract, before a justice of the peace, to recover one hundred and fifteen dollars and interest. Costello appeared and demurred to the complaint, on the ground that the justice had no jurisdiction of the subject of the action, because the claim exceeded one hundred dollars. The demurrer was overruled, and judgment rendered against him for want of answer.

*L. F. Grover, Esq., for respondent.*

*J. Kelsay, Esq., for appellant.*

[2 Oregon]

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PRIM, J. It is insisted by the appellant that the act of the legislative assembly of October 11, 1862, increasing the jurisdiction of Justices' Courts, in civil actions, from one hundred to two hundred and fifty dollars, is unconstitutional and void, on two grounds: First. Because the language used in the Constitution on this subject, when properly construed, shows that it was intended by its framers that the jurisdiction of Justices' Courts should be limited to the amount they then had under the territorial organization; and, Secondly. Because the legislature undertook to amend and revise the old law, and did not do it in the manner and form required by the Constitution.

Section 1 of article 7 of the Constitution is in these words: "The judicial power of the State shall be vested in a Supreme Court, Circuit Courts, and County Courts, which shall be courts of record, having general jurisdiction, to be defined, limited and regulated by law, in accordance with the Constitution." \* \* "Justices of the peace may also be invested with limited judicial powers."

The latter part of the section authorizes the legislative assembly to invest justices of the peace with limited judicial powers, without defining what that limitation should be; that is, whether it should be one hundred or two hundred and fifty dollars, but leaving it entirely within the discretion of the legislature.

If the framers of the Constitution had intended to limit them to one hundred dollars, they could and certainly would have used different and more appropriate language to embody their intention. Then the power invested by this act is limited not only as to the amount of jurisdiction, but it is expressly provided also that the jurisdiction of a justice of the peace shall not extend to any action where title to real estate comes in question, or any action for false imprisonment, libel, slander, malicious prosecution, criminal conversation, seduction, or upon a promise to marry.

Section 22 of article 4 of the Constitution provides: "No

act shall ever be revised or amended by mere reference to its title, but the act so revised or section amended shall be set forth and published at full length. By reference to section 1 of the act passed October 11, 1862, it will be seen that it repeals all of titles *one* and *sixteen* of chapter two of an act relating to the election of justices of the peace and constables, and to proceedings in Justices' Courts, passed January 12, 1854; and in lieu thereof, title 4 of chapter 11 was substituted, which is the provision in question. It is set forth and published at full length; and we are of the opinion that it comes within the constitutional restriction.

The judgment of the Circuit Court is correct and is affirmed.

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JACOB KAMM, Appellant, v. F. S. HOLLAND, impleaded  
with S. S. WHITE and others, Respondents.

*Appeal from Multnomah County.*

What is an indorser.

A. HOLLAND and S. S. White, partners in trade, under the name and style of Holland & White, were the original makers of a note to plaintiff Kamm for a valuable consideration, and, before it was delivered to the payee, defendant, F. S. Holland, signed his name on the back of said note, with the addition thereto of the word "*security*," and when the note became due there was no demand upon makers, and no notice, of course, served on him.

The Circuit Court held that F. S. Holland was not liable thereon as maker or guarantor, and, not having been charged by demand and notice, he could not be held as indorser; to which decision the plaintiff excepted and appealed.

*D. Logan, Esq.*, for appellant, claims that one who writes his name on the back of a note previous to delivery is a

*guarantor*, and not an indorser. Cites: 18 *Ill.*, 682; 2 *Cal.*, 485; 24 *Pick.*, 64-66; 31 *Maine*, 536.

A. E. Wait, *Esq.*, for respondents, claims that *guarantor* even is only an indorser. Cites: *Statutes of Oregon*, p. 445, sec. 5; 7 *Hill*, 418; 1 *Comstock*, 321; 6 *Barb.*, 282; common law rule, *Chit. on Bills*, 241; *Story on Bills*, 264, 5, 6; 2 *Hill*, 280; as to *guarantor*, 16 *Cal.*, 152; 4 *Sneed.*, 336; 2 *Metcalf*, 216; 12 *Tanner*, 389; 3 *Ohio*, 418; 9 *Iowa*, 473; 11 *Wisconsin*, 644; 16 *Conn.*, 236, &c.

PRIM, J. In this case we are called upon to determine in what capacity a third party is liable who indorses his name in blank on the back of a negotiable paper before it is delivered to the payee, or indorsed by him. Here, F. S. Holland so indorsed his name, with the addition of the word "security." It is insisted by appellant that, in so doing, he became liable as maker or guarantor of the note, and cites many respectable authorities from Massachusetts and other States in support of that position.

*Contra.*—It is insisted by respondent that in so writing his name, he only became liable as indorser on the usual condition precedent of demand and notice, and cites and relies upon authorities of equal number and force from New York and other States. As this is the first time that this question is here for adjudication, we might decide it in either way under the adjudications in other States as cited, and have an abundance of authority to sustain our decision. It is only necessary for us to elect which rule we will adopt. We are of the opinion that the weight of authority, as well as of reason and sound policy, are in favor of the rule as adopted in New York. That is the great commercial State, and we think it has adapted the better rule of commercial law, which is, where a party places his name in blank on the back of a negotiable paper before delivery to payee, he does not thereby become liable as maker or guarantor, but as an indorser; and

as such is entitled to due demand and notice. (See *Hall v. Newcomb*, 7 *Hill*, 416, and cases there cited; 6 *Barbour*, 282; 15 *Maryland R.*, 291; *Iowa*, 473; *Edwards on Bills*, 273-274.) Then the Circuit Court was correct in holding that F. S. Holland was not liable as maker or guarantor; and, not having been charged by demand and notice, he could not be held as indorser.

Judgment is affirmed.

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\*W. C. GRISWOLD, Respondent, v. A. R. STOUGHTON,  
Appellant.

*Appeal from Marion County.*

The sheriff having sold lands under an execution, regular on its face, presented to the Circuit Court, for its approval, a deed of premises sold; to which approval, defendant in execution objected, and moved to set aside the sale for reason that the judgment was void, and that there was no judgment roll on file—*Held*, 1. That this court will not go behind the execution, and, on mere motion, inquire into the validity of the judgment recited; 2. Section 20, page 124, Statutes of 1855, provides that, "When the sale is of real property, and consisting of several known lots or parcels, they shall be sold separately,"—*held*, that this provision is directory and not peremptory in its application; 3. That, in the absence of other evidence, or setting forth of fraud, injury, mistake or illegality, than the mere return of the sheriff, it is too late for the judgment debtor to come in, after the time for the redemption has passed, and address to the court a mere motion to void a sale, for the reason that two or more adjacent parcels of land were sold in gross.

GRISWOLD recovered judgment by confession against Stoughton, on the first day of June, A. D. 1857, the entry whereof was duly made upon the journal and lien docket of the late District Court of Oregon Territory for the county of Marion. In April, 1862, execution upon that judgment was issued to the sheriff of Marion county, and on the 20th day of May, 1862, certain tracts of land, belonging to defendant in execution, were sold to satisfy the judgment, Griswold being the purchaser.

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\* See 84 Am. Dec. 409.

On the 23d day of September, 1862, the sheriff presented for approval a deed for said land, pursuant to his sale, in the Circuit Court, and Stoughton then appeared and objected to the approval, and moved to have the sale set aside and declared void because

*First.* The judgment upon which the execution issued is void.

*Second.* There was no judgment roll remaining in the clerk's office when the execution issued.

*Third.* Several parcels of land were sold in gross, and not separately.

*Fourth.* It does not appear that one of the parcels was sold either on the same, or at the court house door.

*Fifth.* It does not appear that the defendant had no personal property subject to execution.

*Sixth.* The defendant had personal property subject to execution.

The Circuit Court overruled the motion and approved the deed, and from that decision this appeal is taken.

*Smith & Grover*, for appellant.

*B. F. Harding, Esq.*, for respondent.

SHATTUCK, J. The first two objections cannot be considered in this proceeding. This is an inquiry about the regularity of proceedings *concerning the sale*. An execution is here exhibited, regular upon its face, which recites a judgment, and a judgment roll, and upon a mere motion, at this stage of the proceedings, this court will not go back of the execution to inquire into the validity of the judgment recited.

The other points may be considered, and in examining them this court is confined to the record brought in from the court below. There appears to be no bill of exceptions, and the presumption is that the court below decided the case upon what is here presented; the judgment entry, the exe-



cution, the report of the sale, and the motion, substantially as above presented, without further allegations, averments or proofs.

As to the objection respecting personal property of the defendant subject to levy, the return of the sheriff is sufficiently full, and, being presumed true, negatives the assumptions made by the motion. Both the levy and the return of sale aver that they were made *in default of personal property*.

The objection respecting the *place* where sale was made, is also disposed of by the return, which says: "I exposed for sale as the law directs, on the premises," &c.

The chief question in controversy, then, is respecting the *mode* of sale adopted by the sheriff. The return describes two tracts of land: One being "claim No. 46, and claim No. 64, all comprising 645.31 acres, embraced in notification No. 565 of A. R. Stoughton, bounded," &c.; also, the following premises: "Situate in T. 8, S. R., 3 and 4 W., &c., containing 300 acres, more or less." Each tract is described as consisting of parcels, legal subdivisions or fractions, known by the maps or plats of the United States surveys, and situate in adjoining townships, and the greater portion in one township. Whether the six hundred acre parcel was sold by itself as one tract, or whether the two tracts, amounting to about nine hundred and forty-five acres, were sold together as one parcel, does not appear from the return; neither does it positively appear whether or not the two tracts are adjacent, and could be called one parcel. It is to be inferred, however, from the description, that they are adjacent and constitute a compact body of land. The whole tract, the sheriff reports, was sold for one thousand eight hundred dollars, being about two dollars per acre.

The question now is whether any such irregularity appears in these proceedings as renders this sale void or voidable upon mere motion, after the period for redemption has elapsed. This inquiry involves the construction of the statute of 1854 relative to sales upon execution. It is provided (*Statutes*,

page 124, section 20): "When the sale is of real property, and consisting of several known lots or parcels, they shall be sold separately." If this statute is mandatory, and this provision a peremptory requirement, then it is clear that the sale under consideration is irregular and ought to be set aside. This question has been but once before brought into this court (*Grant v. Roberts et al.*, term of 1860, not reported); and though no opinion directly in point was given, it was clearly intimated by the court that this statute should be held directory, and not peremptory, in respect of the provision above cited. The same point has, however, been decided in New York and Minnesota. In *Cunningham v. Cassidy*, 17 N. Y. R., 278, Denio, J., delivering the opinion of the court, says: "There is a well known distinction between statutory provisions which are of the essence of the proceedings to which they relate and without the observance of which everything that is done is nugatory, and such as are merely model or directory, and the violation of which does not necessarily draw after it the effect of avoiding what has legally been done. After some reflection, and contrary to the opinion which I had formed on the argument, I am prepared to class the direction to sell land on execution in parcels, where it consists of distinct lots or tracts, as falling within the last mentioned class. A judgment is a general lien upon all the land owned by the debtor at the time it was docketed. It is the recovery of the judgment which affects the owner's title, by charging it with the burden of the debt, and the subsequent proceedings relate to the method in which the lien is enforced and executed, and a departure from the prescriptions of the statutes, in conducting these proceedings, may or may not prejudice the judgment debtor or his other creditors." Substantially the same ruling was made in 1 *Minnesota R.*, 183.

We think this is the better and the true rule under our statute of 1854. The main object in adopting one mode or another of conducting sales upon execution, is to obtain the highest price for the smallest amount of the debtor's estate;

and cases can be cited where a large tract of land in a compact form is so situated that the whole, in gross, on sale, will bring a much higher price, than the aggregate amount that could be obtained by the sale in parcels. The interest of all concerned would sometimes be promoted by pursuing one mode at other times by pursuing the other. There should be some discretion allowed the officer as to the mode of sale; and that should be adopted which the condition of the estate makes most advantageous to the party concerned, though the general rule specified in the statute ought to be followed as far as practicable. It is to be presumed that an officer has done his duty, and without fraud or oppression. If it appear that there is great inadequacy of price, or fraud, or abuse of power, or any irregularity that has injured the debtor or his creditors, the sale might be avoided on motion by a reasonable application, upon suitable allegations and proofs. We are not prepared to hold that a debtor may acquiesce in a sale until after the period for redemption has expired, and then, without averring any oppression, fraud or injury, upon a mere motion based upon the return of the officer, have a sale set aside simply because two or more adjacent parcels of land were sold in gross, and not separately.

In this case it appears that the plaintiff's debt was not paid by the proceeds of the land sold, but that several hundred dollars still remain unsatisfied. At the same time there is nothing in the record to show that the land was worth any more than was actually bidden upon the sale. It does not appear that any fraud was practiced, any mistake made by the plaintiff, or the officer, or that any injury was sustained by the debtor, or any of his creditors, by reason of the mode of conducting the sale which the officer adopted.

It is said in argument that Stoughton has a right to redeem any part of the land, but is precluded from redeeming less than the whole by the manner in which the sale was made. If he had actually sought to redeem a part, or been ready

to do so, within the time specified by statute, and been precluded as suggested by counsel, he might have shown it upon his application to avoid the sale, and it might have been considered as a presumption of injury and oppression, but he made no such application; he waited until the time for redemption had expired; and then came in with a mere motion, based solely upon the apparent irregularity above referred to. We do not think that the defendant has made a record in the court below which entitled him to relief, and upon this record we do not think that the Circuit Court committed any error in confirming the sale, and approving the deed.

Judgment is affirmed.

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**PATRICK D. PALMER, Plaintiff in Error, v. STATE OF OREGON, Defendant in Error.**

*Error to Marion County.*

1. Keeping open a house in which intoxicating liquor is kept for retail on Sunday, is an indictable offense.
2. The charter given to the city of Salem does not repeal or change the license law.

At the September Term, A. D. 1862, of the Circuit Court for Marion county, an indictment was preferred against Palmer, charging him with having unlawfully kept open a house, in which intoxicating liquor was kept for retail, on Sunday, and alleging that the house was in the city of Salem. Upon arraignment, Palmer, by his counsel, demurred to the indictment and claimed, among others, as grounds of demurrer:

2d. The grand jury had no jurisdiction over the subject.

3d. The law under which defendant is indicted has been repealed.

5th. The indictment does not show that the statute is in force in the said town of Salem.

The court overruled the demurrer, and defendant excepted to the ruling, and standing by his demurrer, was fined in the sum of ten dollars and costs; and in this court error is alleged in the overruling of defendant's demurrer.

*G. H. Williams, Esq.*, for plaintiff in error.

*B. Mallory, Esq.*, prosecuting attorney for State.

WILSON, J. In support of the allegation of error in the action of the Circuit Court, two positions are here principally relied upon:

1st. That the grand jury had no jurisdiction of the subject.

2nd. That the charter of the city of Salem confers upon the city government the exclusive power to regulate the business of saloon keeping.

In the argument reference was made to a general law to prevent Sabbath breaking, passed by the territorial legislature, January 13th, 1854, which confers jurisdiction upon justices of the peace only, and upon conviction authorizes them to assess a fine not exceeding ten dollars; and among the offenses enumerated in that law is found that of keeping open tippling houses on that day. At a subsequent day of said session, the 18th day of January, A. D. 1854, the legislature passed the act under which this indictment was found and presented. Section 5, of that act, page 545, Statutes of 1855, provides that "no person shall keep open any house or room in which intoxicating liquor is kept for retail on the first day of the week, commonly called Sunday," and limits the fine at not less than ten and not more than twenty-five dollars. Counsel for Palmer now claims as the first point, that the prosecution should have been under the act of January 13th, 1854, and before a magistrate; and as a necessary consequence, the interposition of a grand jury was an impossibility. The statute for the licensing of saloons for the retail of

spirituous liquors had not been made at the time of the passage of the Sunday act of January 18th, 1854, and, doubtless, it was the intention of the legislative assembly to provide special legislation in reference to the restraining and the regulating of a business, which, legalized by solemn statute, is ever so productive of evil results. Statutes, not expressly repealing others, are if possible to be so constructed as to suffer both to be in force; in other words, repeals by implication are to be avoided, yet when the inconsistency and repeal is clearly apparent then the latter statute supersedes the former (21 *Pickering's R.*, 373); and we hold that the act of January 18th, 1854, providing for licensing saloons and for regulating them, virtually repeals so much of the Sunday law or so much of any former statute as undertook to regulate such business, or rather, that the regulation thereof is excluded from the operation of such previously existing provisions. By section 9, page 545, the violation of any of the provisions of the chapter under which this prosecution was had is specially subjected to the action of the grand jury. As to the second point, a brief reference to the charter of the city of Salem is necessary. On the 19th day of October, 1860, (*page 107, Session Laws*), the city of Salem was incorporated; and we need, for the purposes of this decision, refer to but two of the provisions of that act. Section 6, page 108, reads thus: "The mayor and aldermen shall compose the common council of said city, and at any meeting shall have *exclusive* power \* \* to license and regulate bar-rooms, tippling houses, etc., \* \* that the tax and license hereby granted shall be in addition to those made by the county, \* \* to make by-laws and ordinances not inconsistent with the laws of the United States or this State." It certainly is an act of regulation for the carrying on of any business, to prescribe the hours or day within which such business shall be transacted, or to forbid its transaction upon any certain day, or for any certain time, and if, as the act provides, the common council have the *exclusive* power within the limits of Salem to regulate

saloons, then, in the absence of any provision prohibiting the full exercise of that regulating authority, we should hold that the right of such regulation belonged to the city alone; but the last clause of the charter, as above quoted, clearly indicates that the city of Salem undertook the exercise of its privileges and authority with a full recognition of the force and overruling power of any and all laws of the State of Oregon, then existing. The act of January, 1854, now in question, had been for years in full force, and under it many offenders had been subjected to its penalties, and we cannot see how this charter in any way lessens its force, or excludes its full operation over the city limits of Salem any more than from any other part of the State. We admit that the legislative assembly might by express provision change the workings of any law over a particular portion of our State; but until such act clearly appears to have been passed, and that, too, in the absence of any and all such saving clauses as the last one above quoted, we hold the State laws to be in full force wherever their passage sent them.

Judgment is affirmed.

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CITY OF PORTLAND, Appellant, v. M. STOCK, Respondent.

*Appeal from Multnomah County.—Section 22, Article 4, of the Constitution of Oregon construed.*

1. The act revised or amended need not be set out in the revising or amendatory act.
2. The act revised or section amended, must be set forth and published in full as revised or amended, incorporating all changes made.

M. STOCK, defendant below, was brought before the recorder of the city of Portland, upon a charge of violation of city ordinance No. 141, committed by unlawfully carrying on the business of a retail dealer, without first having, under

that ordinance, obtained a license. He was fined by the recorder, appealed to the Circuit Court for Multnomah county, and upon a motion interposed by his counsel, was discharged and the proceeding dismissed. From this judgment and order the city of Portland appealed, and the whole case here turns upon the question involved in two of the points specified in defendant's motion to dismiss the proceedings in the court below, viz:

1st. The charter of Portland confers no power upon the city authorities to enact ordinance No. 141.

2d. The amendment to the city charter under which this ordinance is enacted, is unconstitutional and void.

*G. H. Williams, Esq.*, for respondent.

*E. W. McGraw, Esq.*, city attorney.

Authorities cited by counsel are sufficiently mentioned in the opinion.

WILSON, J. As these questions involve a construction of certain provisions contained in the charter of the city of Portland, the familiar rule comes in for our guidance here, that the powers and authority conferred upon municipal corporations are to be strictly construed, and the limit of such construction is the charter itself. Further comment upon the reason and safety of this rule is unnecessary. The counsel admit that this ordinance, No. 141, has its vitality not from the original charter of January 24th, 1854, but from the amendment of that act, passed October 15th, 1862. Between the dates of the passage of these two acts, a constitution for the State of Oregon had been made, which changed in many respects the powers and modes of operations of the legislative assembly. The respondent denies the constitutionality of the latter act, and claims that so far as this ordinance extends, the proceedings are invalid. That we may have a clear understanding of the provisions of the amendatory act,



I will use the digest thereof as given by the circuit judge. The act in question is entitled "An act to amend an act entitled 'An act to incorporate the city of Portland.'" Section one repeals, by reference to numbers, sections one and two of article seven of the original act of incorporation. Sections two to six inclusive, provide for the improvement and repair of streets, and for the modes of enforcing the regulations made, and intended as a substitute for the sections repealed. Section seven reads as follows: "That in addition to the powers now possessed by the mayor and common council of the city of Portland, the said mayor and common council shall have power, within the corporate limits of said city: 1st. To license, tax and regulate hacks, cabs and other vehicles, and all offensive or noxious trades or occupations. 2d. To license, tax and regulate dealers in goods, wares and merchandise, liquors, provisions, fruits, vegetables, meats and all persons engaged in assaying, melting and refining the precious metals. 3d. To license, tax and regulate eating houses, hotels and laundries; but the power given by subdivision two of this section, in relation to dealers in provisions, fruit, vegetables and meats is not to be construed to apply to persons wholly dealing in such articles, when produced, raised or manufactured by themselves." Section eight provides the time when the act shall go into effect.

In direct connection we cite the constitutional provision here called in question, which is found in section 22, of article 4, of our State Constitution, and reads thus: "No act shall ever be revised or amended by mere reference to its title, but the act revised or section amended, shall be set forth and published at full length." This section was adopted for good reasons. It has been a custom with our legislatures to amend existing laws by mere reference to their titles, and under that cover, to change words and phrases anywhere in its sections; to insert and strike out sentences; to repeal parts of sections at one session, and at the next to re-repeal and amend until it had become a real task to discover what was the existing

statute on many subjects, and without the utmost watchfulness the legislators could not know the extent or effect of proposed amendments. There can be no question as to the wisdom in incorporating that provision into our Constitution and being found there, it comes for the first time into this court, that being here construed, future legislatures may frame their acts in accordance therewith. The first question for determination is, whether section 7, of the act of October 15, 1862, operates as a revision or an amendment of any part of the charter of the city, passed January 24, 1854, and if so, of what part? Section 4, article 4, of the charter declares, in its twenty provisions, what powers the mayor and common council may have within the city limits. Their authority is found in no other place, and they may not, in our judgment, assume or exercise any jurisdiction, unless a fair construction on some of these clauses warrant it. Section 7, of the act of October 15, 1862, starts out with this declaration: "That in addition to the powers now possessed by the mayor and common council \* \* shall have power \* \* 2d. To license, tax and regulate dealers in goods, wares and merchandise, &c." Manifestly, then, section seven enlarges the powers previously possessed by the city government, revises and amends them; and, if that section were valid, the city authorities could, after the 15th day of October, 1862, perform acts which would not have been lawful previous to that date. We conclude, then, that the act of 1862 is a statute which operates as an amendment to the charter; and we pass to the main question. The meaning of section 22, article 4, of the Constitution, is apparent; there is no real ambiguity which requires intended interpretation, and we need avail ourselves of but two modes of construing; one from the words of the section; the other from the construction given to that clause by States adopting it previously to its incorporation into our Constitution. There might possibly be derived from this section two meanings, differing in degree of change required, one of which was adopted by the Circuit Court, viz: That whenever

an act or part of an act shall be amended or revised, the old law shall be exhibited on the same page with the proposed amendment; and the other, which we now adopt, viz: That when an act, part of an act, or section, is amended or revised, the act, part of an act, or section shall be set forth as amended or revised, in full, with the changes incorporated in their places. This clause was taken bodily from the Indiana State Constitution, and from a like provision in the Louisiana State Constitution. The States of Maryland, Michigan, California and Ohio, without enumerating others, have substantially the same provision in their several constitutions. The Constitution of Louisiana, of 1845, seems to have been the first containing such clause; and to determine our holding now, we may review briefly the course of procedure in those States, and recognizing as authority their constructions of that provision, determine what one shall prevail in Oregon. In 11 *Louisiana Reports*, 56, in the case of *Arnoult v. New Orleans*, the Supreme Court of that State construed the provision in question as we now construe it; and the subsequent statutes of that State teem with acts amendatory of others, and in every case falling within our observation, the section as amended, or the act as revised, is only found. The court in that case says: "It was intended that each amendment, and each revisal, should speak for itself; should stand independent and apart from the act revised, or the section amended. It was therefore provided that *in such cases*, if the object was to *revise* an act, it should be *re-enacted* throughout; and if the object was to *amend* an act, then the *section amended* should be *re-enacted and published*." (*Statutes of Louisiana*, 1856, pages 17, 27, 74-5-6, 80, 96, &c. *Statutes*, 1860, pages 64, 67, 70, 81, &c.)

With the same provision substantially we find the *Statutes* of Michigan, Maryland, California and Ohio exactly conforming to those of Louisiana: *Statutes of Michigan*, 1859, pages 28, 30, 33, 37, 91, 96, 148, &c.; *Statutes of California*, 1860, pages 133, 141, 157, &c., *Statutes of Maryland*, 1861-'62,

pages 12, 16, &c.; *Statutes of Ohio*, 1858, pages 72, 73, 74, &c.; *Statutes of 1860*, pages 17, 20, 21, &c., and the cases in point occurring on those statute books are very numerous.

In Indiana a somewhat different construction prevails, by which the Circuit Court below seems to have been guided. In *Langdon v. Applegate*, 5 *Indiana R.*, 328, a majority of the court held "that the meaning of this section is, that the act revised or section amended shall be inserted at full length in the act amending or revising it." Same doctrine held in *Rogers v. State*, 6 *Indiana*, 81. Same doctrine re-affirmed in *Kenyon v. Shull*, 9 *Indiana*, 154, and in *Armstrong v. Berryman*, 13 *Indiana*, 426. In 9 *Indiana*, 102, *Wilkins v. Miller*, Stuart, Justice, follows the ruling in *Langdon v. Applegate*, but dissents. In 9 *Indiana*, 118, *Little v. Smiley*, Justice Gookin also dissents.

From a full review of these authorities, we come to the conclusion, as expressed in the Louisiana authorities, that if the object be to *revise* an act, then the act *as revised* should be set out in full; if the object be to *amend* an act, then the section *as amended* must be set out in full, incorporating all changes and amendments. While we do not go to the same length as did the Circuit Court below, in our construction, the final bearing upon the case in court is the same. The amendatory act, in either view, is not within the requirements of the Constitution. In the case at bar, the act of October 15, 1862, in its title, professes to *amend* an act entitled an act to incorporate the city of Portland;" and section 7, under review, does amend and enlarge section 4 of article 4 of the former act, without setting out in any way the section or sections amended.

In view of the clear meaning of the Constitution we conclude that the act in question is unconstitutional, and the proceedings under the same are invalid.

Judgment is affirmed.

DANIEL CARLAND and others, Plaintiffs in Error, v. L.  
HEINEBORG, Defendant in Error.

*Error to Douglas County.*

1. What service is sufficient to give a court jurisdiction of the parties?
2. What the effect may be of the absence of a material paper from the transcript, or its loss from the judgment roll.

So many of the facts as are necessary to be stated in this case will appear in the opinion of the Court.

*B. F. Dowell, Esq.*, for plaintiffs in error.

*L. F. Mosher, Esq.*, for defendant in error.

WILSON, J. Upon a bill and notice of suit filed in the Circuit Court for Douglas county, there was a return of service as follows:

"I hereby certify that I served this bill and notice, by leaving two copies of said bill and notice at the dwelling house of Daniel Carland in Douglas county with a young white man, residing with the family, over the age of fourteen years, with a request that he hand them to Mr. Carland and Mrs. Carland.

"October 29th, 1861.

"JOHN FULLERTON, *Sheriff.*"

There was also a recital in the proceedings of the court of an order directing reference to a master, as follows: "And it appearing that the respondents have been duly served with notice of this proceeding, and a copy of the bill, etc." It is also admitted that the original notice, if any there were, has been lost, so that no copy thereof, or other indication of existence appears here. Upon this record and admission, we are asked to reverse the action of the Circuit Court, and two questions are urged by plaintiffs in error.

1st. Was the return of service of complaint and notice sufficient to bring defendants below into court?

2d. With such a return by Fullerton, and a full recital of proper service of bill and notice, and of default of defendants, is it sufficient to conclude the parties now?

In reference to the first point our attention is called to two positions: That there was no sufficient service; and that no proper person certifies to the service. *The Statutes of 1855, page 86, section 29, clause 5*, provides "in all other cases to defendant personally, or if he be not found to some white person of the family, above the age of fourteen years, at the dwelling house, or usual place of abode of the defendant." It is eminently proper that all reasonable steps are to be taken to bring to the notice of a defendant that proceedings have been instituted against him in a court, and I think it equally proper to hold, that when there has been a substantial compliance with statutory requirements as to service, parties should be required to answer, or be subjected to the burdens of a default. In this case every requisite was literally complied with, except as to the relation sustained by the person with whom the papers were left. The words in the Statutes are: "of the family," and those in the service are: "residing with the family." It would certainly be true that one residing with a family would constitute a member of the household, and for all purposes required for service of such papers, we think he would be of the family, and that the service in this respect would be sufficient. Again, this cause was entitled of Douglas county, addressed to the judge of the proper court of that county, and the return embraces among its certified facts, that service *was made* at the dwelling house of Carland "in Douglas county," and is then signed by *John Fullerton, sheriff*. It is not beyond any reasonable presumption for a court to hold that no other than the sheriff of Douglas county was the person making that certificate. With the return, and the officer before it, the Circuit Court found that said Fullerton was the proper officer; and in view of the

facts here, and the record, there is no reason for declaring the service insufficient in this respect. As to the second point, there is no original notice on file, and this transcript contains no copy of such paper, and the question submitted is: With the recitals upon the record in due form, ought the decree of the Circuit Court to be disturbed for the reason that a material paper is not now found among the papers in this cause? We hold it should not. When this decree was rendered below, there was no other way provided by law for the preservation of the records and papers than the preparation and *filing* of what was called a judgment roll, and the entry of judgment upon the court journal. This preparing of the judgment roll, embracing certain papers, was the duty of the clerk. Our present Code provides especially for a more sufficient security. *Section 61, page 119, Statute of 1855*, in force at the time of this decree, provided only for attaching together and filing certain papers, of which the notice is one. The better rule would have been, upon the entry of judgment, to have made a full record of the papers constituting a judgment roll. In the absence of such a provision, we must avail ourselves of all due precaution, and by our findings preserve as far as is reasonable and just, all the rights of the parties. If we hold, that, while return of service and the record are properly made, and default properly entered, every paper requisite to perfect the *judgment roll* should be kept constantly on the files of the court, in order that the judgment creditor can enforce his judgment by collection under execution, it would be but a compelling necessity for the creditor to stand guard over the office where the records were kept; and would require courts to insure against the acts of interested persons, who, by the designed abstraction of a single paper, might render trial and judgment unavailing; an insurance against losses which no court could prevent. It is true that upon this point authorities are conflicting. (*Smith's Leading Cases*, 841-2.) It is essential that courts should have such jurisdiction that parties and their rights shall not be unfairly

dealt with; and when a court has so disposed of its business as to leave no other impression upon us, after due consideration, than the strongest of presumptions that it has properly exercised its authority, neither mere technicality or apparent omission should cause us to disturb a solemn judgment. We think the court below rightly took full jurisdiction and that parties are concluded thereby.

Decree is affirmed.

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CHARLES BURCHARD, Plaintiff in Error, v. STATE  
OF OREGON, Defendant in Error.

*Error to Multnomah County.*

1. The Charter of the city of Portland provides, by section 4, that the mayor and common council shall have power within the city "to license, tax, regulate and restrain bar-rooms, etc. *Provided*, that no law, or parts of law authorizing any officer of the county of Multnomah to grant tavern or grocery licenses, shall apply to persons vending liquors within the limits of said city. *Held*, that the general law is not modified in any wise except as to the *granting* of license.
2. Requisites in indictment.
3. The allegations "and on divers other of said days between said day," etc., and "to divers other persons whose names are to the grand jury unknown," in an indictment for the sale of spirituous liquor, are *surplusage*, and do not vitiate the indictment.

On the 15th day of November, A. D. 1862, an indictment was preferred against Charles Burchard, and filed in the Circuit Court for Multnomah county, charging said Burchard with the offense of selling intoxicating liquor, the body of which indictment is as follows:

"The said Charles A. Burchard, on the 14th day of September, A. D. 1862, it being the first day of the week commonly called Sunday, and on divers other of said days, between said day and the finding of this indictment, at the city of Portland in this county, at the 'Gem Saloon,' will-



fully and unlawfully sold to A. B. Brannan, and to divers other persons whose names are to this grand jury unknown, intoxicating liquor, to wit, one gill of whiskey, against the statute in such cases provided."

To this indictment defendant by his counsel interposed a demurrer substantially as follows:

"1st. The indictment does not charge that the liquor sold was sold by defendant, at or in any house or room where any intoxicating liquor was kept for retail.

"2d. There is no law in force in the city of Portland, making a sale of intoxicating liquor on Sunday a criminal offense.

"3d. The said defendant has a right to sell liquor on Sunday in the city of Portland, by virtue of the act of the legislative assembly of the territory of Oregon, entitled an act to incorporate the city of Portland, passed January 24th. 1854.

"5th. The indictment charges more than one offense."

The court overruled the demurrer and defendant, refusing to plead and standing by his demurrer, was adjudged to pay a fine and costs, to which ruling and judgment he excepted, and this case is here for revision.

*G. H. Williams, Esq.*, for plaintiff in error.

*W. C. Johnson*, prosecuting attorney.

WILSON, J. Three points are designated in this case and insisted upon as requiring a reversal of the judgment below; *one*, as to the provisions in the charter of the city of Portland; and *two*, as to alleged defects in the indictment. The determination of the first point involves a mere construction of the statute. The charter given to the city of Portland contains, among other clauses prescribing the authority of the common council, this provision: "To license, tax and regulate and restrain bar-rooms, etc. \* \* *Provided*, that no law or parts of laws authorizing any officer of the county of

Multnomah to grant tavern or grocery licenses, shall apply to persons vending liquors within the limits of said city." It is insisted here by plaintiff that this latter clause exempts the city limits from the operation of *all* parts of the law under which this indictment is preferred; and on the contrary, it is admitted by the State that the provisions of the statutes, so far as they relate merely to the *granting* of licenses, do not apply to the city of Portland, but it is claimed that all the *penal* provisions of the same statutes are in full force there as elsewhere in the State. We think this fact is apparent. While the statutes of Oregon provide for an easy obtaining of a license to sell spirituous liquors by retail, the legislative assembly undertook to sedulously guard the public from the ill results attending such traffic, and by very special enactments have restrained the possible infractions of those laws. We hold that the provisions of that charter secures to the city of Portland the exclusive right to license saloons within the city limits; and so far those sections of the general law which refer especially to the granting of such licenses are inoperative; but we must as far as possible construe both the general statute and the charter so that both may stand. The one, so far as its provisions have not been expressly repealed or restrained; the other, so far as express authority has been given it. We cannot think that the legislature intended to give the city of Portland the exclusive authority to punish illegal sales of such liquors. Doubtless the city may enact penal ordinances in reference thereto, which are not inconsistent with the general laws of the State. Suppose the city should have the exclusive right to punish, or not, as should seem to a common council best to do, then by a plentiful granting of licenses and a neglect or refusal to impose restraining and punitive ordinances, the whole purpose of a license law would be defeated, not only within the limits of that city, but so far as the influence and control of trade held by Portland extends. We have no doubt but that the grand jury had full right to

inquire into the alleged breaking of the law in this case, and the Circuit Court had full jurisdiction thereof. As to the second point: "That the indictment is clearly defective in not stating that the liquor was sold in a house in which intoxicating liquor was kept for retail." The grammatical and ordinary construction of the reading of *section 5, page 545, Statute of 1855*, clearly separates the offense of keeping open a house in which intoxicating liquors were kept for retail from the offense of selling, etc., such liquors on Sunday. Nor does the first provision necessarily attach to and form a part of the offense in the second provision. Any other construction would obviously defeat the meaning and intent of the law. The absence of the clause stating that the liquor was sold in such a house is not in this case a material defect. As to the third point, "that sundry offenses are charged in this indictment," it is only necessary for us to state that one offense is sufficiently stated; and that the allegations that "on divers other of said days, between said day," etc., and "to divers other persons whose names," etc., may be stricken out without in anywise affecting the sufficiency of the indictment, and without affecting the rights of defendant. This is evidently what is termed *surplusage*, and may be disregarded with safety.

Judgment is affirmed.

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THE OREGON STEAM NAVIGATION COMPANY,  
Respondent, v. THE CITY OF PORTLAND,  
Appellant.

*Appeal from Multnomah County.*

1. After the assessment of all the taxable property has been made and returned, and tax levied thereon, the common council of the city of Portland has no power to order an additional assessment to be made of property subsequently coming within the city limits.
2. Exception. Persons not previously taxed, who shall commence, subsequently to the levying of the taxes, to sell and barter goods, and not previously assessed, may be assessed.

UNDER the provision of the charter granted to the city of Portland, June 24th, 1854, the city government had authority to levy and collect taxes not to exceed one-half of one per centum per annum, upon all real and personal property made taxable by law for county and State purposes. *Section 10, of article 4, of the city charter*, further provided, "That if any person or persons not previously taxed, at any time after the annual assessment, shall commence to sell or barter, any goods or chattels not previously assessed for city taxes, within said city, such person or persons shall be liable to be assessed in respect of said goods and chattels; and shall pay to said city a tax on said property in the same proportion to the annual tax last assessed, as the time intervening between said commencement to sell said property and the next annual assessment bears to the whole year."

*Section 4, of article 6, of the charter* provides that, "It shall be the duty of the assessor, in addition to the duties prescribed by the common council, to make out, within such time as the common council shall order, a correct list of all the property taxable by law within said city, with the valuation thereof, which he shall certify and return to the common council; said list and valuation shall be in the manner prescribed by law for assessing and collecting county and territorial taxes. Should the owner of any property assessed not be satisfied with such valuation thereof, he may apply to the common council for a reduction, etc." *Section 5, same article*, gives the collector power to enforce collection of taxes in the same way as a sheriff might collect county taxes.

The Oregon Steam Navigation Company was formed as a corporation, having its place of business in Portland, on the 25th day of November, 1862, and first became possessed of property on the 5th day of December, 1862, by purchase and transfer from a company organized under the same name by the territory of Washington; and the business of said company is the navigation, by steam and other means, of the rivers in Oregon, &c. The only real estate held by said

company in Portland, had been assessed, under the annual assessment, and the tax had been paid. The regular annual assessment for the year ending July 1st, 1863, was made and returned to the common council in September, 1862, and taxes levied thereon by ordinance passed November 26, 1862.

In April, 1863, the common council ordered the assessor to assess property for the year ending July 1st, 1863, not included in his list of September, 1862; and the assessor found as "not assessed," the sum of \$75,000, personal property of the O. S. N. Company. This assessment was ordered to be amended, and it was recommitted to the assessor, and on the 3d of June, 1863, was returned, approved by the council, and taxes levied thereon, and warrant for collection given to the city collector. On this amended list the O. S. N. Company were assessed in the sum of \$1,000,000, and upon their refusal to pay \$4,000, as taxes thereon, the collector, on the 27th day of June, 1863, levied upon the steamboat *Julia*, belonging to the company.

The O. S. N. Company and the city of Portland submit in an amicable suit to the Circuit Court, to determine whether the said O. S. N. Company is liable to pay to said city the sum of \$4,000 taxes, or any sum; and if so liable, for what amount and on what property. The Circuit Court, by judgment, found that the O. S. N. Company were not liable for any amount as taxes, and that the assessment under order of April 29th, 1862, was unauthorized and void. From this judgment the city appealed, and the case is in this court for determination.

*Williams & Strong*, counsel for O. S. N. Company.

*E. W. McGraw*, city attorney.

**WILSON, J.** The charter given to the city of Portland, authorized the assessment of property for taxation to be made in the same manner prescribed by law for assessing and collecting county and territorial taxes; and the city assessor

could go no farther than the county assessor might in the discharge of the duties of his office. By a statute passed in 1854, page 416, *Gen. Stat.*, the county assessor was required within a prescribed time to assess all the taxable property in his county, and return his roll to the County Commissioners, and that having been done and corrected, his official authority was ended. So with the city assessor. Having completed his assessment roll, as required by ordinance, and returned the same, his authority was ended so far as the annual assessment was concerned. To save any omissions in the return of the county assessors, the legislature, by an act passed January 26th, 1855, section 3, page 418, provided that when the sheriff, engaged in collecting taxes, discovered any such omission to assess, he might, and it became his duty, to assess such omitted property. No such authority was given to the city of Portland or any of its officers. This act was subsequent to the charter. The city collector, by section five, article six of the charter, only had the power and authority of the sheriff to *collect and compel payment* of city taxes, not to *assess* any property. The only exemption to this view of the case is found in section ten of article four of the charter; but it is not pretended here that the O. S. N. Company could come under that exception. They were not then, and have not since been engaged in selling and bartering goods, &c.

We think that, when the annual assessment was made by the city assessor, in September, 1862, and returned, and the tax levied thereon by the common council November, 1862, there was not any authority left to the common council to order a re-assessment in April, 1863, unless, under the provisions of the charter, they had taken the proper steps to raise a special tax. The conclusion then is, that the assessment made in the spring of 1863 and returned, was unauthorized and void. In view of the strict construction to be placed upon the authority and powers delegated to municipal corporations, we can come to no other conclusion. The O. S. N. Company had no property subject to assessment until Decem-

ber 5th, 1862, a time subsequent to the annual assessment and laying of the tax for that year; and that company was not within the exception in section ten, article four, of the charter. The O. S. N. Company were not liable to the city of Portland in any amount of taxes as claimed.

Judgment is affirmed.

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JOHN D. HURD, Respondent, v. ISAAC MOORE,  
Appellant.

*Appeal from Benton County.*

1. The use of the words "conversations," "discourses," "publish" and "declare," in the complaint, is a sufficient averment, implying that the words were spoken in the presence of others.
2. In actions for slander, the words used are to be construed in that sense in which they are generally understood.
3. What is sufficient to charge an offense?

THE complaint charges that the defendant, Moore, "maliciously intending to injure the plaintiff, did, in certain conversations or discourses, utter, publish and declare, of and concerning the plaintiff, these false, scandalous and defamatory words, to wit: 'Hurd' (the plaintiff meaning) 'burned my house,' referring to a certain dwelling house of the defendant which had previously caught fire and burned; 'he' (the plaintiff meaning) 'set my house on fire;' 'Hurd is a d—d rascal;' 'the,' &c., using other opprobrious epithets, 'that burned my house,' meaning by said charges that the plaintiff had been and was guilty of the crime of arson."

It is insisted by the counsel for the appellant, that the complaint is defective and wholly insufficient, because:

- 1st. It does not show that the words were spoken in the presence or hearing of any person or persons; and
- 2d. The words charged to have been spoken by defendant, do not impute to plaintiff a crime or indictable offense.

*Williams & Kelsay*, for appellant.

*A. J. Thayer*, for respondent.

SHATTUCK, J. As to the first point, it is unquestionably the rule, in actions for verbal slander, that the complaint must show that the words were spoken of and concerning the plaintiff, in the presence or hearing of some person or persons; but, in this case, we think that the terms employed by the pleader, "conversations," "discourses," "publish," imply the presence of hearers, and sufficiently indicate that the declarations were public and notorious. This point is not, then, well made.

As to the second point, it was contended in the argument that the averment "referring to a certain dwelling house" that had "caught fire and burned," taken with the words charged to have been spoken, show that no arson was or could have been charged, and consequently the words spoken are not actionable; and also that the words used, taken with the averment, are capable of an innocent construction, and therefore a slanderous meaning should not be attached to them.

It is conceded that the innuendo cannot extend or enlarge the meaning of the words charged to have been published; but we are of the opinion that the words charged in the complaint, taken with the averment, do, of themselves, convey a clear and direct imputation of a slanderous character.

Formerly, the rule prevailed, in actions of this kind, that words are to be innocently construed if possible; but the rule is now held to be, that words are to be taken in that sense in which they are generally understood; and when that puts upon them a guilty sense, it is incumbent on the defendant to show that they were innocently used. (*Pike v. Van Wormer*, 6 Howard Pr. R., 101 *Goodrich v. Walcott*, 3 Cow., 239.)

The defendant, by failing to answer, admits all the allegations of the complaint to be true. Now the words charged are not ambiguous; there is no uncertainty in regard to the subject matter to which they relate, or the person to whom



they were intended to apply. The defendant, after applying vile and opprobrious epithets to the plaintiff, indicative of bitterness and great animosity, without qualification, declared that the plaintiff was the one that "set it on fire," "that he had burned it." It is difficult to see how other than a guilty sense could be put upon these words so used. It is only a fair and reasonable inference, from the whole discourse charged, that the defendant intended to charge the plaintiff with having willfully and maliciously set fire to that house; that he was guilty of arson. We are, therefore, of the opinion that enough is charged in this complaint to put the defendant upon his denial, or upon the proof that the words were innocently used.

Judgment is affirmed.

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H. J. WALDRON, County Treasurer, Appellant, v. JOHN HARRISON et al., Respondents.

*Appeal from Wasco County.*

1. An express assent, to be liable for the appearance of a prisoner at a future time, upon the order of court, is not necessary to bind the sureties.
2. As to liability of sureties upon bail bond.

THE condition of this recognizance is that "John Harrison shall appear in the Circuit Court" at a certain time and place "to answer a charge of adultery, and not depart without leave of said court, and abide the judgment thereof in all things." The respondents insist that no breach of this condition is charged, inasmuch as it is averred that the said Harrison did appear in said court, at the term specified in the recognizance, and by order of the court the cause was continued until the first day of the succeeding term, and the defendant ordered to appear at that time to answer said charge, and in the meantime was allowed by the court to go at large upon the recognizance first given.

*W. O. Johnson*, for appellant.

*N. H. Gates*, for respondents.

SHATTUCK, J. It is said that by the terms of this recognizance the sureties were bound only for Harrison's appearance at the May term, 1862, and that a continuance of the cause until the September term, without their express consent, exonerated them from further liability.

It is admitted as a general rule that the obligations of a surety cannot be enlarged or extended without his assent; but we do not think, that in this case the respondents can claim any aid from that doctrine; for by assuming to become sureties in this recognizance, they took upon themselves the office of voluntary jailors for Harrison; they became his keepers; and by the very terms of their obligation undertook to have him obedient and subject to all orders of the court. He was to go and come, whenever the court should direct, and they were to bring him whenever called. We think it was within the power of the court on the day named in this recognizance for the appearance of Harrison, to set down the case for a future day, even a day of the succeeding term, and to order him to come upon such future day to answer the charge made against him. This continuance, we think, was an order which these sureties undertook should be obeyed by Harrison; and if on such appointed day he did not appear, and his sureties did not bring him, then the condition was literally broken. Harrison had departed without leave and failed to abide the order of the court. No express assent or agreement to stand as sureties until the future day appointed by the court was necessary to continue their liability; they must be presumed to have been present in court with their prisoner, and to have known of the order made by the court; and they could have exonerated themselves by an express dissent, and by delivering the defendant into custody in open court; or, they could at any time, have carried him before a magistrate,

and had him committed. Failing to do this, they remained bound for his appearance at the subsequent day appointed by the court. (*People v. Clay*, 17 Wend., 375.)

Harrison having failed to appear at the September term as ordered by the court, there was a default, and the plaintiff below should have judgment, unless the respondents by answer can show other matters in defense than those presented by the demurrer in this case.

The judgment below must be reversed and the cause remanded.

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A. HARKER and another, Respondents, v. A. FAHIE,  
Appellant.

*Appeal from Multnomah County.*

A voluntary appearance in court does not waive defendant's time to plead. It only waives informality of process and service.

*W. W. Chapman, Esq.*, of counsel for plaintiffs.

*G. H. Williams, Esq.*, of counsel for defendant.

BOISE, C. J. This is a suit in chancery, where a decree was rendered for the plaintiff. The service was not sufficient as to time, but defendant voluntarily appeared, and the question here is: Did such an appearance by the defendant waive his right to time to plead, given him by statute, as in ordinary cases? Service was had on the 24th day of May, and the return day was the second Monday in June following, which was less than twenty days. The *Statute of 1859, page 18*, provides that in suits in equity, as well as actions at law, a defendant may be brought into court either by the service of the complaint and notice or by subpoena, as provided in the *Statute, title 1, of chapter 1*, regulating proceedings in suits in equity. Such statute provides that no defendant in equity shall be compelled to plead, answer, or demur in less than

twenty days after the service on him. That statute is found on page 198, section 22, of the bound statutes, and further provides that if the subpoena shall have been served thirty days before the return day thereof, the defendant shall file his plea, demurrer or answer to the bill on or before the third day of the term at which the process is returnable. If it shall have been served less than thirty days before such return day, then defendant shall file his plea, demurrer, or answer, within thirty days next after such return day. I think the statute of 1859, referred to, only modified the latter statute, so as to shorten the time of service from thirty to twenty days. Where plaintiff chose to commence his suit by notice instead of by subpoena—the *practice* in chancery remains as before—defendant was to plead, answer, or demur, on the third day of the return term if service had been thirty days; or, within thirty days after the return day, if service had been less than thirty days before return day. The evident intention of the legislature was to enable parties to bring suits in equity by service of notice instead of subpoena; and if no provision as to time of service in chancery had been made, then ten days' service would have been sufficient, as in other cases of notice; but in cases in chancery, twenty days is fixed for the time of service of notice; and if it had been the intention to otherwise change the chancery practice, it would have been set forth. Then we would have had two modes of practice in chancery, which would lead to confusion. I think the better construction of these statutes is that the new statute only shortened the time of service, and left the practice in other respects as it was. It is also insisted that as the defendant appeared voluntarily and made a motion in the case, he not only waived all informality of service of process, but also his time to plead. This would be carrying the effect of an appearance too far. If a defendant appear voluntarily in court, he is under no disabilities he would not be under if regularly brought into court by due service of process. If brought into court by subpoena or notice, he would have the

time which the law allows him in which to plead, and we think he should have the same right if he appears and waives service.

Judgment is reversed.

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**JAMES HAMLIN and others, Appellants v. ELIZABETH KINNEY and others, Respondents.**

*Appeal from Jackson County.*

1. The sureties on an executor's bond cannot be sued until after default of the executor in the Probate Court.
2. A supplemental answer is not a waiver of all former pleas not inconsistent with it.

*B. F. Dowell*, of counsel for respondents.

*G. H. Williams*, of counsel for appellants.

BORSE, C. J. Elizabeth Kinney and others, the widow and heirs of David M. Kinney, deceased, brought suit in the Circuit Court for Jackson county, against James Hamlin, executor of said Kinney, and the sureties of said executor, to recover seven hundred dollars which had been allowed them, out of the assets of said estate, for the support of the family of the deceased, pending the settlement of the estate. It does not appear in the complaint that any steps have been taken in the Probate Court of said county to enforce the payment of said allowance before the bringing of this suit. And the first question made in the case is: Can the bond of the executor and his sureties be presented and the sureties made liable for the default of the executor, to pay such allowance before some action on the matter is had in the Probate Court? Such an allowance being made by the Probate Court, if assets come into the hands of the executor and he neglect or refuse

to pay the allowance, then application could be made for an order of the Probate Court on the executor to pay the same; and if he still neglected or refused, then the Probate Court could proceed to enforce its order, or revoke the letters of such executor, and appoint an administrator who would obey its order. If the executor had wasted the estate so that the widow and heirs failed for that reason to receive the allowance, then, and not till then, would the sureties of the executor become liable to pay the amount of the allowance. We think the law contemplates that the allowance should be paid out of the assets of the estate; and the sureties of the executors only become liable when, by the misconduct of their principal, a loss falls on the widow and heirs in this respect and that this should appear in the complaint of the plaintiff who sues on the bond; and since this does not appear in this case, we think the court had no jurisdiction of the case. There is another question which has been discussed in this case, on which, though not necessary for the disposal thereof, it is thought best to express the views of the court, as it is a matter of practice. Whether a supplemental answer in the nature of a plea *puis darein continuance* is, under the Code, as at common law, a waiver of all former pleas. Our statute on this subject is a copy of the New York statute, and there it is held under the Code that the filing of a supplemental answer in the nature of a plea *puis darein continuance* is not a waiver of all former pleas, unless they be inconsistent. We are inclined to adopt the same rule here.

**Judgment reversed.**

**THOMAS CARTER, Appellant, v. W. W. CHAPMAN  
AND WIFE, Respondents.**

*Appeal from Multnomah County.*

1. The claimant of a donation land claim, under the act of Congress of 27th September, 1850, must set the land apart for his own use, and designate it by boundaries with reasonable certainty; and any substantial change in the location will be an abandonment of his claim, and the taking of a new one.
2. A married woman cannot be deprived of her real estate except by her deed.

*L. F. Grover, Esq., for appellant.*

*Kelly & Chapman, for respondent.*

BOISE, C. J. In 1850, W. W. Chapman, the husband of Margaret F. Chapman, conveyed block "W" to D. H. Lownsdale. On the 10th day of February, 1852, D. H. Lownsdale and wife conveyed the same block to Carter, plaintiff. Since that time, a patent to the land claim, including block W, has been issued to the said Margaret F. Chapman, it being her portion of a donation right to her husband and herself, under act of Congress of 27th September, 1850, donating land to settlers in Oregon. The complainant claims that, at the time Lownsdale and wife conveyed to him, they were the owners in fee of the land, including block W, as claimants under said act of Congress of 27th September, 1850; and that he got from them by deed an indefeasible title. He claims that, at that time, Lownsdale and wife had complied with all the requirements of said act of Congress so as to entitle them to the grant of land, including block W. Complainant asks that the court decree that, as said Margaret F. Chapman has obtained the patent wrongfully, she be declared a trustee of said block W for the use of com-

plainant. As this is purely a matter of evidence, we have inquired into the facts. It seems that about 1848, or more than four years before the execution of the deed of Lownsdale and wife to Carter, Lownsdale settled on and held a land claim under said act of Congress, lying west of the Portland claim. That then, one Pettygrove was holding and claiming the Portland claim. That the boundaries between these claims were in dispute between claimants Lownsdale and Pettygrove, and that Lownsdale was residing on the disputed ground. In 1849, Lownsdale bought out Pettygrove, and went into actual possession of the Portland claim, as claimant, and abandoned his former claim all but the small portion that was in dispute between him and Pettygrove, and that Lownsdale then for the first time became the claimant of the Portland land claim, including block W. It is contended by the counsel for Carter, that, as Lownsdale actually resided on and cultivated the disputed tract, which had been claimed by himself and by Pettygrove, before he bought out Pettygrove, and which was a small strip of land on the west edge of the Portland claim, as held by Lownsdale after his purchase from Pettygrove, such residence and cultivation is a substantial compliance with the act of September 27th, 1850; that is, that, if a settler actually reside on and cultivate one corner of six hundred and forty acres of land, claiming it all as a land claim for a time, and then abandon six hundred acres of it, retaining forty, and take six hundred acres more on the other side of his residence, which he obtains by the abandonment of another settler, this latter is, in contemplation of law, the same claim. We think this view is erroneous; it would be taking substantially a new claim. For instance, to take a donation land claim, a person must segregate his claim from the rest of the public domain, and fix its boundaries with reasonable certainty, so that others may know what land he claims, and be enabled to take claims adjoining his. The claimant must also be in actual legal possession of



the land he claims, and he cannot be said to be in possession of land he does not claim; he must exercise over it acts of ownership such as would make his possession *adverse*. It cannot be said that Lownsdale exercised acts of ownership over the Portland claim until after he bought it of Pettygrove, and went into possession under that purchase; for, prior to that time, Pettygrove was in possession, and Lownsdale acknowledged that possession and recognized him as rightful owner. It is clear from the evidence that Lownsdale's right to the land, including block W, did not accrue until after the purchase from Pettygrove in 1849; consequently, Lownsdale had not, at the time he and wife gave the deed, resided on and cultivated the land for four years, as the law of 1850 required to perfect a right to the land. This disposes of this part of the case in favor of the defendants. We here remark that, as this question is settled by the evidence, the court does not intend to express an opinion as to what would be its holding had the facts been as claimed by the complainant, as that would involve questions of importance affecting our land system in this State. These questions are left until they are more fully presented.

There is another matter relied on by the plaintiff, which is, that the deed of Chapman to Lownsdale estops the title to Mrs. Chapman, she having had notice of the deed before her title from the United States government became perfected. On this point the evidence leaves the question of notice in doubt. We think it makes no difference whether she had notice or not. This land having been lawfully granted to her, and she being a married woman, the title cannot be taken from her, except by her deed properly executed.

**The decree is affirmed.**



CASES  
ARGUED AND DECIDED  
IN THE  
Supreme Court of the State of Oregon.

SEPTEMBER TERM, A. D. 1864.

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PAINE P. PRIM, <i>Chief Justice.</i> ERASMUS D. SHATTUCK, REUBEN P. BOISE, RILEY E. STRATTON, JOSEPH G. WILSON,	}	Justices.
R. WILLIAMS, <i>Clerk.</i>		

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\*SWIFT, HURLBURT & CO., Plaintiffs, Respondents, v.  
B. STARK, E. S. SHERMAN and J. S. SHERMAN,  
Defendants, Appellants.

*Appeal from Multnomah County.*

1. Effect in this State of a judgment in another State under the joint debtors act, upon a party served and appearing in that State.
2. Judgment is a merger of original contract, and is *prima facie* evidence of indebtedness against the joint debtors not served or appearing.
3. Defendant served and appearing in original judgment, cannot have the original cause of action re-examined in an action on that judgment.

RESPONDENTS declared in the court below, *in form*, against appellants, upon a judgment rendered in favor of respondents and against Benjamin Stark, appellant, and E. S. Sherman and J. S. Sherman, in the Supreme Court of the State of New York, for the city and county of New York, in January, 1863. Stark only appeared in the court below. The Sher-  
mans did not appear, being non-residents, and not having

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\* See 88 Am. Dec. 463.

been served with process. Stark filed his separate answer, upon which the case was tried and verdict found in favor of plaintiffs below, against Stark, for the sum of \$3,804.65. Stark moved, in arrest of judgment, to set aside the verdict and for a new trial; all of which were overruled by the court, and judgment rendered on the verdict, *in form*, against the joint property of all the defendants and the separate property of Stark; and Stark appeals to this court. The judgment in the court in New York was rendered against defendants Stark and the Shermans, under the statute of New York known as the "Joint Debtors Act," the suit having been brought upon the joint promissory notes of defendants. Stark was duly served with process, and appeared by attorney in the action; and the Shermans were not served with process and did not appear in the action.

*A. E. Wait, Esq.*, counsel for appellant.

1st. Judgment of sister States not conclusive unless they show jurisdiction over subject matter and person.

2d. This judgment in New York was void, and is void here as against the Shermans. (4 *Comst.*, 518, 19, &c.; 18 *Cur. S. C.*, 586.)

3d. A judgment void in part is void in toto. (6 *Pick.*, 246, 7, *note*; 21 *Cur. S. C.*, 588, 9; 13 *Wend.*, 418; *Smith's Mer. Law*, 324; 1 *Denio*, 540; 20 *Ill.*, 173; 4 *Hill*, 442, etc.)

*J. H. Mitchell, Esq.*, counsel for respondents.

*Joint Debtor Acts of New York, 1801 to 1830; 1830 to 1859; 1859 on.* The judgments referred to by counsel for appellant were under the act of 1830. The act of 1859 is like ours and unlike that of New York of 1830; 6 *Johnson*, 98 (1807); 16 *Johns.*, 86 (1819); 6 *Cowen*, 697 (1827); 6 *Wend.*, 501 (1831); 5 *Hill*, 38 (1843). In suit upon judgment the judgment cannot be attacked collaterally. (1 *Peter's Cir. C. Rep.*, 135; 21 *Cur. S. C.*, 30; *How. Code*, sec. 136,

274; *Ogn. Code*, 59.) Conclusiveness of judgments in sister States. (*Cons. U. S.*, art. 4, sec. 1; 7 *Cranch*, 481; 3 *Wheaton*, 234; 6 *Wisconsin*, 214; *Ogn. Code*, secs. 728, 786, 7.)

PRIM, C. J. There are numerous assignments of error, but the main question presented by this record is what force and effect a judgment, rendered in form in New York on a joint liability under their joint debtor act, is to have on a party in this State, who was served with process and appeared by attorney in the action. The statute of New York referred to is: "If the action be against defendants jointly indebted upon contract the plaintiffs may proceed against the defendants served, unless the court otherwise direct; and if he recover judgment, it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all, and the separate property of the defendants served."

By examination of the adjudicated cases in New York, under this law, we find it is held that the original contract is merged in and extinguished by the judgment; and that the judgment is valid and binding on the absent defendants as *prima facie* evidence of a debt, reserving to them the right to enter again into the merits and show that he should not have been charged, if sued upon the judgment. But where the defendant has been served with process, or voluntarily appeared in the action, he is concluded from going behind the judgment and controverting the original cause of action. (*Dando v. Doll*, 2 *Johns.*, 87; *Bank of Columbia v. Newcomb*, 6 *Johns.*, 98; *Taylor v. Pettibone*, 16 *Johns.*, 66; *Carman v. Townsend*, 6 *Wend.*, 206.) The Constitution of the United States declares that "full faith and credence shall be given in each State to the public acts, records and judicial proceedings of every other State, and the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." By the act of May 26, 1790, Congress prescribes:

1st. The mode in which the judicial records of one State shall be proved in the tribunals of another, to wit: "That they shall be authenticated by a certificate of the clerk, under the seal of the court, with a certificate of the presiding judge that the clerk's attestation is in due form."

2d. "And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from whence the said records are or shall be taken."

Then, by the law and usage of New York, the judgment on which this suit is founded was properly rendered, *in form*, against all the defendants; that the original contract is merged in and extinguished by the judgment; that the judgment is valid and binding as *prima facie* evidence of a debt against the Shermans, in this State; but as they were not served with process, and did not voluntarily appear in the action, either in person or by attorney, they had the right, in the court below, to enter again into the merits and show that they should not have been charged; but, not so as to Stark, who has had his day in court, been served with process, and appeared by his attorney in the court of New York; and there might have made his defense, if he had one. (*Mills v. Duryea*, 7 Cranch, 481; *D'Arcy v. Morris, Ketchum et al.*, 11 Howard, 165.) The judgment is then valid and binding on him in this State, and concludes him from going behind it to examine into the original cause of action. It is further claimed by appellant that the authentication of the record from New York is defective, and, therefore, improperly admitted as evidence in the court below; but, on examination of the authentication, we think the act of Congress, heretofore mentioned, is substantially complied with.

We think there is no substantial error, and the judgment is affirmed.

**\*J. P. O. LOWNSDALE, Respondent, v. J. T. HUNSAKER and others, Appellants.**

*Appeal from Multnomah County.*

When a contract in writing, for the sale of specific articles of personal property, contemplates a counting out of the separate articles to the vendee at a future day, and the acceptance by the vendee of only such articles as are in a certain specified condition.—*Held*, that such writing is not a complete bill of sale, but only a contract to sell.

For a clear understanding of the questions decided by the court it will be necessary to state those facts in the case which are involved in the questions passed upon in this court. In 1862 the plaintiff was the owner of a band of cattle and horses then kept and running in Clickitat county, Washington territory. On the 14th day of February, 1862, plaintiff, by his attorney, Daniel H. Lownsdale, entered into a contract in writing with defendant Hunsaker, for the sale of this band of stock; and the following is a copy of that instrument:

"It is agreed between J. P. O. Lownsdale, by his agent, Daniel H. Lownsdale, and Jacob T. Hunsaker, as follows: said J. P. O. Lownsdale hereby sells to said J. T. Hunsaker, his band of cattle and Indian horses specified in an agreement between said J. P. O. Lownsdale, and Willis Jenkins, and dated August 10th, 1861, which said agreement is hereto attached, to be taken and considered as a part of this contract; said cattle are to be delivered to said Hunsaker in Clickitat county, Washington territory, as soon as practicable after the navigation of the Columbia river is open from Willamette to the city of the Dalles. Upon the delivery of said cattle, or as soon thereafter as practicable, said Hunsaker agrees to pay said J. P. O. Lownsdale, or his said agent, for said cattle and horses at the banking house of Ladd & Tilton,

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\* See 38 Am. Dec. 465.

in Portland, the sum of \$6,500. It is further agreed that if upon the delivery of said cattle and horses, any of them shall be dead or missing, so that they cannot be delivered, or any shall be unable to get up and walk, that said Lownsdale, for each one so dead, missing, or disabled, shall from said sum of \$6,500 purchase money make deductions as follows: 'for all cattle (except bulls and calves) \$15.54 per head; for all bulls, \$50; the calves of last and of the present year are to be taken by said Hunsaker as they are, but no account is to be made of them in any way, either by way of increase or decrease; for Indian horses or mares, \$40 per head. When said deductions are made, if any shall be necessary, as per this agreement, the balance of said \$6,500 shall be paid as aforesaid.' "

On the 4th day of April, 1862, Hunsaker transferred this bill of sale or contract to the other defendants, Hull, Masters & Harbaugh, by an endorsement on the written contract in these words: "For value received (as per agreement between myself and Messrs. Hull, Masters & Harbaugh), I hereby assign, sell and convey unto the said Hull, Masters & Harbaugh, all my right, title and interest in and to the within contract, and the cattle and horses therein conveyed to me."

Hull, Masters & Harbaugh, claimed the cattle under this contract and transfer to them, and took possession of a portion of them without the consent of the plaintiff; and the plaintiff brought this action to recover the value of the cattle, and damages for the unlawful taking, as he alleges.

*J. H. Mitchell, Esq., for appellants.*

*G. H. Williams, Esq., for respondent.*

BOISE, J. One defense relied on by the appellants, defendants, is that this contract is a complete bill of sale of the property named in it, and that by it the ownership and title to the property became vested in Hunsaker at the time of its execution, and that he and those claiming under him had a right to take the cattle and horses without the consent of



Lownsdale, and consequently it was no trespass for Hunsaker or those claiming under him to take them. The question is therefore on the construction of this contract.

The court below held that the contract was not a bill of sale, but a contract for a sale; and that by it the property did not pass out of Lownsdale. This court is of the same opinion as was the court below. I think it is clear from the terms of this contract that, if after its execution, any of the cattle or horses named in it had died, the loss would have fallen on Lownsdale; that by the contract there was no delivery of the property, but, that delivery was contemplated at a future time. This was merely a contract for a sale, and if Lownsdale failed to comply, the remedy of Hunsaker was by suit on the contract. There were other questions raised in this case but they are unimportant.

Judgment affirmed.

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FREDERICK KETCHUM, Respondent, v. STATE OF  
OREGON, Appellant.

*Appeal from Clatsop County.*

1. If there be more than one cause of action, and the demurrer be to the whole complaint, and one of the causes of action be good, the demurrer will be overruled.
2. When the statute of limitations begins to run against certain causes of action.

On the 12th day of January A. D. 1853, the legislature of the territory of Oregon appointed commissioners to locate a road from near Astoria to the Willamette valley, and authorized them to procure all necessary assistance, &c., and promised to pay such aid at the rate of five dollars per day. Plaintiff, Ketchum, was one of the persons so employed, and on presentation of his claim to the legislature in 1854, 5, received three dollars only for each day; leaving a balance of

two dollars per day unpaid. He also presented a claim for services of horses used by the said commissioners as pack-animals; which claim was disallowed by the legislature; and the plaintiff brought suit against the State under the act of October 17th, 1862, to recover said balance, and for services of horses, amounting to four hundred dollars. The prosecuting attorney demurred to the complaint on two grounds—1st, that the complaint does not state facts sufficient to constitute a cause of action; and 2d, that the action has not been commenced within the time limited by the statute.

Upon this issue in law the court below overruled the demurrer and gave judgment for plaintiff on both issues. The State appealed from that judgment relying upon the demurrer.

*E. W. Hodgkinson*, prosecuting attorney for State.

*Cyrus Olney, Esq.*, for respondent.

WILSON, J. The demurrer specifies one general, and one special ground; one being to the merits of the case, and the other operating as a bar. The application of a few well known principles will dispose of the first ground. The demurrer admitting the truth of all the alleged facts, and denying their sufficiency, claims a judgment in law. The first ground of demurrer goes to the whole complaint. There are clearly two distinct causes of action in the complaint, upon each of which plaintiff relied for recovery. The first is for the balance of a claim, concerning whose validity there can be no doubt since the legislature recognized and partially discharged it, and it is certainly well pleaded and amply sufficient when undenied to warrant judgment.

The second ground is in the nature of an implied obligation, and under the state of pleading, and known state of the case, we might well hold it a valid, well pleaded claim; but that labor is not required here, after that we apply a settled

rule of pleading. If there be more than one cause of action and the demurrer be to the whole complaint, and one of the causes of action be good, the demurrer will be overruled. (*Van Santvoord Pleadings*, 652; *Butler v. Wood*, 10 *How. Pr. R.*, 222; 8 *Wendell*, 129; 10 *Peters*, 257.) The first claim is undoubtedly well set out, and for this reason that part of the demurrer is not well taken; this point was substantially settled in this court in 1 *Oregon R.*, 357. As to the second point, previous to 1862 there was no general statute, authorizing the commencement of an action against the State, and, as a consequence, holders of claims were under the necessity of seeking redress by appealing to the generosity or justice of the legislature. By the act of October 17th, 1862, pages 78, 79, any person having claims against the late territorial government of Oregon, or present State government, were authorized to bring action or suit against the State of Oregon in the Circuit Court for the county where the claimant resides. *Section 4 of that act, page 79, Session Laws of 1862*, is somewhat peculiar in its language, and is relied upon by both parties here; it reads thus: "That the presentation of a claim now existing to the legislative assembly, or either house thereof, whether of the territorial government or the present State government, shall be deemed and construed equivalent to the commencement of an action or suit therefor, so as to prevent the same from being barred by the statute of limitations." *Section 6, page 5 of the Code*, is the one which contains the limitation to the commencement of actions or suits upon express or implied contracts or upon a liability created by statute; and fixes that kind at six years after the cause of action shall have accrued.

The complaint in this case shows that the cause of action, and the presentation of the claim to the legislature, both occurred more than six years previous to March 22d, 1864, the time of filing this complaint. Counsel for the State now insists that under the statute, and showing of this state of facts, the plaintiff is too late, and that is the point in the case.

On the other hand, counsel for appellee claims that the claim of plaintiff below is not only not barred, but having been once presented to the legislature cannot ever be barred by that statute of limitations. No authorities have been cited by counsel. It will not be necessary to determine the truth of the full position taken by counsel for appellee, and we shall only ascertain whether this claim in question is barred, without deciding how much longer it might have remained unprosecuted and yet be valid. Statutes of limitations are intended to be statutes of repose, to prevent litigation; and where one has slept for years with a full knowledge of his rights, and seeks only to enforce them when essentially important witnesses have long since departed from the jurisdiction or reach of process, and the defendant is powerless from the frailties of human memory, it is eminently proper that the law should expressly intervene, and say to the plaintiff that his sleeping has been too long, and the advantage now sought too grossly faulty to be encouraged. This view of the benefit of such a statute supposes that all this time the claimant was resting under the shadow of judicial tribunals whose assistance he might invoke; that by law he could at any time enforce his claim by action, and that he abused that right, and by delay disarmed his opponent of his watchfulness. Truly, the plaintiff has a right to choose the time to enforce his rights, but it is a provident feature in the law to say that he must exercise that right within a reasonable time or the law will presume his claim satisfied. (*McLaughlin v. Hoover*, 1 *Oregon R.*, 31; *Baldro v. Tolmie*, 1 *Oregon R.*, 179.)

But this case comes very far short of such an one. Here the claimant had no right to sue previous to the act of October 17, 1862. He could only seek the uncertain justice of the legislature, and must abide the vote of a majority of its members. By that statute he obtained the right to sue, and we think his claim is not barred, and would not be at least for the lapse of the statutory time after the taking effect of

this enabling act. The statute of limitations must have some right upon which to operate, something which after a term of years would be extinguished and a new class of rights created. These statutes operate upon the remedy, and it is only just that they shall not operate with the harm enuring wholly to one party. The State of Oregon cannot enjoy the fruits of the labor of individuals and then shield itself from recompensing them by reason of a lapse of time, during which its legislatures have wholly failed to open any remedial avenue through which the suffering party could seek his rights. In the case of *McLaughlin v. Hoover*, above cited, this court very properly said, "that it is the duty of the court to apply the remedy by limitations in all cases, except where it would cut off the right, and then the court is bound by the fundamental law to give a party reasonable time in which to escape such remedy." The plaintiff below has been diligent, and sought in the proper way and time to enforce his claim, and this court should be every ready to affirm such act.

The judgment is affirmed.

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JACOB T. HUNSAKER, Appellant, v. STEPHEN COFFIN, Respondent.

*Appeal from Multnomah County.*

A complaint was filed in the District Court on the 24th day of July, 1855. Summons was issued on the same day requiring defendant to appear and answer *forthwith*, or judgment would be taken against him. Personal service was had on the 24th and on the 25th of July, A. D. 1855. Judgment by default was entered against defendant for \$2,079.30.—*Held*, that such judgment was void.

On the 24th day of July, 1855, Hunsaker obtained a judgment in the District Court of Oregon territory, for Multnomah county, against Coffin, in the sum of \$2,097.30. The

complaint was filed July 24th, 1855. Summons was issued on same day, and personally served. The summons required Coffin to appear in that District Court *forthwith*, and answer the complaint, or the plaintiff would take judgment. The court rendered judgment on the next day, July 25th, 1855, which judgment reads thus:

"JACOB HUNSAKER,  
v.  
STEPHEN COFFIN. }

"The plaintiff, by Wait and Kelly, his attorneys, comes, and the defendant though duly called comes not, but makes default, and the court having assessed the damages of plaintiff to two thousand and ninety-seven dollars and thirty cents, it is considered that the plaintiff recover of the defendant his damages aforesaid, and also his costs.

"(Signed.)

CYRUS OLNEY, *Judge.*"

On the 29th day of October, A. D. 1863, Hunsaker, by his attorneys, Williams and Huelat, filed in the Circuit Court below under section 292 of the Code, a motion for the allowance of an order, for the issuing of execution upon said judgment, and proper steps were taken to bring the matter to issue, and upon the 29d day of December, A. D. 1863, the court below refused the motion, from which refusal Hunsaker appealed, and has brought the transcript here.

*G. H. Williams, Esq.*, for appellant, cites 12 *Curtis U. S.*, 197; 37 *Maine*, 21; 15 *Ohio*, 435; 1 *Carter, Ind.*, 132; 6 *Abbott's N. Y. Dig.*, 342, *par.* 14.

*J. H. Mitchell, Esq.*, for respondent, cites provisions of the statutes of Oregon.

WILSON, J. *Section 292 of the Code of Civil Procedure* enacts that "whenever, after entry of judgment, a period of five years shall elapse without an execution being issued upon

such judgment, thereafter an execution shall not issue except as in this section provided;" and, whatever steps are required therein seem to have been properly taken by the parties below; and the question in this court is narrowed down to an affirmance by appellant that the judgment rendered July 25, 1855, was still valid and binding, and a denial by appellee of such validity, with an averment that such judgment was wholly void. Coffin avers that the District Court had no jurisdiction of the person of the defendant at that time, so as to warrant the entry of judgment, and in that manner attacks the judgment set up in this motion. The process by which, in 1855, the District Court could obtain jurisdiction of the person of a defendant, was a writ of summons, and the statutes then in force clearly set forth the requisitions necessary in such writ. *Title 111, section 25, page 85, Statutes of 1854*, provides, "that at any time after filing a complaint, the plaintiff may have a summons issued, which shall be directed to the defendant, and shall be signed by the clerk, and issued under the seal of the court, and shall be made returnable on the first day of the next term of the court." Section 26 further provides, that "the summons shall require the defendant to appear and answer the complaint, or that judgment by default will be taken against him, if he be served in the county in which the action is brought, ten days before the term of court, &c., and he shall appear and answer the complaint on the return day of the summons;" and it further provides, "if he do not have such ten days notice, then defendant shall have until the first day of the term next after the return day of the summons." The first question for determination is, was the summons by which Coffin was sought to be brought into court in 1855 a valid and legal one? And then, was the service such as would give the court jurisdiction in the case? The summons in question, so far as is necessary for present purposes, is as follows: "To Stephen Coffin. In the name of the United States of America, you are required to appear in the District Court

of the county of Multnomah, in the territory of Oregon, *forthwith*, and answer the complaint of Jacob Hunsaker, a copy of which is hereto annexed, or the plaintiff will take judgment, &c.," and service was made upon Coffin on the day of its issuing.

Evidently, one of the main requisites of a statutory summons was omitted, and a very arbitrary and illegal provision inserted in lieu thereof. Instead of notifying defendant to *appear and answer on the return day of the summons*, which would have been the *first day of the next term*, it required him to appear and answer "*forthwith*." No rule of construction has been better settled than that; when the steps by which a court obtains jurisdiction are prescribed in the statutes, they must be clearly followed, in order that the court may have full authority over the person. (1 *Hill*, 180; 2 *Kernan*, 575; 6 *Abbott's Pr. R.*, 162.) While the pretended summons omitted one of the most material requisites, it contained one that was wholly illegal. It follows, that a service of such a writ would have no binding force upon the defendant, or compel him to appear and answer any more than would the service of so much blank paper. It would require either the proper issuing and serving of a new summons, or such an *appearance* of Coffin as would waive defective process and service, to give the court authority to enter judgment against him. The defendant could as well have been mulcted in damages immediately upon the return of the sheriff into court with the writ, as at any subsequent time, and hence, the action of the court would depend upon the celerity with which the sheriff could execute service; and if, outstripping defendant in speed, the sheriff should first arrive at court, plaintiff might have judgment, when by the use of the utmost diligence defendant could not get to the place of holding court in time to prevent its rendition. From the transcript, it seems that the first day of that term of court was the day upon which the summons issued, and judgment was rendered upon the next day.



Section 47, title 10, page 116, *Statutes of 1854*, provides where judgments by default may be taken, "judgment may be had on proof of the *service of summons*, and complaint, if the defendant fail to answer within the time prescribed by law," evidently referring to section 25 above cited, as the first day of the next term of court, and to no other time. In this case instead of any proof of *service* appearing, the only obvious ground for the entry of judgment was that defendant did not *answer* when duly called at the court house door. These matters are apparent.

1st. The summons in question was not warranted by law.

2d. No service of any proper summons was made upon Coffin, and

3d. No appearance was made by him in that court.

It follows most clearly that the District Court, on the 25th day of July, A. D. 1855, had no jurisdiction over the person of Coffin as a defendant in that action. The character of such a judgment may be easily ascertained from the examination of authorities. In *Townsley v. McDonald*, 32 *Barbour*, 604, this doctrine is held: "Where, in an action commenced by publication, the affidavit upon which the order for publication is obtained is insufficient, the order is unauthorized and void, and fatally defective in itself, the court acquired no jurisdiction, the judgment is void, and a purchaser under it acquires no title." Also *Bigelow v. Stearns*, 7 *Cowen*, 269. Authorities in plenty may be found which show that a judgment, rendered without jurisdiction of the person of defendant, is void, a mere nullity, and apart from any authorities, a common sense construction of the statutes cited, clearly determines that the act of the District Court in 1855 was wholly void, and the judgment worthless.

Appellant insists that this judgment was voidable only, and, that while it remained unreversed, was in full force, and could not be attacked in a collateral proceeding like this. The authorities cited by counsel go this far, that, after a court has acquired jurisdiction, and the record fails to show

the many subsequent requisites in the proceedings, the appellate court will presume that the court below proceeded properly. 1 *Hill*, 130; 19 *Johnson*, 38, and numerous other cases. Many authorities hold that such will be the presumption until the contrary appears. (*Cole v. Hall*, 2 *Hill*, 625.) And, as a general rule, such a judgment cannot be attacked in collateral proceedings. But that course of argument, and those authorities, are scarcely applicable here. This case is between the same parties as in the original proceeding, the subject matter is the same in both, and no tension of terms can make this a collateral proceeding. We hold it unnecessary that the judgment of July 25th, 1855, should have been reversed before such action could be had as was taken by the defendant below. No case can be found in which, when the court had not acquired full jurisdiction, and that fact appeared in the transcript, any such doctrine was enunciated. The ruling has ever been, that such a judgment could be attacked, even collaterally, by the parties directly affected by it and relying thereon. (*Chemung Canal Bank v. Judson*, 8 *N. Y.*, 254; *Dobson v. Pearce*, 12 *N. Y.*, 156.) But this case does not require us to investigate that question. It is not a collateral proceeding. The parties, and the subject, are identical in both, and we hold that the defendant might well and safely ignore the fact, that any judgment had been rendered against him in favor of plaintiff, which would in any event incommode him, or determine any of his rights. The ruling of the Circuit Court and the judgment thereon were wholly proper, and that judgment is affirmed.

Z. MOSSEAU, Plaintiff, Respondent, v. A. VEEDER, Defendant, Appellant.

*Appeal from Multnomah County.*

Having discharged the regular panel of jurors for the term, the Circuit Court has no authority to summon a different jury for the trial of any cause at that term, against the will of either party.

MOSSEAU sued Veeder, before a justice of the peace, to recover the value of certain baggage, alleged to have been entrusted to defendant, as a *hotel keeper*, and which had been lost. Veeder appealed from a judgment had against him there to the Circuit Court of Multnomah county; and from a similar judgment in that appellate court, Veeder has appealed his case into this court. At the June term, 1864, of the Circuit Court, the cause stood upon a motion to supply defective transcript, until the regular panel of trial jurors for the terms had been finally discharged; the cause was then called for trial; the circuit judge ordered the sheriff to summon a jury from the body of the county; and, upon the appearance of the persons so summoned, ordered the trial to proceed, against the express objections of defendant, made for the reason of the alleged irregularity in such proceedings. The court overruled the objections to the summoning and empanneling of the jury, and to such overruling defendant, by his counsel, excepted, and, with the record, files his proper bill of exceptions.

*Mitchell & Meigs*, for appellant.

*H. A. Gehr, Esq.*, for respondent.

WILSON, J. The only question submitted is this: Having discharged the regular panel of jurors in attendance at that term, before the calling of this cause for trial, had that court

the authority to order another jury, and upon the coming in of such persons to compel defendant below to go to trial unwillingly!

Our attention has been directed to certain provisions contained in the Constitution of Oregon, and to certain sections in the Code of Civil Procedure; and upon these it is our province to determine a rule of practice.

Article 1, section 18, of the Constitution provides, "that in all civil cases the right of trial by jury shall remain inviolate." Section 921 of the Code provides that the County Court shall "make from the last preceding assessment roll of the county a list denominated the jury list, containing the names of persons to serve as grand and trial jurors, until the following year." Section 926, further directing, says: "The jurors for *every* term of the Circuit Court in the county shall be drawn from the names, &c.," selected as prescribed in section 921. Section 937 provides that "when- ever, for any reason, the number of jurors, either in whole or in part, required by this Code, do not attend a term of court, the court has power to direct the sheriff to summon forthwith, from the body of the county, persons having the qualifications of jurors, to serve as such during the term." This last section, together with a part of section 178, reading thus: "If the ballots become exhausted before the jury is complete, the sheriff, under the direction of the court, shall summon from the bystanders, &c., so many qualified persons as may be necessary to complete the jury," are the only provisions of the statutes known, by which the court can procure jurors in cases of default in attendance of those summoned, or, the incompetency to serve in particular cases of those attending. If none of the regular panel attend, then, by section 937, the court may procure a full panel; or, in case only a part attend, by the same section, the court may complete the panel, or make such additions thereto as will suffice for the business of the term. The Code, in section 926, has undertaken to designate how the *jurors* for *every* term of the

court shall be selected; and, subject to the two above noted exceptions for supplying deficiencies, *those* are the only competent jurors. We hold that when the court discharges that jury, there can be no more competent jurors for that term. While a single one of the regular panel remains in attendance, it has been, and now is our practice to fill up the jury in any case under section 178, and such jury would be a competent one; but when the whole regular panel has been discharged by order of court, then neither of the sections 178, and 937 can apply, or give the court any such power as was exercised in this case by the court below.

We know of no other authority, and hence must hold that it was error in the Circuit Court to call such a jury, or force defendant to trial. Appellee should have prevented the inadvertent omission by the court, and by calling the attention of the court to his case, have had it tried at a proper time, and in a proper manner.

Judgment must be reversed, and this cause remanded for a new trial.

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STATE OF OREGON, Respondent v. LEANDER JOHNSON, Appellant.

*Venus.*

1. The offense of larceny, committed without the State continues and accompanies the stolen property.
2. The offense may be tried in any county within the State, into which the stolen property may be brought by the offender.

RESPONDENT stole a horse in Washington territory, and with it crossed the Columbia river into Wasco county, Oregon. He was there apprehended, indicted for larceny in that county at the December term, 1863, and on trial was convicted and sentenced.

His counsel at the trial asked this instruction: "If the jury believe that defendant stole the horse in Washington territory, they could not find him guilty of a larceny in Oregon." The court refused, and instructed the jury that "it was a continuing offense; and if the property was stolen in Washington territory and brought into Oregon, it was a larceny in Oregon."

Defendant's counsel excepted to the refusal of the one and the giving of the other instruction, and appealed.

*C. R. Meigs*, prosecuting attorney, for respondent.

*G. L. Woods, Esq.*, for appellant.

BY THE COURT. Larceny is an offense at common law, and it continues and accompanies the thing stolen, from one State to another, as it does from one county to another in the same State.

The decisions in the respective States are different. New York, Pennsylvania, Kentucky and Tennessee, held that the offense would not continue if the original taking was without the State, as the offense would be beyond the jurisdiction of their courts. Massachusetts, Connecticut, North Carolina, Maryland, Ohio, and Vermont, maintain the same view we now have taken.

The ruling of the court below was correct and judgment affirmed.

NOTE.—Since the above decision was made, the Code, passed in 1864, provides in section 16, page 444, "that when property feloniously taken by burglary, robbery, larceny or embezzlement, without the State, is brought into it, the action may be commenced and tried in any county therein, into which such property may be brought." R.R.

CASES  
ARGUED AND DECIDED  
IN THE  
Supreme Court of the State of Oregon.

September Term, A. D. 1865

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PAINE P. PRIM, *Chief Justice*.  
ERASMUS D. SHATTUCK,  
REUBEN P. BOISE,                     }  
RILEY E. STRATTON,                 }*Justices*.  
JOSEPH G. WILSON,  
R. WILLIAMS, *Clerk*.

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JAMES HEATHERLY, Appellant, v. HADLEY &  
OWEN, Respondents.

*Appeal from Lane County.*

1. Jurisdiction on appeal. Motion to dismiss.
2. On failure to prosecute appeal, how respondent may obtain affirmance.

RESPONDENTS filed a motion to dismiss appeal for failure to file transcript, and for judgment of affirmance. As questions of practice under the Code, the court made these rulings:

1st. That after failure of appellant to file transcript on the second day of the term, this court could have no jurisdiction.

2d. That when an appeal is perfected, and the transcript is not filed as required by law, the respondent should bring into this court a copy of the notice of appeal and service thereof, a copy of the bond and the judgment entry, and upon filing these certified copies in this court, ask for an affirmance of the judgment.

REP.

A. M. and L. M. STARR, Respondents, v. BENJAMIN STARK, Appellant.

*Appeal from Multnomah County.*

1. A patent for land from the United States may be attacked and set aside for fraud.
2. What color of title sufficient to give one a sufficient standing to impeach patent.
3. Residence and cultivation, under the donation law of 1850, what?
4. Effect of a patent issued to the city of Portland.

BENJAMIN STARK claimed a part of the town site of the city of Portland, as a donee under the act of Congress of 27th September, 1850, donating lands to actual settlers in Oregon. The fourth section of that act provides that in order to obtain a patent from the United States, the settler shall first reside on and cultivate the tract claimed for four years continuously. The act further provides that a notification of the tract claimed describing the land and stating the time of settlement, shall be filed with the surveyor-general, and the fact of a continual residence and cultivation for four years be proven to the satisfaction of that officer; and when such continual residence and cultivation is proved, a donation certificate from the surveyor-general shall be furnished the settler. Stark obtained a donation certificate from the said surveyor-general, dated September 1st, 1853, in which is the following recital of the proof: After describing the land, the certificate says that said Stark, "having proven to the satisfaction of the surveyor-general of Oregon the fact that such settlement was commenced on the 1st day of September, 1849, four years prior to the date hereof, and having, in pursuance of the requirements of the seventh section of the act aforesaid, established by two disinterested witnesses the fact of continual residence and cultivation, required by the fourth section of said act," &c. In accordance with this certificate, a patent



was issued to Stark on the 8th day of December, 1860, in which patent reservations are made in favor of such tracts as are occupied by persons for commercial purposes within the limits covered by the patent. The day before the patent to Stark was issued, *to wit*: on the 7th day of December, 1860, a patent was issued to the authorities of the city of Portland, in trust, for the several use and benefit of the occupants thereof, according to their respective interests, under the town site act of Congress of the 23d of May, 1844, entitled "An act for the relief of citizens of towns upon the lands of the United States, under certain circumstances." The complainants, the Starrs, say that Stark threatens to eject them from the lots in question, *to wit*: Lots numbers one, two and four, in block number eighty-one; that they have been in the constant occupation of said lots since 1849, using them as places of business for the purposes of trade and commerce, and claim that they have a right to have their title perfected under the city patent; and further say, that the reason they have not had such title perfected, is that the legislature of the State of Oregon has passed no law to enable the city authorities of Portland to fulfill said trust.

Stark claims that said patent to the city is without authority in law, and can give claimants no standing in court to claim under it.

From the decree of the Circuit Court Stark appeals.

*Strong & Wait*, of counsel for appellant.

*W. W. Chapman, Esq.*, of counsel for respondents.

BOISE, J. Without undertaking to discuss the question as to the validity of the patent to the city, as against that to Stark, had it been obtained without fraud against the government, I think the claimants, being actual occupants of these lots in good faith, and occupying them, for purposes of trade and commerce, have a sufficient color of title under the patent of the city to give them a standing in a court of equity to

impeach if they can, the patent to Stark, on the ground that the same was obtained from the government by fraud.

The fraud alleged in the complaint is, that the written evidence of four years actual residence and cultivation produced by Stark to the surveyor-general, on which the donation certificate was issued, was false and fraudulent; and that in fact Stark had not, on the 10th of September, 1853, remained on, and cultivated said tract for four years.

The court, after having examined the evidence in this case, finds that the findings of the facts in the case by Judge Shattuck, who tried the case in the court below, are correct, and for convenience I shall adopt them here, as follows: *Facts*—That the defendant had, during the time between September, 1849, and September, 1853, a mercantile house on the claim of John H. Couch, adjoining the tract claimed by defendant, a mercantile house in San Francisco, California, and one in New York, in co-partnership with another person; was himself a merchant, and in actual charge, and managing partner of the house in San Francisco. It is not found that defendant had any house, residence or place of business upon the tract covered by his patent prior to the fall of 1850. That up to 1851 the defendant was engaged in mercantile business and commerce between Portland, San Francisco and New York, but spent the greater portion of his time at San Francisco, between September, 1849, and September, 1850. That the defendant was in Portland, Oregon, in June, 1850 and in August, 1850, one Sherman, an agent of the defendant, commenced the construction of a building upon the tract described in defendant's patent, which was afterwards used as an office, and was occupied by defendant's agent; but it is not found that defendant himself ever occupied this building, if at all, prior to October, 1850. That defendant left Oregon in October, 1850, and was absent in the Atlantic States, and in California until somewhere in 1857, but with the intention of returning to Oregon, and of making a home on the tract named in his patent. That prior to his departure in October,

1850, the defendant caused a dwelling house to be erected on the tract, which was leased to a tenant, and occupied by a tenant till defendant's return in 1857, and occupied by defendant himself as a boarding place or residence, from his return till 1861. "That portions of the tract were, prior to March, 1850, divided into lots and were occupied at that time, and have been up to the commencement of this suit occupied for purposes of trade and commence." "That a part of the premises in controversy, to wit: Lot number two, was occupied by the plaintiffs in October, 1850, and has continued to be occupied by them till the commencement of this suit for the purpose of manufacturing tinware.

"That the other portions of the premises in dispute have been occupied by and in actual possession of the plaintiffs and their grantees, claiming adversely to the defendant, since some time in the early part of 1850.

"That the plaintiffs were in possession of all they claim in the complaint on the 7th of December, 1860," the date of the patent to the city of Portland.

From this finding of the facts, it is obvious that Stark had not resided on and cultivated the land described in his patent, for four years, on the 10th of September, 1853, the date of his donation certificate, for he had no house or place of residence on the land before the fall of 1850, so that the testimony by which he was enabled to obtain his donation certificate from the surveyor-general of Oregon was not true in fact; and whether the witnesses who testified to these facts were mistaken, or willfully false, makes no difference. It was a fraud on the government and on the plaintiffs.

As to the question of residence and cultivation, they must be actual on some portion of the land, and the possession of the whole tract must be an adverse possession; that is to say, a possession that gives the claimant control of the whole premises as occupier or landlord. As the patent refers to and is issued on the donation certificate, we cannot inquire into the question of the right of Stark to complete his residence

after the date of his certificate; and as the patent of Stark is void for the reason that his residence was not completed at the time of the granting of the donation certificate. The act of Congress, relative to citizens occupying town sites for the purposes of trade and commerce, applies to this land, and the patent to the city, being unimpeached by a better title, will be held valid in this case, so far as to protect the title of the plaintiffs.

Decree affirmed.

NOTE.—This case was reversed in the Supreme Court of the United States at the December term, 1867. That court, among other points, held thus: "The mere naked possession of the plaintiff is not sufficient to authorize him to institute the suit, and require an exhibition of the estate of the adverse claimant, though the language of the statute is, that 'any person in possession, by himself or his tenant, may maintain' the suit. His possession must be accompanied by a claim of right that is founded upon title, legal or equitable, &c.

"If the town site act was not in force in Oregon before the right of Stark to a patent of his donation claim became perfected, the reservation of the patent was inoperative and void. The right became perfected when the certificate of the surveyor-general and accompanying proofs were received by the commissioner of the general land office, and he found no valid objection to them. That is to say, if the donation act of 1860 was applicable to the lands, his right to a patent became perfect when the certificate of the surveyor and accompanying proof showed, in the judgment of the commissioner, a compliance with its requirements.

"The town site act of 1844 was not extended to Oregon until the 17th day of July, 1854, and even then it only operated to exclude lands occupied as town sites or settled upon for the purposes of business or trade, from a donation claim which had not been previously surveyed. Before the passage of this act, the claim of defendant, Stark, had been surveyed, and the required proof of his settlement and continued occupation and residence made, and such steps had been taken as to perfect his right to a patent. The lands embraced by his claim had then ceased to be the subject of purchase from the United States by any person, natural or artificial. The right to a patent once vested is treated by the government, when dealing with the public lands, as equivalent to a patent issued. When in fact the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary, to cut off intervening claimants."

"It follows, from the views expressed, that the plaintiff derived no title or estate in the premises in dispute, by force of the patent to the corporate authorities of the city of Portland." (*S. O. Rep.*, 1869.)

JOHN B. GARRISON, Respondent, v. CITY OF PORTLAND, Appellant.

*Appeal from Multnomah County.*

1. In the formation of a jury, a juror having been called and challenged peremptorily, it was not error for the court to allow the challenge to be withdrawn before another juror had been called.
2. In a suit against a municipal corporation for damages, a resident and tax-payer is not a competent juror.
3. A judgment will not be reversed for error, which plainly could not have prejudiced the rights of parties.

JOHN B. GARRISON brought this action to recover damages from the city of Portland, for injuries sustained by him in consequence of falling into a pit or unfinished cistern, the work being recent, unknown to him, and negligently left by the defendant's servants without guard, fences or lights to prevent passers by from falling into the excavation. There was a verdict for the plaintiff for \$4,875. Defendant appealed.

*W. Strong, Esq.*, of counsel for respondent.

*J. H. Mitchell, Esq.*, of counsel for appellant.

STRATTON, J. Of the numerous exceptions taken at the trial, but three have been relied upon in the argument of appellant's counsel, and these only will be considered.

1st. Sherry Ross, a juror on the regular panel, being called was challenged peremptorily by the plaintiff, but immediately after and before another was called, or before the juror had retired, the plaintiff, by leave of the court, withdrew his challenge, to which the defendant excepted.

Section 189 of the Code provides for the order in which challenges are to be taken; but if the statute were silent upon the subject, they would naturally fall into this order. As each juror must be disposed of before another is called, it

is difficult to see how the defendant could have been prejudiced by the action of the court.

Judicial proceedings are and ought to be in conformity with the provisions of law, or some fixed rules, but it would be pushing the rule to an absurd result if there was no discretion or power in a court to facilitate its business, without incurring the hazard of a reversal of its judgments, and especially when the record discloses no state of facts to the prejudice of appellant.

2d. In the formation of the jury, the plaintiff interposed challenges to these jurors for cause, on the ground that they were residents and tax-payers of the city of Portland, and interested in the event of the suit. The challenges were allowed and the defendant excepted.

The *Code*, section 184, subdivision 4, leaves the question of what is a disqualifying interest to the common law rule, and it must therefore be interpreted in the light of adjudicated cases. The theory of a trial by jury is, that the jurors shall stand absolutely indifferent between the parties litigant; that they shall be as free from interest or prejudice as it is possible for humanity to be. The authorities are numerous and uniform to the effect that an interest in the event of the suit, though small and remote, disqualifies the juror. The jurors set aside by the court, being tax-payers, were directly responsible for a rateable proportion of whatever verdict might be rendered against the city. The ruling of the court below was in conformity with the current authorities and right.

As to the last point urged by appellant: The plaintiff called as a witness one Dr. J. A. Davenport, who testified to the general health of the plaintiff for several years prior to the 22d day of October, 1862, the date of the accident.

Upon cross-examination, the physician testified that the plaintiff had been suffering from disease during the time referred to in his direct-examination, whereupon he was asked this question by the counsel for defendant: "What

was the disease from which plaintiff was suffering at the time referred to by you?" The plaintiff objected to the question, and the objection was sustained by the court. Inasmuch as it was possible that the answer to this question might have thrown some light upon the physical condition of the plaintiff at the time of the alleged injury, and therefore might have affected the question of damages, the answer to the question should have been received, and allowed to go to the jury, and the refusal was error.

The object in the examination of witnesses, both direct and cross, is to elicit the truth, to get all the facts pertinent to the issue before the jury, and when that is done, the object aimed at is accomplished; and, as a rule, it is not material from which side it comes. The court erred in suppressing what might have been an important fact, and the defendant could have stood upon his technical advantage had he chosen to do so. At a subsequent stage of the trial, the witness was called by defendant himself, and the same question was put without objection, and was answered. The defendant has not, therefore, been damaged by the action of the court in the first instance. The error was cured. It was not intended to be intimated that a case might not arise where it would be error to drive a party to the necessity of calling an adversary's witness for himself, where he had a right to an answer upon a cross-examination.

Judgment is affirmed.

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STATE OF OREGON, Respondent, v. HENRY BENJAMIN, Appellant.

*Appeal from Wasco County.*

1. Section 663 of the criminal Code does not repeal section 9 of the license law.
2. What constitutes a repeal by implication.

HENRY BENJAMIN was indicted for violating the ninth section of the statute, page 773, fifth section of the act of January 18th, 1854, regulating licenses to sell spirituous liquors, which section provides: "No person shall keep open any house or room, in which intoxicating liquors are kept for retail, on the first day of the week commonly called Sunday."

The trial resulted in the conviction of defendant.

*Denny & Hodgkinson*, counsel for respondent.

*J. K. Kelly, Esq.*, counsel for appellant.

BOISE, J. At the trial the counsel for the prisoner asked the court to instruct the jury that section five of the act of 1854, was repealed so far as it relates to keeping open a house in which intoxicating liquors are kept for retail, which instruction the court refused. Counsel for the prisoner claims that section 653, page 564 of the Code, repeals, by implication, section five aforesaid.

Section 653 provides: "If any person shall keep open any store, shop, grocery, ball-alley, billiard room, tippling house, or any place of amusement, or shall do any regular business or labor, &c., on Sunday, he shall, on conviction, be punished," &c. Are these provisions so inconsistent that they cannot both stand? Section 653 contains no words descriptive of this offense, and cannot, therefore, by implication, repeal section five. To repeal an act by implication, there must be a subsequent statute on the same subject, and providing for the same subject matter; so that at the time the legislature enacted the subsequent statute, they must have intended it as a substitute for the former. Section 653 does not provide against keeping open houses in which intoxicating liquors are kept for retail; there is then no inconsistency or repeal by implication.

**Judgment is affirmed.**



STATE OF OREGON, Respondent, v. ANSEL W.  
SWEET, Appellant.

*Appeal from Wasco County.*

Embezzlement is the proper name of that crime, when an agent fraudulently converts the money of his employer.

ANSEL W. SWEET was an attorney at law, and in that capacity collected some nine hundred dollars for a client, Reuben Breed. This money so collected, Sweet embezzled, converted to his own use, and failed to account therefor.

*G. L. Woods, Esq.*, counsel for appellant.

*Denny & Hodgkinson*, counsel for respondent.

BOISE, J. The indictment charges defendant with embezzlement, calling the offense by that name, and using, substantially the language of the 22d Section, page 216 of the Statutes, defining the offense. The statute is as follows: "If any agent of any private person shall embezzle or fraudulently covert to his own use, without the consent of his employer, any money which shall have come to his possession by virtue of such employment, he shall be deemed to have committed the crime of larceny." The indictment charges the prisoner with embezzlement, setting out the facts constituting the crime, and the prisoner was convicted on the charge. It is now insisted by the prisoner, that no conviction could be had on such a charge, for the reason that the statute names the crime as larceny, and that it should have been so named in the indictment.

The statute used the word embezzle in describing the offense. It says: "If any agent shall embezzle any money, he shall be deemed to have committed larceny." It was necessary to set out the facts in the indictment, so that the proof would

correspond with the facts charged; and if these facts charged describe the crime as defined by statute, it is sufficient, and the calling the offense embezzlement in the caption of the indictment does not constitute a variance from the definition given by the statute. The word "larceny" is used in the statute simply to determine of what degree the offense shall be, and what its penalty. It says simply, embezzlement shall be deemed larceny, that is, that embezzlement shall be equal in enormity to larceny. I think the word embezzlement describes the offense charged, and that it was not the intention of the legislature to abolish the name of embezzlement from the catalogue of crimes, but only to say that the crime of embezzlement should be equal in degree to larceny, and have the same penalty attached to its commission.

Judgment affirmed.

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JOHN WHITEAKER, et al., Appellants, v. WILLIAM  
H. HALEY, Respondent.

*Appeal from Lane County.*

1. Rights and powers of a State over domestic taxation.
2. Domestic taxes payable in gold and silver coin.
3. Construction of a statute, which, without repealing existing statutes, changes, materially, the order and effect thereof.

On the 17th of January, 1865, plaintiffs, appellants, residents in and tax-payers of Lane County, Oregon, tendered to respondent, then sheriff of Lane County, and tax-collector therein, the sums of money assessed against each of plaintiffs for State, county and school taxes for the year 1864. The sheriff had a properly certified tax list and warrant. The tender was made in U. S. treasury notes, commonly known as "legal tender" currency. The sheriff refused to receive the money tendered, or give receipts, as the plaintiffs claim

he should have done. Plaintiffs sued out an alternative writ of mandamus, and at chambers, on the 10th day of February, 1865, the sheriff answered, setting forth the reasons why he had refused to receive said money. To this answer plaintiffs demurred for insufficiency, making these points:

1st. The act of the legislature, entitled "An act to provide for the disposing of the several kinds of money in the public treasury," approved October 21st, 1864, referred to in sheriff's answer, is void, as to all provisions therein, providing for the collection of taxes from tax-payers, for the reason that the same are not embraced or indicated in the title, and are contrary to the Constitution of Oregon, in reference to such provisions.

2d. The second and third sections of said act, which provide for the payment of salaries and other claims in coin, have no reference to the duties of sheriff in the collection of taxes.

3d. The act amending the act relating to assessments and collection of taxes has no reference to the duties of the sheriff in the collection of taxes, but only provides that county treasurers shall pay over, in gold and silver coin, the first of all such moneys that shall come into their hands. But section 46, which is the only section referred to in said act, is itself repealed by an "Act relating to assessments, and collection of taxes," passed October 21, 1864.

4th. The sheriff admits the tender of lawful money. The act last above referred to only requires the sheriff to collect taxes in lawful money.

5th. The provision requiring coin for taxes, has no application to taxes of the current year, as alleged to have been tendered.

6th. All legislation of the State, excluding the right of the tax-payer to pay his taxes in lawful money, is void and of no binding force; the same being in contravention of the laws of Congress, declared to be valid by the Supreme Court of Oregon. (*Term of 1868.*)

The circuit judge, at chambers, overruled the demurrer, refusing the peremptory writ of mandamus, and gave judgment for respondent, and plaintiffs below appeal.

*S. Ellsworth, Esq., for appellants.*

I. The appellants allege that the act of October 21, 1864, can be at most only a good law for the subject matter specified in its title, to wit: For disposing of the various kinds of money in the public treasury, and that the provision in the act specifying the kind of money in which taxes shall be paid is wholly void, being in violation of *section 20, article 4, Constitution of Oregon*. In other words, that the subject of collection of taxes is not embraced in or properly connected with the subject of paying out moneys of the public treasury.

1st. The officers who collect taxes have nothing to do with paying it out of the treasury, and would, therefore, have no occasion nor be at all likely to look into an act with the title referred to. One object, doubtless, of the constitutional provision is to make it unnecessary in many cases to look beyond the title of an act. 2d. The matter of collection of taxes is finally provided for in another act, passed at same session, a lengthy act, comprehensive and exhaustive in all the details of collection of taxes. 3d. It is said to be a matter of history (see journals of the session of 1864,) that the words gold and silver coin were stricken out of the general tax act, and it is not therefore probable that the same legislature would have intentionally inserted so important a provision into an obscure act, with another title, but that it was passed by reason of not being properly indicated by the title; another evidence of the value of the constitutional provision referred to.

II. But the petitioners claim that even if properly entitled and passed, the provision under contemplation requiring taxes to be paid in coin, *if construed as by the sheriff in this case to exclude other lawful money of the United States*, must

be held to be in violation of the act of Congress passed February 25th, 1862. That act of Congress having been declared constitutional by the highest judicial tribunal of this State, must be the supreme law of the State, any State law to the contrary notwithstanding. (*Article 6, Constitution of U. S.*) And that act provides that the money therein specified (same as tendered in this action) is a lawful money, and a legal tender for all debts public or private, with one solitary exception, viz., duties on imports. A tax, if a debt, clearly falls within the scope and meaning of the legal tender clause of the act of Congress; and because this is so the Supreme Court of California found it necessary, in the case reported (20 Cal., 348), to hold that a tax was not a debt. One of the first questions to be determined therefore, is whether that decision is good law, and to be followed by this court.

1st. What was the probable intention of Congress in framing the act? The answer would seem to be obvious that it must have been their intention to make the act absolutely universal, the only exception specified being that of debts due to foreign nations for importations, in regard to which we must be governed by the law of nations. No species of debt or obligation to pay money *within* the United States, whether between individuals or individuals and the government being excepted. This in fact is an essential ingredient, if not a *sine qua non* in the creation of a circulating medium with a legal tender property attached to it, that it should be absolutely without exception in its application. To allow the law itself to be construed different ways in different tribunals or different localities to legislate at their option adversely to the permanent law of the land, would be to at once destroy the whole value and effect of the law itself.

But whether this general inference be correct or not, it is plain that inasmuch as one tax or duty (for they are exchangeable terms) to wit, that on imports is excepted, then all other taxes are left to be included in the phrase "debts public or private."

2d. Has the State the power of designating any specific money or thing in which taxes shall be paid to the exclusion of lawful money? To this appellants say no; that this right of taxation is a clearly defined power. It is not the right of eminent domain by which private property can be taken for public use, nor is it the police power under which, in an emergency, the personal services of the citizen may be required for public defense. It is simply the right to exact contributions in money to carry on the government and protect society, and the right must be exercised with absolute equality and general application; both which ingredients, being incorporated in the Constitution of the State and the United States, show that it is not an inherent right of the government, but is the result of an implied contract between the individual and the government, the consideration for which is the protection afforded to the former by the latter.

The proper authority makes the levy and assessment, but even that may be scrutinized and corrected, if wrong, by the individual; but after the levy which springs from the nature of the power of taxation, and after the time for amendment expires, at which time the liability of the tax-payer becomes fixed, then the State stands in the same position as any other creditor, must seize property, give due notice, and publicly sell, and must accept redemption money when offered. And any lawful money that will in law extinguish the claim of any other creditor must also satisfy this claim at any stage of the proceeding.

To avoid the force of this reasoning the Supreme Court of California undertakes to give several attributes of a tax, to show it is not a debt, first defining, and correctly, that "a debt is a sum of money due by contract expressed or implied."

They say a tax is not founded on contract, but we have already shown that it is the result of an implied contract; and see 4 *N. Y. Appeals Reports*, page 419; 13 *N. Y. Appeals Reports*, 147; *Sedgwick on Const. Law*, page 498.

They say it does not establish the relation of debtor and

creditor. This is simply begging the question in dispute, but as we have already shown, is an erroneous view; and see *Oregon Reports*, page 358. They say it does not draw interest. This is an error, in our State at least; there is a penalty by way of per cent added after a certain delay, precisely analogous to interest, the rate being regulated entirely by statute, but the principle being applied to taxes as well as other debts. See sections 36, 37, 47, 49, 53, 56, 57, 65, 66, 80, and 94 of the old act relating to assessment of taxes, in each of which the principle of interest on unpaid taxes is fully recognized.

And they say further, to close the list, that a tax is not the subject of attachment, nor liable to set-offs. In regard to which it may be said that neither attachment nor set-off are incident to any debt at common law, but only by statute; and the statute may as well, whenever the legislature so provides, extend the same provision to taxes.

It is also made a point of support for the California decision that Congress, in enumerating the various kinds of dues to the United States, mentions taxes and debts separately, as though they had a separate meaning. But so also are debts and demands mentioned separately; but who would pretend that because of that mode of enumeration a debt was no longer a demand? More than this, it is of no consequence how Congress describes dues to the United States. The question which concerns us is as to what other demands are intended to be embraced in the legal tender clause, and there we find "all debts public and private, except duties on imports." As before remarked, if duties (on taxes) are not debts then why was the exception necessary?

"All debts must certainly, therefore, include taxes. A debt, according to Webster, 1 *Bouvier*, is that which is due or owing. A tax is so much of the allegiance *we owe* to government as can be computed by dollars and cents. This view is still further strengthened by the fact of the practical impossibility of collecting taxes in coin. After the act of Congress referred to was in force every person is obliged to

accept the new issue of money as lawful money and the legal equivalent of gold and silver. Henceforward payments of gold coin are dispensed with, and it becomes practically unattainable; and for the government which has brought about this state of things to exact gold and silver from the tax-payer, after placing it beyond his legal reach, would be more cruel than the fabled treatment of Tantalus, and more oppressive than the Egyptian master who required the Hebrew slave to continue to furnish brick after depriving him of straw. No person is required to purchase imported goods. If he chooses to do so he must obtain gold to pay the duty, but the tax-payer has no choice. He *must* pay his share of the public burden or his property be liable to sacrifice, and he must also be allowed to pay in whatever can be forced on him as lawful money. Again, suppose his property is exposed for sale, what can prevent the buyer paying the purchase price in lawful money? The act of October, 1864, does not empower the sheriff in selling property to make the payment of coin a condition precedent. For his power to sell property at all is derived wholly from another act where nothing is said except purchase money, without reference to the kind of money. That a tax means simply a contribution in money, see 6 *Johns, N. Y.*, 92.

The authority relied on by the California court (3 *Metcalf*, 520) does not decide that a tax is not a debt at all, but simply involves a question of set-off under a special statute.

III. But the act of October, 1864, has no application to the taxes referred to in this proceeding, for the obvious reason that the taxes were levied and became due and payable in September, several weeks before this act was passed.

IV. If the sheriff should rely on the allegation, in his return that section 46 as amended in October, 1864, requires coin to be collected by implication, it may be answered: 1st. That section 46 has no reference to the collection of taxes by the sheriff, simply points out the duty of county treasurer in paying over. 2d. That section 46, although amended, is re-



pealed by the act relating to assessment of taxes. 3d. That no intendments nor inferences from a State law shall be allowed to contravene or destroy the manifest provisions of a law of Congress.

WILSON, J. Admitting the proper supremacy of the Constitution and laws of the United States over and upon all proper subjects of legislation, does it follow that Congress can, in any way, interfere with State taxations, either as to measure of assessment or as to the manner or means in which collection thereof may be made? It is now too late to question the rule of construction of the rights and powers of the general government or to establish a different one. That government acts alone by delegated authority, and can exercise no other than such as may be necessary to carry fully into effect some granted power. In doubtful or disputed questions, if the Constitution, or proper legislation, does not adequately define them, or if adjudication thereof has not already been made, we must follow the general rule for construing statutes; and when, from the statute or the instrument itself, the meaning is not clear, recourse must be had to the peculiar views and motives controlling its framers, at the time of forming the Constitution or enacting the law, the question then becomes one of intention. The only provisions in the Constitution of the United States referring to the subject of taxation to which it is needful to refer, are these: Article 1, section 8. "The Congress shall have power to lay and collect taxes, duties, imposts and excises; to pay the debts and provide for the common defence and welfare of the United States." Subdivision 7, section 8. "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers." Section 9, same article: "No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken." "No tax or duty shall be levied on articles exported from any State." Section 10, same article; "No

State shall coin money, emit bills of credit, or make anything but gold and silver coin a tender in payment of debts. No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." Section 10, of the amendments, contains the limit and rule: "The powers *not delegated* to the United States by the Constitution, *nor prohibited* by it to the States, are reserved to the States respectively, or to the people."

These contain the affirmative powers given to Congress, and define what a State may not do. Congress has power to lay and collect a tax. A State may not lay imposts or duties on imports or exports, with a single exception. Congress has not power to lay and collect all taxes, else why, in the same sentence almost, prohibit the States from laying one kind of an indirect tax? Does not that prohibition admit that the right is in the States to levy and collect all other taxes, proper for their maintenance? What is claimed in that behalf by the framers of the Constitution? For convenience, we cite from the opinion of the circuit judge: In the 33d and 34th numbers of the Federalist, Alexander Hamilton has very clearly defined the extent of the powers of the general government, and of those of the individual States in matters of taxation. He says: "Though a law, therefore, laying a tax for the use of the United States would be supreme in its nature, and could not be legally opposed or controlled; yet, a law abrogating or preventing the collection of a tax laid by authority of a State, unless upon imports or exports, *would not be the supreme law* of the land, but an *usurpation* of a power not granted by the Constitution" \* \* "the inference from the whole is that the individual States would, under the proposed Constitution, retain an *independent* and *uncontrollable* authority to raise revenue to any extent of which they may stand in need, by *every kind* of taxation except duties on imports and exports;" and this, he says, "reconciles an

indefinite constitutional power of taxation, with an *adequate* and independent power in the States to provide for their own necessities." Could there be a plainer or more clear defining of the limits to the power of the general government and of the respective States over that subject; made, too, by one who had more to do with shaping the character of the Constitution of our land than had any other person, by one noted for his liberal construction of constitutional power, and who carried federal authority to its utmost limit, and was often charged with *restricting* the rights of the States? There was no gainsaying of this view, and hence we may infer rightly that Madison, Jay, and his fellow statesmen, coincided fully with and assented to its correctness in extent and principle. Again, the power over State taxes is nowhere *expressly* given to Congress, nor is it *expressly* prohibited to the States, consequently section ten of the amendments yields that power to the States. It was rightly considered by the convention to be a matter peculiarly belonging to the States, and if so, as to the time of levy and amount, then equally as to the *means* by which the tax when levied could be paid. If a State should deem it necessary to lay a tax at a certain season of the year, and provide for its collection in the products of the soil, or in the physical services of its citizens, we know of no power on earth possessing the right of interference or prohibition; and the *moral obligation* exists why a State should pay its creditors in coin, there is no power that can enforce it, and Congress could in no way interfere. (*State Treasurer v. Wright*, 28 Ill., 512.) The revenue is the life of the State, and for Congress to say when and where and in what manner it must be laid and collected, in other words, to say when a State should breathe, would be giving Congress the sole power of life and death over a State. What are the other rights worth, when that upon which its life depends is denied. Interference as to any one of the incidents of levying and collecting taxes, would as effectually take away State inde-

pendence as it would to wholly deny the right. (*Dobbins v. Comrs. of Erie Co.*, 14 *Curtis, S. C.*, 373.)

The Supreme Court of Oregon, at its September term 1864, held as constitutional the act of Congress providing for the issue of treasury notes, and of course those notes are applicable as money, and as legal tender for the payment of all matters upon which the United States Congress properly and fairly legislated. If our first position is true, then Congress could not, and did not make those notes an absolute discharge for State taxes; that would remain with the States.

Assuming, however, that Congress *might* have made them such a legal tender as would apply to the payment of such taxes. Was there any such legislation? Or, on the other hand, was there a want of such legislation, on the part of the State of Oregon, as would make these notes inapplicable to the case in hand? The existence of either might sustain the appellant's claim. If our position be correct, there might be kinds of legal money which the State could say directly, or by presumption of law indirectly, were inapplicable to payment of taxes, or could by law make its taxes payable only by personal service, or in certain kinds of property. As the law now stands, the taxes are payable in money; and the sheriff is required to collect them, taking therefor legal money, or, as we hold, money made applicable for that purpose. A brief examination of the act of Congress, providing for the issue of treasury notes, will show that State taxes are not included in the subjects to the discharge of which those notes are made legal tender. Previous to the act of 1861, gold and silver coin were undoubtedly the only legal tender in Oregon; the constitutional prohibition that no State could make anything but gold and silver a legal tender, had never been modified. By the provisions of that act, and as construed by our court, a new currency, became a legal tender; to what extent? As changing the existing order of things, its provisions, creating a *limited currency*, are to be *strictly construed* in determining how far they changed the relation of debtor and creditor, and

of State and citizen; and that currency would be a legal tender only *so far* as is clearly pointed out in that law. Congress can change the currency, but the extent of that change must be definitely expressed. It cannot repeal or override State laws, unless the latter are so inconsistent or repugnant to the constitutional act of Congress as to prevent the conclusion that both may stand by fair construction. The books define taxes as a contribution levied or imposed by government upon citizens or individuals for the service of the State. With us they mean the poll and property assessment of the statute. They do not, certainly, come within the meaning of public or private debts. They have none of the characteristics of a debt. A debt is something arising from and due upon contract; and before an enforcement of that something due can happen, there must come the processes of the law and the solemn adjudications of the courts. A tax is a judgment in its inception, fixed without the consent of the tax-payer; perhaps without his knowledge, as to assessment, levy and collection; it needs not the issuance of an execution to enforce it; if not paid in due time, penalties follow; and, willing or not, upon default, the delinquent's personal property passes by collector's sale to the purchaser, or he loses the title to his real estate. There is none of the mutuality which enters into a contract, and none of the legal incidents of a debt; are not subject to attachment, are not off-sets, bear no interest, and need no solemn acts of courts to enforce them. It is clearly confessed, upon the reading of the act of 1861, that taxes and debts are distinct subjects. The section declares that the treasury notes are payable for all *taxes*, internal duties, excises, *debts* and demands of every kind due to the United States, except for interest on bonds and notes. So far as the United States, are concerned, then, there can be no doubt of the extent of their *limited* applicability. It first mentions the subject of *taxes*, and then, in the same connection, enumerates *debts* and *demands* of every kind. Why do not the latter include taxes, if taxes are debts?

As to the States and the citizens thereof, the language of the act is peculiar: "And shall also be lawful money and a legal tender in the payment of all *debts*, public and private, within the United States." In what does the word *debts* in the latter differ from the same word used in the former clause of the same section? There it stood for a distinct class of subjects from those including or relating to taxes. What court will construe that a statute uses an essential word in the same section in two wholly different meanings? We cannot violate the rules of construction so much as to declare that the two uses of the word are not identical in meaning. In the one case the word debt did not include taxes, and in the other it does not. There is no difference between a United States tax and a State tax, save in the authority used in enforcing collection, and in the name. We must grant to the members of Congress common sense in the use of the words contained in the statutes they frame. The doctrine here is fully sustained in *People v. Shearer*, 30 Cal., 645, and the authorities there cited.

We conclude, then, assuming that Congress could control a State as to the kinds of money in which its taxes were to be paid, that Congress has not done so in the act of 1861, but has carefully refrained from such interference, leaving it for the States to change any of their existing laws and make that money applicable or not, at pleasure. We think Congress has not the right to control or interfere in that matter.

As to the third point. In the absence of any provisions of our statute as to the kind of money proper for the payment of taxes, it might be supposed that any lawful money would satisfy the demand. At the time when the assessed taxes for the year 1864, became *due* and *payable*, the *Statutes of Oregon*, on page 438, section 32, title 5, in the latter clause of the section, provides thus: "And the sheriff shall in all cases pay over to the county treasurer the full amount of State and school taxes in gold and silver coin." And section 46, same title, page 441, provided that: "On or before the first Mon-

day in February of each year, the several county treasurers in this State, shall pay over to the State treasurer in gold and silver coin, the amount of State taxes charged to their respective counties; which State tax shall be paid out of the *first* moneys collected and paid into the county treasury." Thus stood the law under which the assessment and apportionment had been made, and under which the collector for a long time had in his possession the lists and warrant for the collection of taxes, and *should have enforced the same* before the tender in this case was made. No mistake could be made as to the language of the statute; there was a clear and certain provision that certain taxes must be paid by the tax-payer in gold and silver coin; and it makes no difference in this case, that other taxes beside the State and school, are included in the sums assessed against each of plaintiffs, since the whole amount is a unit and no objection is made to our so considering it. The statute provided a heavy penalty if the sheriff did not pay over all the money by him so collected, and at the same time provided that he must pay it over in gold and silver coin; and in another section, requires the county treasurer to pay over by a certain day, the State tax, out of the *first* moneys collected and paid into the county treasury, and they must make that payment in gold and silver coin. If any other than gold or silver coin could be paid on taxes, and the treasury filled with cloth or paper dollars, how could the treasurer pay over gold and silver coin. A heavy penalty rested upon both the sheriff and treasurer to pay coin, and no other construction could satisfy the law, than that the State and school taxes must be paid in coin. Plaintiffs claim that these sections have been repealed, admitting to some extent that under those statutes taxes were made payable only in coin.

On the 21st day of October, while the collecting officers of the different counties were collecting taxes in gold and silver coin, the legislative assembly interfered somewhat with the existing laws. They passed an act entitled "To provide

for the disposing of the several kinds of money received into the public treasury;" in one clause of the first section, requiring that all taxes should be collected and paid in gold and silver coin, and not otherwise; and in the second clause, that the county treasurer in each county shall transmit to the State treasurer the amount of the taxes which may accrue in that county, in the gold and silver coin of the United States, and not otherwise; and section second provides that all salaries and claims against State or municipal corporations, must be discharged in coin, or its equivalent. It is claimed that, under *section 20, page 106 of the Code*, these sections, so far as they treat of the collection of taxes, are not constitutional, that subject not being embraced in the title of the act. Passing that question for the present, we find that, on the same day, the assembly passed an act amending *section 46, title 5*, of the act of 1854, enlarging the time for the return of money by the county treasurer, and still requiring their payment to be in coin. On the same day the assembly passed a general act repealing *titles five and six* of the act of January, 1854, which titles originally included sections thirty-two and forty-six, above referred to, so that three acts referring to the same subject were passed on the same day. We hold that section forty-six of the act of 1854 was not repealed by the act repealing titles five and six since that section had been carved out and preserved as a law by a distinct amendatory act. The same obligation remained upon county treasurer to pay over moneys to the State treasurer in coin as before; in other words, the State tax must come in coin, and in no other way.

A change was made in section thirty-two, striking out the clause that the sheriff was to pay over State and school taxes in gold and silver coin, and enacting a more sweeping clause in the act claimed as unconstitutional. There can be no question but that clause second of section one of the act of October 21, 1864, providing for the disposal of the several kinds of money received into the public treasury, is consist-



ent with the Constitution. Then that clause and section forty-six were both in force from and after October 21, 1864. Without disposing of the question as to the inconsistency or constitutionality of clause first of section one of the act of October 21, 1864, we find that full assessment and apportionment, and partial collection of the taxes of 1864 had been made, while *all* the provisions of the old law were in full force, in our judgment clearly requiring payment of taxes to be made in coin. We find still the same provisions, excepting that of section thirty-two, existing in the present law; twice distinctly requiring the county treasurer to pay, out of the *first* moneys collected on taxes, the State tax in gold and silver coin; and so far as concerns this case, we may treat all the taxes assessed as State taxes. These provisions most clearly require such taxes to come into the county treasuries in coin only; since out of the first of that money, and in the *same kind* as received, the county treasurers must pay gold and silver coin to the State treasurer.

On the 21st of October, 1864, and since October 19th, 1860, the county treasurers had been the collectors of taxes in each year, until the 1st day of January, succeeding each assessment.

Apart from the clause in first section of the act of 1864, now questioned, we hold that the law of the land clearly provided that the State tax at least should be paid in gold and silver coin.

This fully decides the case here as in the court below.

Upon the hearing in this court no counsel appeared for the respondent, and we have thus far in our decision discussed the questions raised by counsel for appellants.

The positions we take are these:

That Congress has no legal or constitutional power or authority to interfere with State taxes, either in amount, assessment, collection, or means of payment. That Congress did not attempt so to do in the passage of the legal tender act of 1861. That the act of Congress making treasury

notes a legal tender is limited in its applicability and compass.

That the statutes of the State of Oregon provide for the payment of its taxes in coin.

Though not particularly mentioned in the argument of the case or in the consultations of the justices, I deem it proper to present here that view which I take of the question and which I think would have saved the full discussion of the question of what is and what is not contained in our statutes. Without discussion I will state the reasoning.

It is conceded that the act, making treasury notes a legal tender, is one of limited application. The rule for the construction of such statutes is this: It must be confined to the subjects to which it is clearly and expressly applicable. It did not expressly or in any way include State taxes; being silent upon that subject. It then did not change the existing laws, customs and regulations concerning such taxes. The money so created could not then discharge State taxes, until the State legislature, exercising a proper power, should by enactment make it applicable and sufficient therefor.

It certainly follows that even in the absence of any State law requiring the payment of taxes in coin, they could not be satisfied by the offer of legal tender notes; for the way in which they had previously been paid was not changed by the act of Congress, or intended to be interfered with.

The judgment is affirmed.

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D. W. WILLIAMS, Treasurer of Multnomah County, Respondent, v. A. D. SHELBY, Appellant.

*Appeal from Multnomah County.*

1. Authority of justice of the peace in felonies.
2. Bonds in criminal matters are statutory.
3. Difference in construction between bonds in civil and criminal cases.

THIS action was brought to recover \$500, the penalty of a bond executed on the 8th day of December, 1864, by F. Patterson, as principal, and A. D. Shelby, as surety; conditioned for the appearance of Patterson before J. F. McCoy, recorder of the city of Portland, to answer a charge of commission of assault upon, with intent to disfigure one Kate Mason.

The charter of the city of Portland gives to its recorder the jurisdiction and authority of a justice of the peace, for the county of Multnomah, within the limits of the city in both civil and criminal matters. Patterson having failed to appear, the bond was declared forfeited and judgment had in the lower court for the penalty.

*E. Hodgkinson, Esq.*, of counsel for respondent.

*W. F. Trimble, Esq.*, of counsel for appellant.

PRIM, J. The crime with which Patterson was charged was a felony; and a justice of the peace had no authority or jurisdiction to try and determine the case, but only to act as a court of inquiry, with authority to hear the proofs for the purpose of ascertaining whether an offense had been committed; and whether there was probable cause to believe the prisoner guilty thereof; and if so, to take his bond with one or more sureties conditioned for his appearance before the Circuit Court to answer the charge. See *Statutes of 1855, page 246*.

The condition of the bond in question is that Patterson appear before J. F. McCoy, a justice of the peace, on the 7th day of March next, to answer the charge of an assault with intent to disfigure.

There was no statute in existence at the time of this proceeding authorizing a justice to take such a bond, therefore it must be treated as void. (7 *Mass.*, 280; 16 *Mass.*, 199; 11 *Mass.*, 337; 23 *Wend.*, 47.)

The Circuit Court held that, although there was no statute then in existence authorizing the taking of this bond by the

justice, yet it might be sustained and held valid as a common law undertaking; that the discharge of the principal for the time being was a sufficient consideration to sustain the promise and agreement entered into. This holding, we think, cannot be sustained by the authorities; in fact, none have been produced to that effect. Authority has been cited to this effect, that another class of bonds might well be sustained; from their form and structure, without the aid of statute. Such as injunction bonds, replevin bonds, bail bonds, in civil cases, forthcoming bonds, appeal bonds, and all such as are made payable to the beneficiary or interested party. Such have been held valid at common law, without resorting to the statute to give them effect; but it is held otherwise in criminal cases. (9 *Texas*, 1.)

Judgment reversed.

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**HARRIET KING, and others, Appellants, v. CITY OF  
PORTLAND, Respondent.**

*Appeal from Multnomah County.*

1. An assessment upon adjacent lots, of their share, for improvement of a street is in the nature of a tax.
2. Meaning given to the word taxation in section 32, article 1, of the State Constitution, is that it applies only to defraying the general expenses of the government.
3. The legislature, and the city council of Portland, under legislative enactment are not prohibited from assessing the expense of a street improvement upon the lots abutting thereon.
4. It is in the discretion of the legislature to provide the mode of assessment of such expense, and the exercise of that discretion is not reviewable in the courts.

On the 15th day of June, 1865, the mayor and common council of the city of Portland, for the purpose of making improvements on Front street, in said city, passed ordinance 210, declaring the cost of said improvements, and that each

city lot, abutting on Front street, was liable for the full cost of improving one-half of said street, immediately adjacent to each lot, and of one-half of the intersections, where such exist. The amount for which each lot became liable, under that ordinance was entered, as provided by law, upon the docket of city liens of the city of Portland. Plaintiff being the owner of lots five and six, in block one hundred and eight, upon Front street, and the other persons, plaintiffs, availing themselves of a joining in this suit, being severally possessed of one or more lots upon Front street, were liable to pay said assessments made and entered on the lien docket, or have the lots sold upon default in payment. The time within which, by the ordinance, the payment should be made had expired, and the lots were ordered to be sold for the amount of assessments. Plaintiff and others filed a complaint, at the June term, 1865, setting forth the facts, asking that an injunction might issue restraining the city of Portland and its agent from proceeding farther in enforcing sale of lots; claiming that the tax assessed was an illegal one, without authority of law, and that the acts of the city and its officers were improper for that reason. To this complaint the city, by its attorney, demurred, and the demurrer was, by the circuit judge, sustained; the bill of complaint was dismissed, and costs adjudged against plaintiffs. Plaintiffs appealed from this ruling, and claim it was erroneous, and should be reversed on two grounds:

- 1st. That the same was against law, and contrary to equity.
2. That the court erred in sustaining the demurrer, and in refusing to grant an injunction, and in dismissing the bill, and in rendering a decree for costs against plaintiffs.

*Strong & Trimble*, for appellants, insist:

- 1st. That the Circuit Court had full jurisdiction over the subject matter of suit. (5 *Minn.*, 54; 4 *Kernan*, 9; 8 *Mich.*, 275; 19 *Ohio*, 418; 10 *Wis.*, 242.)

- 2d. That the rule of taxation in this case is in contraven-

tion of section 33, article 1; of section 1, article 9, and of section 5, article 11, Constitution of Oregon.

3d. That this assessment was a tax; and cite, as leading case, 4 *Comstock*, 419, where such assessments were held as taxes, and overruling previous decisions. (36 *Barb.*, *S. C.* 179, 193; 19 *N. Y.*, 116-18; 2 *Black*, *S. C. R.*, 310.)

4th. Can a law authorizing specific assessments or taxes stand in view of the Constitution? (5 *Ohio S. R.*, 243; 10 *Wis.*, 242, 282; 9 *Dana*, 513; 25 *Missouri*, 271; 8 *Mich.*, 275.)

*J. H. Mitchell, Esq.*, for respondent.

1st. That before a court should declare an act of the legislature unconstitutional, a case must be presented in which there could be no rational doubt, and cites 1 *Ohio S. R.*, 82; 1 *Cowen*, 450; 24 *Barb.*, 446; and construction should be liberal; 27 *Barb.*, *S. C.*, 575; 17 *N. Y.*, *E. Smith*, 235. It may be antagonistic to certain constitutional provisions, and, if not in direct or necessary conflict, is still constitutional. (24 *Barb.*, *S. C.*, 232; 3 *Denio*, 281.)

2d. State legislatures are sovereign over general and local taxation, unless their power is limited by the Constitution. (*Smith's Com. on Constitutional Law*, 261-266.)

3d. Claims there is no limitation in the Constitution of Oregon; and if not limited, then courts cannot review what is a matter of discretion of the legislative authority. (*Bank of Rome v. Village of Rome*, 18 *N. Y.*, 89; 3 *Kernan*, 378; 24 *Barb.*, 446; 4 *Peters U. S. C.*, 514; 4 *Wheaton*, 428; 1 *Ohio S. R.*, 137.)

4th. That the act of the legislature complained of, is an exercise of the power of taxation; but that the term *taxation* in the sections of our Constitution cited, refers wholly to general taxes. Cites many authorities, some already referred to: 24 *Wendell*, 65; 7 *Hill*, 23; 19 *Ohio*, 518; 11 *Ohio S. R.*, 637; 25 *Missouri*, 593-505; 27 *Mississippi*, 222; 12 *Cal.*, 477; *Ib.*, 83; 8 *Mich.*, 275, 286, 298; and, as a leading

case, *Emery v. San Francisco Gas Co., California Sup. Court, July term, 1865.*

WILSON, J. The objection made to the jurisdiction of the Circuit Court over the subject of this suit involves an examination of some of the provisions found in the charter of the city of Portland. For it is admitted by respondent's counsel, that if the charter made a tax deed *prima facie* evidence, excusing its holder from proof of the proceedings upon which the deed was made, then there could be no contest as to the rightful jurisdiction. True it is, that courts of equity will not interfere and set aside every paper purporting to complete a title or impose a lien; and the appearance of a valid defect in the proceedings leading to its execution, does not, as a rule, give the right to invoke the aid of equity.

Section 376, of the *Code*, in creating the equity side of our courts, defines the grounds upon which a resort may be had to that tribunal. It declares: "The enforcement or protection of a private right, or the prevention of or redress for an injury thereto, shall be obtained by a suit in equity, in *all cases* where there is not a *plain, adequate and complete* remedy at law." It makes the absence of a proper remedy at law the main requisite.

In this suit it is admitted that the authority for making the assessments, or liens upon the lots of plaintiffs, come from these certain sections in the city charter. Section 85: "When the *probable* cost of the improvement (of the streets) has been ascertained and determined, and the proportionate share thereof of each lot, or parcel thereof, has been assessed as provided in section 84, the council must declare the same by ordinance, and direct its clerk to enter a statement thereof in the docket of the city liens." Section 87: "The sum so entered is to be deemed a tax levied, and a lien thereon, which lien shall have priority over all other liens or incumbrances whatever." Section 139: "In any action, suit or proceeding in any court, concerning any assessment of

property, or levy of taxes authorized by this act, or the collection of any such tax, or proceeding consequent thereon, such assessment, levy, consequent proceeding, and all proceedings connected therewith shall be presumed to be regular, and duly done, or taken, until *the contrary* is shown; and when any proceeding, matter, or thing, is by this act committed to the discretion or judgment of the council, such discretion or judgment, when exercised or declared, is final, and cannot be reviewed, or called in question elsewhere." Section 140: "It is sufficient, if it substantially appear from such deed that the property was sold by virtue of a warrant from the city of Portland, and the date thereof, for a delinquent assessment or tax, and amount thereof, together with the date of the sale, and the amount bid thereat by the purchaser." From these sections, together with others containing kindred provisions we may easily determine how far the whole matter of improving the streets, and providing for the payment thereof, has been committed to the discretion or judgment of the city council; and how far such action affects private rights, and consequently calls for interposition of legal or equitable authority.

When the city council decide upon the improvement of a street, that body may proceed without any possible hindrance or objection to ascertain and determine the *probable* cost of making the same, and assess upon each lot, or part thereof, its proportional share of such cost. The whole of the matter, as regards expense and apportionment, belongs to the discretion or judgment of the council, and the same charter declares that discretion or judgment as final, and in no wise reviewable. Their proceedings are to be taken as regular, and the sale and transfer by deed stand substantially, and we might say expressly, as *prima facie* evidence thereof, throwing the burden of proving the irregularities in the proceedings, and the invalidity of sale, &c., upon the party assailing such deed. Under the provisions of the charter, there can be no way to correct the amount of assessment or interfere with its



enforcement, as is generally provided in taxation laws. The assessments are made and, by a mere entry of a clerk, become liens upon designated property, claiming a priority to all other liens, and call for a warrant and consequent sale; and the deed terminating those acts is valid until by some lawful means it may be attacked and set aside. The deed, too, need contain but few recitals, and none concerning the assessment and acts of the council. It certainly appears to be a condition of liabilities, rights, and remedies, strictly within the rule, as claimed by respondent's counsel, which could properly call for equitable interference. The right of the council to commence any such improvement, and make the expense a valid lien upon appellants' property, is assumed, and, until the *contrary* is shown, is proven by the fact that there is a deed. The regularity of the proceedings are established thereby with equal force; the *probable* cost and the proportionate amount assessed to each lot as its share of the burden, being within the discretion and judgment of the council, are established beyond successful contradiction, and the lot owner is in proceedings at law remediless. Not only has he no *adequate* remedy, but no remedy falling even far short of comparative relief. Certainly appellants show a case in full accordance with the spirit and intent of section 376, and we cannot doubt their right to institute and maintain this suit upon allegations sustained by sufficient proofs. Precedents are not wanting which go far beyond what is needful to decide this point now. (5 *Minnesota*, 54; 4 *Kernan*, 9.) And, in suits of this character, courts have paid little or no attention to the objection to the jurisdiction. (8 *Michigan*, 275; 10 *Wisconsin*, 242; 19 *Ohio*, 418.)

Our considerations are directed mainly to the second point in the case, over which counsel have strenuously contested. Appellants claim that the apportionment by the city council to each lot, or part thereof, abutting on the improved street, of its share of the expense of such improvement is unconstitutional, and, therefore, that all proceedings subsequent to

such apportionment for its collection are illegal and a trespass upon appellants' rights. As this question is before us for the first time, and is made a test applicable to kindred cases, we have carefully considered it, and have gone at length into the investigation of decisions elsewhere made, and examined the subject in all its bearings. It is not the province or duty of courts to declare the acts passed by the legislative assembly to be unconstitutional upon grounds seemingly reasonable; the case must be one in which the court can have no rational doubt, and the Constitution of our State is to be liberally construed in upholding the constitutionality of statutes. (*Ex parte McCollum*, 1 Cowen, 450; *Clarke v. City of Rochester*, 24 Barb., 446; *People v. Board of Supervisors of Orange*, 27 Barb., 575; 17 N. Y., 235.) Otherwise the court usurps the place of legislators and assumes to enact laws.

The appellants claim that the assessment or apportionment made by the city council upon appellants' lots, if authorized at all, must be so by reason of the exercise of some of the powers of taxation residing in the law making authority; and if so, then that it contravenes the express provision in section 32, article 1, of the Constitution of Oregon, which reads thus "and all taxation shall be equal and uniform." Respondent admits that it comes from that source, and has no connection with the other kindred power of a State over property, the right of eminent domain. This claim and admission narrows the inquiry to this: Does that section cover taxation or burdens for all purposes; general and local; State and municipal; revenue and benefit? The construction of State Constitution is widely different from that to be given to the Constitution of the United States. The latter is sole source of power and authority for the national government, granted and delegated by those, in whom the original powers were acknowledged to have existed; and who were not divested of any of that authority, save as was plainly set forth in the instrument itself. In the former, it is fairly the reverse; the people, acknowledged to be sovereign, framed

it as a *restriction* upon such powers as might be needed by the legislature over subjects enumerated therein. On all other matters the power of that body is unrestrained; it is absolutely sovereign, except when limited by the terms of the Constitution alone. (*Smith's Com. on Constitutional Construction*, pages 261, 266.)

Upon the subject of taxation certainly, unless the Constitution contains plain restrictions, the control of the legislature is absolute. It represents the people, and if these latter have not ceded away that right, they may, in State, or municipal character, or by their representatives determine upon assessment or taxation for any and all purposes deemed for the proper interest of those concerned. The improvements to be made upon streets, being for public use is a public benefit; yet, it is equally true that these improvements inure to the benefit of those in the immediate vicinity of the work, disproportionally with that of those living in a remote part of the community, whose property is not increased thereby in value, and who may seldom, if ever, use that portion of the public highways, assuming it to be a public work, to be used by the public, and claiming also that the act of the city council was the exercise of a power called the right of taxation. Appellants insists that if the council had the legal right to declare the mode of payment for such work, it should have been done under section 32, above cited; and that a tax equal and uniform in its burden upon all property within the corporation of Portland should have been levied. We certainly agree with counsel, that the act of the city council was an attempt to exercise the sovereign right of taxation. What may be the extent of that right is ably expressed and defined by Chief Justice Marshall, in 4 *Peters*, U. S., 514, 61, 63, whose words I use: "The power of legislation, and consequently of taxation, operates on all the persons and property belonging to the body politic. It is an original principle, which has its foundation in society itself. It resides in the government as part of itself, and need not be

reserved where property of any description, or the right to use it in any manner is granted to individuals or corporations. However absolute the right of the individual may be, it is still in the nature of that right, that it must bear a portion of the public burdens, and that portion must be determined by the legislature."

Again, in *McCulloch v. Maryland*, 4 *Wheaton*, 428, "It is admitted, that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the subject to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax the government acts upon its constituents." Again: "Assuming this to be sound doctrine, it must be conceded that the power of taxation, or of assigning to each individual his share of the burden, is vested exclusively in the legislature, unless this power is limited or restrained by some constitutional provision. The power of taxing, and the power of apportioning taxation are identical and inseparable."

A full discussion of this question is found in the leading case of the *People v. Mayor of Brooklyn*, 4 *Comstock*, 420, and has become, we deem it, settled law, that the legislature, apart from constitutional restriction, may levy taxes and devise ways of apportionment thereof in such manner, and to any extent they may deem advisable.

Section 32, article 1, is in full in these words: "No tax or duty shall be imposed without the consent of the people, or their representatives in the legislative assembly, and all taxation shall be equal and uniform." If, when our Constitution was made, certain words or sentences had obtained a certain signification or force, either by common usage or legal decision, it must be presumed, if found in that instrument that they bear that established meaning, unless plainly from the context or other provision, a different meaning is certainly

intended. The same question had been adjudicated to some extent in the courts of different States, prior to the time when Oregon laid aside its territorial character, and assumed the place of an independent State; and the force of the word "taxation" had been declared when found in similar connection as in our Constitution, and when in a different status. From these and from usage, we may gather what was then the signification of that word. It is a well known custom, coming through many years, that those expenses which though incurred in matters of a public nature, were yet peculiar to the local governments of municipal corporations for opening and grading the highways, improving and repairing the same, and for constructing canals and drainage ditches, have always been charged upon the property in the localities where made, and which were specially benefited thereby; and the manner of apportionment of the burden has differed almost with the locality; most assuredly the manner has always varied from the mode of general taxation, in extent of imposition as well as in the manner.

Doubtless the reason was that, in taxation for the general expenses of the government, the benefits to each person could not be determined even approximately; but for local improvements these could be very nearly ascertained, and those who received the benefit could be made to bear the burden. This distinction could not have been unknown to our constitutional convention.

Again, numerous decisions, previous to 1848, had been made elsewhere, all, save in the State of Louisiana, tending towards the limitation of the word "taxation" as used in the different constitutions, and its restriction to the general burdens for general expenses for carrying on the government, and the enforcement of those matters designed for equal benefit to one and all. About the time of the adoption of our Constitution, these many decisions were gathered into leading cases in most of the States, and the courts announced unmistakably what had been, and more definitely what

should be, the interpretation given to the word "*taxation*" as generally used. In the constitutions of some of the States, in addition to the term *taxation* was found in close connection the term *assessments*. Unquestionably they do not both mean the same thing. Courts have always construed them differently; taxation has been uniformly restricted to the mode for raising a revenue for the general expenses of the government; and assessments to the means for paying those local burdens arising by reason of the wants of small communities or of portions of larger ones.

In some others, the word *assessments* does not expressly appear, and in those States, reasoning upon general principles, and applying the rule in benefit and burden, and recognizing the common interpretation of *taxation* elsewhere, the courts have invariably adhered to the restriction of that word to general purposes only; and in these States the conclusion is maintained, that the legislature was not restricted from using any other mode or measure for discharging these local burdens. That body had the absolute control of such matters, and it rested in their sound discretion, and was unassailable in the courts; the only remedy was with the people. In 4 *Wheaton*, 428, the Supreme Court declares: "It is unfit for the judicial department to inquire what degree of taxation is the legitimate use, and what its abuse." In 18 *N. Y.*, 38: "A general rule is that a discretion committed to one authority is not to be reviewed by another."

Our Constitution differs in words, perhaps from the two classes of State constitutions named above, but we deem it equally clear in language and meaning as any. While the word *assessment*, upon which decisions elsewhere rest, is not found in section thirty-two, yet there is present there a word which creates the reason for the most technical decision as to the scope of the word *taxation*. It declares, "No tax or duty," making clear distinction between the two subjects; yet the word duty, in its enlarged sense, has the legal interpretation of being "nearly equivalent to taxes, embracing

all impositions or charges levied on persons or things." (1 *Bouvier Law Dic.*, 455.) I cannot see why it does not embrace *assessments*, and go far beyond that term, as it does clearly when applied to *customs* or *imports*. It may well be applied to just such matters as the subject in this suit, and where a decision rests on the word *assessment*, equally will it do so on the word *duty*. While taxation must be equal and uniform, there is no such provision as to *duties*.

If our legislature was not then restricted by express constitutional provision, it might exercise fully any and all powers necessary to provide for the necessities of the people in small communities, as for the people at large, and exercise these powers without restraint or revision. A brief examination of the decisions will sustain, beyond cavil, the position here assumed. In 11 *Johnson*, 77, a church had been assessed for its share of improvements made to Nassau street, in the city of New York. The statute was, that "No real estate belonging to any church shall be taxed by any law of this State." Yet the court held that that provision referred to general or public taxes, for the benefit of the State, county or town, and that assessments for street improvements were not a tax contemplated by the act.

In *The Mayor and City Council of Baltimore v. Proprietors of Green Mount Cemetery*, 7 *Maryland*, 517, the charter of that company provided that their lands should "not be liable to any tax or public imposition whatever." On resistance made to an assessment for street improvements, the Supreme Court held that nothing more was intended than to exempt their property from all taxes and burdens "levied or imposed for the purpose of revenue, and not to relieve it from such charges as are inseparably incident to its location with regard to other property." In 12 *Ill.*, 405, lands were assured to a canal corporation on these terms: "The lands and lots shall be exempt from taxation of every description by and under the laws of this State, &c.;" and the court there held: "In our opinion, the exemption must

be held to apply to taxes levied for State, county, and municipal purposes only." In 12 *Penn. St. R.*, churches were by law exempt from all "county, city, and borough taxes," and still St. John's church was held not exempt from assessments for laying water pipes for public use. The same conclusion will be found in cases too numerous for examination here. 5 *Ohio S. R.*, 245, a leading case in Ohio; 12 *Cal.*, 82; *Ib.*, 477; 10 *Wisconsin*, 256; and we refer to the exhaustive opinion on this subject, made by the Supreme Court of California at the last July term of that court, and appearing in the Sacramento Union, it being not yet published in a volume of reports, in the case of *Emery v. San Francisco Gas. Co.* These decisions were based upon constitutional provisions, which contained the terms *taxation* and *assessments*.

In *Williams v. City of Detroit*, 2 *Mich.*, 564, a law authorizing assessments upon lots fronting on a street, for its improvement, was held constitutional. The same ruling was made in 8 *Mich.*, 276; and in the latter case a distinct approval was made of the leading case in Ohio, above cited. In 27 *Missouri*, 495, an act had been passed giving a corporation the right to reclaim lands in a certain district subject to inundation; and in order to pay for the construction of ditches, levees, &c., the sum of one dollar might be assessed on each acre of the lands lying within that district. On a case arising, I quote from the decision: "That provision of our State Constitution which requires taxation to be proportioned to the value of the property on which it is laid, is only applicable to taxation in its usual, ordinary and received sense; and is, therefore, limited to taxation for general purposes alone, where the money raised by the tax goes into the State treasury, county treasury, or the general fund of some city or town, and is applicable to any purpose to which the legislative body of such State, county or town may choose to apply it; and is not intended to apply to local assessment, where the money raised is to be expended on the property taxed. These local assessments are not necessarily, under



our Constitution, apportioned by reference to the value of the property taxed, but may be regulated by the value of the benefit which the improvement to which the money is devoted is expected to confer on the proprietor."

To the same conclusion are the cases found in 25 *Mo.*, 510; 80 *Mo.* 541, and 1 *Ohio*, 135.

In all these latter cases, the decisions were made under constitutional provisions, which, naming *taxation* alone, were silent as to *assessments*. Those States had the same provision as has our Constitution, empowering the legislature to charter municipal corporations, viz.: Section 4, article 11, "Acts of the legislative assembly, incorporating towns and cities, shall restrict their powers of taxation, borrowing money, contracting debts and loaning their credit." This does not contain the word *assessment* or *duty*; but our provision, section 23 above cited, contains, in addition to theirs, the word *duty*; and if that word embraces the payment for street improvements, then our legislature are, by the omission of that word in section 4, article 11, clearly unrestrained in their power over all subjects embraced in that term. The class of decisions first mentioned above were based upon constitutional provisions, of which the New York one is a sample: "It shall be the duty of the legislature to provide for the organization of cities, and incorporated villages, and to restrict their powers of taxation, *assessments*, borrowing money, contracting debts, &c."

The line of decisions, under both forms of constitutional provisions, with and without other words than *taxation*, seems to be unbroken in establishing the conclusion, that the word *taxation*, as used, is limited to the means of raising money to meet the general purposes of the government, whether of State or city. At best the provision, that all taxation shall be equal and uniform, is very imperfect in its enforcement. All property is assessed to pay a certain rate to the state; yet, the assessor, chosen for Wasco county, places a value upon property, perhaps fifty per centum, higher than does

the assessor of Multnomah county, upon precisely the same kind of property; and the result is, that the tax-payer of Wasco county assists the general government just so much more than does the one in Multnomah county. We think the manner of assessments for street improvements in Portland is just as equal and fair. A citizen, living in a distant part of that city, may never use the street so repaired; his property may not be enhanced in value thereby one farthing, and personally he is not benefited at all; while the owner of the lot fronting on that repaired street, sees his property rise in value, and has a perfect way of access for himself and the public to and from his property. He may be, and, as the case almost invariable proves, is repaid in real benefit far beyond his burden. Suppose he could obtain all this at an expense which is an absolute injury to another, the burdens would be intolerable. The legislature has placed a limit upon the general taxation to be levied by the city of Portland; it has restricted its power of borrowing money, and loaning of credit, and has exercised the farther power of providing how the expenses of extraordinary and local necessities shall be paid. We see no reason, had we the right, for saying that the apportionment of the expenses, for improving the streets upon the abutting lots, is not as equal in its burden as any other means. The legislature held that matter in their discretion, and has exercised that discretion, and we may not say it has erred. It was for that body to say, too, in the charter to the city of Portland, whether sufficient restrictions were put upon the exercise of authority by the city council.

We think these conclusions follow: The term taxation, in section thirty-two, article one, must be limited alone to the meeting of such expenses as are necessary for the maintenance of the general government of State, county, city, &c., and that the full power resides in the legislative assembly to provide for other expenses, belonging to any other branch of taxation, in their discretion, and that such discretion is final;

that the legislative assembly has exercised its powers in restricting the authority of the city of Portland, and we may not say whether sufficiently done or not; and that the granting to that city of the right to apportion expenses for improving a street upon the adjacent lots, was a rightful exercise of legislative authority and must be upheld.

The judgment is affirmed.



**CASES**  
**ARGUED AND DECIDED**  
**IN THE**  
**Supreme Court of the State of Oregon.**

**SEPTEMBER TERM, A. D. 1866.**

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**ERASMUS D. SHATTUCK, *Chief Justice.***

**REUBEN P. BOISE,**  
**RILEY E. STRATTON,**  
**JOSEPH G. WILSON,**  
**PAINE P. PRIM,**

*Justices.*

**R. WILLIAMS, *Clerk.***

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**CRAWFORD, Respondent, v. S. ABRAHAM and H.**  
**ABRAHAM, Appellants.**

*Appeal from Douglas County.*

Rules governing practice in the courts in reference to claims for disbursements in causes:

1. Mileage—What the limit.
2. Means for procuring attendance of witnesses.
3. Mileage and attendance must be actual.
4. Disbursements must be real.
5. Verification.
6. Mileage within the State—When objected to.
7. Number of claims for mileage and attendance.

In the cases of *Crawford v. S. Abraham*, and of *Crawford v. H. Abraham*, at the October term, 1865, of the Circuit Court for Douglas county, judgments of nonsuit were taken. In each case a bill of disbursements was filed, specifying the mileage and attendance, severally, of numerous witnesses. The verifications are the same, except the name of the

affiant, and are in these words: "— — —, being duly sworn, says that the above amount of disbursements, except the fees of officers, is just and correct; and that the said disbursements were necessary for his defense in the above action, as he is informed and believes. — — —." Plaintiff filed objections to certain items in each of said bills, specifying those items of attendance and mileage of witnesses, and stated, as the reason, "that said witnesses were not subpoenaed or sworn in said cause," and to the claims of three witnesses for mileage, objection was made, for the reason that, being served with subpoena at the place of trial, they could not claim for more than two miles each. One of these latter lived at Folsom, California, and the others at great distances from Roseburg, the place of trial. Subpoenas were issued but in one case, and to the mileage and attendance of those witnesses no objection was made, except to the mileage of the three witnesses above. The clerk, under the Code, allowed in one case \$403.30, and in the other \$433.90. Additional affidavits of L. F. Mosher and J. F. Gazely, Esqs., counsel for defendants, were filed below, stating substantially that the whole of the witnesses were necessary for the defense, and as to the correctness of the mileage charged generally. The original bill of disbursements and proofs had been lost, and upon supplied papers, the judge below, on appeal made, allowed in one case \$6.60, and in the other \$128.30. Defendants appealed. The causes being similar are consolidated here, both for argument and opinion.

W. R. Willis, Esq., for respondent, claims that no other affidavits can be used on appeal than were before the clerk, and cites 11 *How. Pr. R.*, 160; 16 *Ib.*, 91 *How.*, N. Y. Code, 578. That affidavits to justify the clerk in allowing witness' fees must state the actual time spent in attendance, and mileage actually traveled, for the express purpose of being witnesses, citing additional, 5 *How. Pr. R.*, 458; 4 *Hill*, 595, 6; 6 *Hill*, 376.

*Mosher & Dowell*, for appellants, claimed errors by the court below, in refusing mileage and attendance for witnesses attending at request of defendants; in refusing mileage of witnesses residing beyond the reach of process, but attending at request of defendants. Counsel claimed first allowance under *section 543, page 288, of the Code*, that a subpoena is only necessary as determining what witnesses had been summoned, but of no moment when attendance was not denied. That when the personal attendance of a witness is necessary, the party has a right to have him present and to recover at least legal fees, citing 1 *Greenleaf Ev.*, *sections 320, 323*; *U. S. An. Dig.*, *vol. 1, page 140*.

WILSON, J. Questions of taxation of costs and allowance of disbursements are of interest to attorneys and clients, and especially so since the Code of Oregon is of recent date. The disposition of these must, to some extent, be arbitrary, as fixing a rule of practice, yet not without reason therefor.

1st. Mileage will not be allowed for witnesses beyond the boundaries of the State.

This is the New York rule, based upon a similar statute, and is one whose utility we do not question. Ample means are provided for the continuance of causes in the absence of witnesses, in order to procure material evidence; and liberal statutes provide for taking the depositions of witnesses residing without the State. The rule may now and then work a hardship, but it would open the door to incalculable evils to hold otherwise. Litigation would cease to protect the poor man, who, as plaintiff, might fail of his rights; or, as defendant, unfortunate by reason of his poverty, could be crushed by claims for mileage of witnesses, whose testimony might have been taken at small expense, but who, under unlimited license for mileage, are permitted to seek pleasure or accomplish other aims under guise as material witnesses. It would furnish evil minded litigants with means for ample revenge in heaping up cost bills.

2d. The attendance of witnesses may be procured by request of parties, or by agreement; and the party so liable may recover disbursements for proper mileage and attendance.

The statutory means of compelling the attendance of witnesses is by subpoena duly served; but we are at a loss to see how any party can be injured in having to pay mileage and attendance merely for the witnesses of an adversary, who attends upon request or agreement, when the additional expense of officers' fees and mileage for issuing and serving of a subpoena, swelling largely the claim for disbursements, could do no more than procure the attendance of the witness.

3d. The claim for disbursements must be for the number of miles actually traveled, and the number of days in actual attendance, as a *witness only*.

If one come upon other business, or be detained at court upon other matters than his relations as a witness, he should not have a claim for attendance as a witness; he is not deprived of any time thereby or caused any damage. Suppose an attorney conducts a cause and is subpoenaed as a witness therein, it is necessary for him to attend court, to travel from his home to see to his client's interests, for which he is paid, and we think he should not have additional fees as a witness.

4th. The bill filed for disbursements should contain no item which the claimant has not either *paid* or is *liable* to pay, and the items should be specifically set out.

If a witness make no charge for his mileage or attendance, or performs those duties for some other reasons, surely one party ought not to recover for alleged expenditures he has never incurred, or from which he has been released, and replenish his purse by receiving money for another which was never claimed by that other person as due to him.

5th. The verification to a bill for disbursements, in the first instance, should be as specific and formal as is the verification to a pleading.

Under *section 546 of the Code*, we think that is sufficient;



made with the same accuracy as is required of the different persons who may verify a pleading. When objections have been specially made to any or all the items claimed, then it would be proper, if within the power of the claimant, to make full showing as to the materiality of the witness, his travel and attendance as such; this showing should be in the form of an amended verification, and we announce it as a rule of practice that no other affidavits will be allowed. The verification and its amendment will constitute the proofs. It is enough to call an affiant's attention to the particular items objected to, and then common honesty, or the fear of committing perjury, will prompt that person to make a true showing.

6th. Mileage will be allowed, of course, to witnesses residing beyond the reach of ordinary subpoena within the State, unless objection is made thereto; in which case a showing must be made to sustain that item, equivalent to that which is necessary under *section 785 of the Code*, to procure a special subpoena. It would certainly be better for a party to pay such single mileage for a witness, than to force a party to procure a special subpoena, and thereby incur, under *section 785*, the liability to pay double mileage and attendance.

7th. In two or more cases between the same parties, at the same term, a witness would be allowed but single mileage and attendance; and the attendance in each successive case would reach back only to the final disposition of the preceding cause.

Applying these rules to the case in hand, objections were made to mileage and attendance, sufficiently specific, and additional affidavits were filed; but, permitting them now to be considered, no such case is made out as would comply with even the spirit of our rulings. The witnesses are claimed to have been necessary for the defense, but their materiality is in no wise shown; their residence is mentioned, but no averment that they traveled a single mile as witnesses; general attendance is averred, but neither actual attendance or attendance as witnesses *only* is claimed, and the case is left

but little better than it was upon the original verification. The findings and allowances of the court below are not set forth by items and it is difficult for us to determine the items admitted sufficiently to serve as a basis for a judgment here; but plaintiff below admits that the finding of the circuit judge is proper, and we shall, therefore, affirm that.

Judgment affirmed.

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SARAH A. BRUMMET, Respondent, v. JAMES  
WEAVER, Appellant.

*Appeal from Douglas County.*

1. A registration of a married woman's property showed the same to have been acquired by purchase—reason for admission in evidence. What objection would exclude it.
2. A married woman may sell or exchange her separate property, and retain the purchase money, or the property received in exchange, as her own separate property.
3. It is error to refuse instruction "that the registration of a married woman's separate property is not notice to a stranger, of any property not mentioned in the registration."
4. The instruction "that a married woman may sell or exchange registered property, and hold the consideration received as separate property, *under her former registration,*" is error.
5. The instruction "that it makes no difference that the woman married subsequent to her registration, that she might have been married half a dozen times, the one registration is sufficient," is error.
6. Constitution of Oregon repeals the Common Law as to married woman's property.
7. Rights under the Constitution of a married woman as respects her separate property.

THE respondent, a married woman, brought suit before a justice of the peace of Douglas county to recover possession of three horses of which, she alleged, she was the owner in her own right, and which she had registered as her separate property. The case was appealed to the Circuit Court, where answer was filed denying her title. The issues were tried by

a jury in the Circuit Court, and verdict and judgment had for respondent, and Weaver appealed to this court.

*Assignment of errors.*—That the court erred:

1st. In admitting in evidence a record of the registration of plaintiff's separate property, which showed that the property was acquired by purchase, and not by gift, devise or inheritance.

2d. In refusing to instruct the jury "that the registration of a married woman's separate property, is not notice to a stranger of any property not mentioned in said registration."

3d. In instructing the jury "that a married woman may sell and dispose of her separate registered property, and invest the proceeds in other property, which would still be covered by the registration."

4th. In instructing the jury "that the registration made previous to the second marriage, uncanceled, is sufficient to hold her separate property."

*W. R. Willis, Esq.*, for appellant, claims:

1st. That a married woman cannot hold as her separate property, other than such as is acquired by gift, devise or inheritance. (*Code of Oregon, page 786; 7 How. Prac. R., 105; 10 Ib., 109.*)

2d. That a registration of a married woman's separate property is not notice of her intention to hold separate any property not described in said registration. (*Code, pages 786, 787; sections 1, 2 and 4.*)

3d. That a married woman cannot trade in her registered property, and hold the property thus acquired under the one registration. (*Code, pages 786, 787; 7 How. Prac. R., 105; 10 How. Prac. R., 109.*)

4th. When a constitution gives a general power, it gives by implication every power necessary for the exercise of it; if the means for exercising the power be also granted, no other or different means can be implied. (1 *Kent's Com.*, 465, note b.)

5th. A declaration made prior to marriage is not sufficient to protect the rights of a married woman to hold separate property under statutes. (1 *Pars. on Cont.*, 283, 286, note 10; 2 *Kent's Com.*, 130.)

6th. A married woman may exercise, under this statute, such rights and privileges as are expressly given, and none other. (1 *Kent's Com.*, 464.)

*Mosher & Kelsay* for respondent, claim:

1st. An examination of the deed of registration in this case will show that the plaintiff originally acquired the property by gift from the United States government as a land claim, although, at the time of registration she had exchanged the land for the personal property described therein.

It is admitted that the property belonged to the plaintiff at the time of the marriage proven by defendant. Under the provision of the Constitution, then, such property is exempt from the husband's contracts, no matter how acquired, or whether registered or not. (17 *How. Pr. R.*, 413, 414, 415, and 417.)

2d. The respondent, and not her husband, had the right to change the shape or character of her separate property, or dispose of it.

3d. The respondent while a married woman filed a registration which has never been revoked. The fifth section of act of 1859 provides for the solemn revocation of such registration. No such revocation has been made. A valid declaration was on record, and there was no necessity for a second recording thereof.

SHATTUCK, C. J. It is assigned, as one of the errors, that the Circuit Court allowed a record of registration of Mrs. Brummet's property to be read in evidence after appellant had objected to the same, on the ground that said record showed that the property therein mentioned was acquired by purchase, and not by gift, devise, or inheritance. We think

this objection to the admissibility of the paper is not well taken; for, if the whole paper be examined with reference to this objection, it will appear upon its face, that the property therein described as separate property was received by Mrs. Brummet in exchange for her land claim, which she had acquired from the government under the donation law of September 27th, 1850. The *Constitution of this State, article 15, section 5*, provides that the "property and pecuniary rights of every married woman at the time of marriage, or afterwards acquired by gift, devise, or inheritance, shall not be subject to the debts or contracts of her husband;" and the statute of 1859 has made provision for the registration of the separate property of married women "acquired by gift, devise, or inheritance." We think that these provisions of law must be so construed as to allow a married woman not only to hold property as separate property, without the intervention of a trustee, but also to exchange one species of her separate property for another; and to authorize her to sell any part of her separate property and retain the purchase money as her own; or with it to buy other property to be held by her in the same manner and for the same purpose. In this case, had the objection been that this paper was not competent to show how *she acquired* the property, it would have been well taken; for clearly, by the statute authorizing the registration, neither the record nor the original declaration could be used for any such purpose. (*Gen. Laws, page 787, section 4.*) For it is expressly provided that "such declarations shall not be evidence of any fact, except that such married woman has elected to hold the property or pecuniary rights described in such declaration as her separate property." The issue in this case is as to the rightfulness of Mrs. Brummet's claim to the property in dispute as her separate property; and it is pertinent to this issue to show as a fact, that, prior to the commencement of this controversy, she had publicly claimed this property as in her own right. The statute expressly provides that such

claim, or the fact that such claim is made, may be shown by the record of registration. For the purpose, then, of showing the relation in which the respondent had placed herself to the property, we think the paper was properly admitted and read to the jury. There appears, by the bill of exceptions, to have been some evidence adduced upon the trial tending to show that in 1861, when the respondent made and recorded this paper, she was the wife of Banner Brummet; that she, after that date was divorced, and in 1864 re-married to him; that during the time between the divorce and the re-marriage she held the property, which during the marriage she had registered as separate property; one of the animals having been exchanged for one of those in dispute in this case; that at the time of the re-marriage, she had this property and still claimed it in her own right, but that no new registration of it was made after the second marriage. Upon submitting the case to the jury the court below was asked, by the appellant, to instruct the jury "that the registration of a married woman's separate property is not notice to a stranger of any property not mentioned in said registration," which the court refused, and appellant excepted; and this refusal is assigned as error. We think this instruction should have been given, for the statute has declared in express terms, that such record "shall not be evidence of any fact except that such married woman has elected to hold the property, or pecuniary rights, *described in such declaration*," etc. (*Code, page 787, section 4.*) As to the horse claimed in this suit, which was not mentioned in the recorded declaration, this record could not of itself, in any event, be considered as notice to a stranger, for it is *not described in it*. The court below instructed the jury, that the plaintiff, being a married woman, and having separate property, and registered as such, as provided by statute, may sell and dispose of such property, and receive the proceeds thereof, and invest them in other property, and hold the property thus acquired *under said registration*, independent of the debts and con-

tracts of her husband. To this instruction the appellant excepted, and assigns the giving of the same as error. The common law, which divested a woman on her marriage of her personal estate, and of control over her realty, and subjected her property to the debts and contracts of her husband, was not repealed by the statute of 1859; and a married woman acquires no rights in contravention of the common law by virtue of that statute. That repeal of the common law was effected. The great change in the relations of husband and wife to the property of the wife was wrought by the Constitution of this State. (*Article 15, section 5.*) Under that instrument no woman loses any pecuniary rights by marriage. Whatever property a woman has at the time of marriage, or afterwards acquired by gift, devise, or inheritance, remains hers, until she, by her own consent, express or implied, parts with it. Without that consent she cannot be divested of her title to it, whether registered or not. No one having notice of her claim can acquire any title to her property by any contract of her husband to which she does not expressly or by implication assent. If she has duly registered her property, the registry is notice to the world, as to all property described in it. If she has not registered it, we think actual or constructive notice, as recognized in cases of deeds and mortgages of land, would be sufficient to bind the party attempting to deal with the husband concerning her property. It seems that the registry act above quoted (*Gen. Laws, page 786*) has made no provision concerning property owned by the wife at the time of the marriage; but her title to such property after marriage is no less indefeasible. Whether, however, a purchaser of such property from the husband, acquires any title, or whether the wife has a right to repudiate a sale by the husband and recover the property, will depend, in every such case, upon the conduct of the wife in regard to the management of the property; or, in other words, it will depend very much upon how far the wife will be deemed, by recognizing and acquiescing in

the acts of the husband in regard to the property, to have waived or abandoned *her* rights under the Constitution, and to have submitted to and affirmed *his* rights at common law. When a registry law has been enacted, the wife must comply strictly with its provisions in order to bind innocent parties; and the registration will have no effect as to strangers without notice, beyond what the statute has given to it. In other words, it will not affect any property except the specific property described in it. Entertaining these views relative to the effect of the constitutional provisions, and of the statute of 1859, we are of opinion that the instruction given by the court below to the jury was erroneous; and though there might possibly have been a verdict for the plaintiff, without regard to this instruction, yet it is quite probable that the jury did regard it, and by it were mislead and perhaps induced to give less attention to the other evidence than the merits of the case demanded. Another instruction, to which exception was taken and for which error was assigned, was to the effect "that it makes no difference that the woman married subsequent to this registration, she might have been married a half a dozen times, the one registration is sufficient." If the construction of the statute which we have adopted and announced above, be correct, this instruction should not have been given. We are of the opinion that a divorce, or the death of the husband, operates as a revocation of the registration. Upon the happening of either of these events, the rights of the woman to the property ceases to be controlled by or dependent upon the registration. She holds the property of an unmarried woman, which she is in fact. If she marries a second time she must register the property anew; or if, having registered it after marriage, she exchanges any part of it for other property, she must register the property last acquired, if she would secure the advantages contemplated by the statute.

Upon these grounds we think the judgment below should be reversed, and a new trial ordered.



THOMAS RYAN, Respondent, v. THOMAS HARRIS,  
Appellant.

*Appeal from Multnomah County.*

1. The charter of the city of Portland declares that the recorder of that city shall be *ex officio* a justice of the peace, within the corporate limits—*Held*, that the legislative assembly could rightly confer such authority.
2. No appeal will lie from what is usually styled a judgment by default.

ON the 6th day of October, 1865, Ryan sued Harris, in a civil action, before J. J. Hoffman, recorder of the city of Portland, and *ex officio* justice of the peace. Summons and service was duly made, and defendant failing to appear and answer on the day fixed for trial, the plaintiff had judgment, for failure to answer, against defendant for \$98.50. From that judgment defendant appealed to the Circuit Court. At the November term, 1865, of that court the respondent moved to dismiss the appeal on the ground that such appeal was improper. After argument, the circuit judge sustained the motion, and affirming the judgment below dismissed the appeal. Defendant Harris appealed from that judgment to the Supreme Court, claiming that neither of the courts had jurisdiction over the case.

*L. Stout, Esq.*, for appellant, claims:

1st. That the recorder of the city of Portland had no jurisdiction of the subject matter in controversy.

2d. That the recorder was exercising the powers of justice of the peace by virtue of the *special law* incorporating the city of Portland. (*Special Laws 1864, section 5, page 14.*)

3d. The legislature had no authority to make such provision. (*Section 23, subdivision 1, article 4, of the Constitution; section 1 of article 7, of the same.*)

*O. H. Mason, Esq.*, for respondent, claims:

1st. That the recorder had jurisdiction.

2d. That no appeal lies from a judgment for want of answer. (*Sections 525, 526 of Code; sections 64, 65, of Justices of the Peace Act.*)

WILSON, J. This case develops but two questions: Was the recorder of the city of Portland an officer properly exercising the power of a justice of the peace in taking jurisdiction over civil causes? and, was the judgment below one admitting of an appeal? Upon the former inquiry references are made to the Constitution of Oregon. Article 4, subdivision 1, section 23, reads thus: "The legislative assembly shall not pass *special* or *local* laws in any of the following enumerated cases, that is to say: 1. Regulating the jurisdiction and duties of justices of the peace and constables;" and, article 7, section 1, in part, reads thus: "Justices of the peace may also be invested with limited judicial powers, and municipal courts may be created to administer the regulations of incorporated towns and cities." In article 6, section 7, the Constitution declares that such "township and precinct officers as may be necessary shall be elected or appointed in such manner as may be prescribed by law." The number of such officers, their appointment or election, are subjects for legislation. *Title 4, chapter 38, section 27, of the Code*, provides: "That there shall be elected at a general election, by the qualified electors of the several election precincts of this State, one justice of the peace," etc. That section proposes that there shall be at least one such officer in each precinct, and that one shall be elected; but there is no prohibition to the appointment or election of as many more as the legislature at a subsequent time might provide. The legislative assembly has supreme power in enacting laws, subject to the Constitution and laws of the United States, and to the Constitution of Oregon. Their acts may be seeming inconsistent with each other; but when the rules of construction are to be applied to them, all State laws are of equal authority, so far as their origin is concerned,

and must be construed so that all may be in force if possible. Concerning subjects not limited or provided for in the Constitution, the legislative assembly has unlimited and absolute authority, guarded only by the right of the people to change their legislators. While there is a general law providing that one justice of the peace shall be elected in each precinct, there is no restriction to the legislature providing for more than that number, and a latter law to that effect would have equal force with the former and would in no wise defeat the former or restrict any of its provisions. The same power made both, and had full right to do so. We hold that the legislature could clothe officers with the authority of justices of the peace, and could assign them their spheres of jurisdiction. The Constitution provides for the creation of municipal courts to administer judicially the regulations of cities and towns, and the legislature has clothed that court with proper power, and made its presiding officer a justice of the peace. The main reliance of the appellant on this point is upon the first reference to the Constitution. In reference to section 23, article 4, we hold that the prohibition from passing *special* laws regulating the *jurisdiction* of justices of the peace, refers to the giving of magistrates in one locality greater jurisdiction over causes of action, greater powers and authority than in another, and does not refer to the territorial jurisdiction of such officers.

Having answered the first inquiry in the affirmative, it will be necessary to decide the second. Under the statutes of 1865, in our courts, a distinction seems to have arisen between a judgment for default and a judgment on failure to answer. By that statute, in actions for money only, and also in other actions, it seemed that the entry of a default by defendant was necessary, and a precedent to giving of judgment. The statute seemed to provide in terms for that course; and in other causes than those upon contracts for money only, it was necessary, after default properly entered for plaintiff, for him to apply for further proceedings in order to

have a judgment either at that or a subsequent term. Judgment for failure to answer seemed to have become limited to those cases where a party defendant appeared in court but waived making any answer either by express notice or by a silence equivalent to a notice. There is no ground for such distinction in the present Code, nor any pretence therefor. Section 246 provides: "When the time for answering the complaint has expired, and defendant has failed to answer, the plaintiff shall have judgment immediately, unless, in order to enable the court to give proper judgment or proper relief, the taking of some proof is necessary." The Code provides only these ways of entering judgments: 1st. Judgment in general; 2d. Judgment of nonsuit; 3d. Judgment on failure to answer; and, 4th. Judgment by confession. No other forms are mentioned. Section 64, page 595, of the Code, relating to appeals from courts of justices of the peace, provides that either party may appeal from a judgment, except when the same is given by confession or want of an answer. It prohibits, then, clearly an appeal in all cases for which provision is made under the head of judgment on failure to answer. Section 246 covers all cases of *default* which may have existed or can exist; and styles them not as judgments "by default," but as "on failure to answer." In this case, the judgment in the Justice's Court shows that defendant was duly served with process, and the time for answering having expired without such pleading, judgment was rendered against him for that reason. We think we do not mistake these provisions of the Code, and we do not doubt that such judgments admit of no appeal.

**Judgment affirmed.**

A. B. RICHARDSON, Appellant, v. L. C. FULLER & CO., and H. MARTIN & CO., Respondents.

*Appeal from Multnomah County.*

1. Under the Code a partner cannot confess a judgment that shall be binding upon his partner, or the partnership property, unless made in an action pending.
2. A sworn statement reciting that the indebtedness arose upon promissory notes for money is insufficient.
3. What statement would be sufficient under the Code.

On the 16th day of March, 1867, in vacation, Henry Martin made a confession of judgment in behalf of himself and P. H. Martin, doing business in the name of H. Martin & Co., to L. C. Fuller and J. P. Smith, doing business under the firm name of L. C. Fuller & Co., for the sum of \$3,904.67 in gold coin.

Richardson filed a motion in the Circuit Court to set aside and declare void this judgment on the ground of the insufficiency of the statement therein, and because said confession of judgment and statement are not warranted by the statute, and not made in compliance with the requirements thereof.

Appellant also filed his affidavit, alleging that on the 16th of March, 1867, he commenced an action against said Martin & Co. for \$485.74, due him from them for merchandise, &c., sold and delivered to them, and that on the 2d day of April, 1867, he obtained judgment for said sum against them; that by virtue of an execution upon said confession of judgment in favor of Fuller & Co., all the property, goods, and chattels of said defendants were levied upon to satisfy the same, and that said pretended judgment was fraudulent and void, as he verily believed.

The Circuit Court overruled this motion and gave judgment against appellant for costs and disbursements, from which judgment and ruling he appealed.

*Stout & Reed*, for appellant.

1st. That under our statute one partner cannot confess a judgment without action pending, which shall bind the other partner or the partnership property.

2d. That the statement accompanying the confession does not state plainly the facts out of which the indebtedness arose and does not *show* that the sum confessed therein, is justly due or to become due.

3d. That the confession and assent thereto are insufficient, and are not made in the manner prescribed by statute. To substantiate the first ground: *Crane v. French*, 1 *Wend.*, 311; *Grazebrook v. McCreddie*, 9 *Wend.*, 439; 7 *How. Pr. R.*, 220. As to second and third grounds: *Code*, title 13, chap. 2; *Lawless v. Hackett*, 16 *Johns.*, 149; *Chappelle v. Chappelle*, 12 *N. Y.*, 215; 30 *Barb.*, 325-117; 18 *Cal.*, 576; 2 *Abb. Forms*, 698; 17 *N. Y.*, 10.

*D. Logan, Esq.*, for respondents, filed no brief.

PRIM, J. Under our *Code*, page 201, section 249, where an action has been commenced, and is pending against one or more defendants jointly liable on contract, a judgment may be given on the confession of one of the defendants, against all the defendants thus jointly liable, to be enforced against their joint property, and against the joint and separate property of the defendant making the confession. It will be seen that this provision does not apply to a voluntary confession of judgment without action pending. (*Code*, page 202, section 252.)

Then as there was no action pending in this case, H. Martin had no authority under the law, to confess a judgment binding upon his co-partner and the partnership property. (*Crane v. French*, 1 *Wend.*, 311; 9 *Wend.*, 439; 7 *How. Pr. R.*, 220.)

Again, the sworn statement, upon which this judgment was confessed, is insufficient under the statute last referred to.

In a confession of judgment without action pending for money due, or to become due, this section requires that "it shall state plainly and concisely the facts out of which the indebtedness arose, and shall show that the sum confessed thereon is justly due or to become due." The statement in this case is that the indebtedness arose on five promissory notes, given to L. C. Fuller & Co. by H. Martin & Co. for money advanced to them by said Fuller & Co. The notes are annexed to and made a part of the statement. It shows the time when each note was given, the time when due, and the amount thereof; and that all of said promissory notes are due and owing to said Fuller & Co. The New York and California Codes contain a provision very similar to the one in ours, as to the nature of the statement to be made in a confession of judgment; and the courts in those States hold that a mere statement that the indebtedness arose on a promissory note is insufficient. They say "that a note at best, even between the parties to the instrument, is but presumptive evidence of a debt. The maker does not become indebted by the mere execution of a written promise to pay money. His obligation arises out of facts *dehors* the instrument, and antecedent to, or accompanying its execution. A promissory note without consideration binds no one." The additional statement that these notes were given for money advanced by Fuller & Co. is also defective and insufficient to meet the requirements of the statute, because it does not show where or how much money was advanced by them, nor any of the circumstances under which it was advanced. This statement might be true, although a mere nominal sum was advanced.

Again, it does not show that the sum for which judgment is confessed is justly due Fuller & Co., but that that sum is due and owing them on these promissory notes. The courts say "the object of the law in requiring this statement is to put creditors upon the track of inquiry, and to enable them to discover perjury by requiring a definite and particular

account of the transactions which might thus be exposed, if it were fraudulent. Then a vague statement, like the one in this case, would fail to subserve any of the purposes contemplated by the law. (12 *N. Y.*, 215; 18 *Cal.*, 576; 16 *Johns.*, 149.)

We think the circuit judge erred in refusing to set aside the judgment confessed in that court.

Judgment reversed.

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THOMAS CHAVENER, Appellant, v. S. A. WOOD, Respondent.

*Appeal from Jackson County.*

1. One of two partners, with the knowledge and assent of the other, gave a promissory note, secured by mortgage, in the name of the firm, "I. D. Haines & Brother." I. D. Haines executed and acknowledged the mortgage.—*Held*, that the mortgage was a legal one, as to the interest of I. D. Haines, and equitable as to the interest of R. H. Haines.
2. Wood subsequently took a mortgage upon the same premises, executed properly by both partners, without actual notice of the equities between Chavener and R. H. Haines, and no knowledge, in fact, of the mortgage to Chavener.—*Held*, that Wood's mortgage is prior to Chavener's, as to the interest of R. H. Haines, and is a legal mortgage as to the interests of both I. D. and R. H. Haines.
3. Effect of a foreclosure suit under the Statutes of Oregon, as regards the nature of the decree, and as regards subsequent lien creditors, made parties to the suit.
4. Plaintiff in execution, becoming the purchaser, extinguishes his specific lien upon the premises.
5. Who may redeem, and upon what terms.

In the year 1860, I. D. and R. H. Haines were partners in trade, doing business under the firm name and style of "I. D. Haines & Bro." They were also tenants in common of a lot of land in that town, which they occupied for partnership purposes. On the 30th of March, 1860, I. D. Haines, managing partner, executed a promissory note in the name of the firm to the respondent, to secure the payment of which



there was, at the same time, a mortgage given on the property above named. The mortgage was executed by I. D. Haines, who signed it with the firm name, "I. D. Haines & Bro.," and himself acknowledged it before the proper officer. It was duly witnessed; another certificate of acknowledgment was in due form. It was filed for record on the 17th of July, 1860. The consideration of this note and mortgage was \$1,724, money loaned by respondent to the firm. R. H. Haines, the other partner in the concern, knew of the loan, and of the execution of the note and mortgage, and assented to the whole transaction. On the 12th of November, 1860, the two partners, both in their individual capacity, executed a mortgage upon the same property to the appellant, Wood. This mortgage was executed, acknowledged and recorded with all the formalities required by law. The date of its record is November 13th, 1860.

Chavener brought suit in the Circuit Court of Jackson county against the two Haines to foreclose his mortgage, and made Wood a party according to the provisions of statute; Wood filed his answer, setting out his mortgage, claiming a priority over the mortgage to Chavener as to the entire lot and the interest of both the Haines, and praying a decree of foreclosure on his own behalf, and a distribution of the proceeds accordingly. The Circuit Court held Chavener's mortgage to be a good legal mortgage as to I. D. Haines, and a valid lien upon the legal estate of I. D. Haines in the property. It was also held that as to the interest of R. H. Haines this mortgage was only an equitable one, and that so far it should be postponed to the mortgage of Wood; but, that as to the interest of I. D. Haines it was a lien prior to that of Wood. In conformity with this decision it was decreed that the property be sold, and the proceeds applied, first to pay the costs, and the remainder in equal shares upon the mortgages of Wood and Chavener. Sale of the property was made, and distribution of the proceeds according to the decree. Chavener was the purchaser. After sale, and within

the time for redemption, Wood proceeded in due form to redeem, claiming a right to the whole property. The sheriff received the money, and executed to Wood a certificate of redemption. Chavener denied the right of Wood to redeem upon the terms allowed by the sheriff and applied to the court to set aside the proceeding before the sheriff, and to annul the certificate of redemption. The court sustained the petition, and set aside the proceedings concerning the redemption. From the original decree of sale and distribution, and from the supplemental order Wood appealed.

*B. F. Dowell, Esq.*, for appellant, claims as errors:

1st. In finding that Chavener's mortgage is a legal mortgage as to the interest of I. D. Haines.

2d. In finding that Chavener's mortgage was first duly recorded, and was constructive notice to Wood as to the interest of I. D. Haines.

3d. In decreeing one-half only of the proceeds of sale to Wood; and,

4th. In denying to Wood the right to redeem. (9 *Cal.* 365; 21 *Cal.*, 108.)

*O. Jacobs, Esq.*, for respondent, claims:

1st. That Chavener's mortgage is a legal one as to I. D. Haines. 2 *Hilld. Real Est.*, 350; *secs.* 10, 12, 13; 9 *Johns.*, 285; 4 *Mass.*, 438; 6 *Pick.*, 86; 9 *Mass.*, 218, and other authorities.

2d. That it was a legal mortgage as to R. H. Haines. (*Story's Agency*, *sec.* 51; 11 *Pick.*, 400; 19 *Johns.*, 546; 4 *Met.*, 548.)

3d. That Wood was not a subsequent lien creditor on any property separately sold; and,

4th. That Chavener was a prior lien creditor and a purchaser, and Wood could only redeem by full payment of Chavener's lien. (*Code*, *secs.*, 297, 8.)

SHATTUCK, J. The questions for decision by this court are these: 1st. What effect is to be allowed to these mortgages respectively, and relatively, to each other. 2d. What relation do the parties to this decree sustain to each other, and to the property involved. 3d. Had Wood a right to redeem; and if so, what estate, and upon what terms.

Chavener insists that his mortgage is a valid lien, prior to that of Wood, upon the whole lot, as well as upon the interest of R. H. Haines; and claims a full payment of his debt out of the proceeds of the property; although, on account of being the purchaser, he does not appeal from the decree of the court below. Wood, on the other hand, insists that Chavener's mortgage is only an equitable mortgage, and should be postponed as to the interest of both the Haines brothers to his own.

We are of opinion that neither of these claims is altogether just, or authorized by our statutes. Upon authority of the elementary writers, and of the cases adjudged, as well as upon the reasonable and consistent view of such transactions, we hold that a deed made by one partner, in the name of the firm, purporting to convey away the property of the firm is valid and effectual, as a conveyance of the interest of the partner, who, as in this case, has affixed his own name to the deed and personally acknowledged it, as well for himself as for the firm. The circumstances of undertaking to convey the estate of his copartners, and describing the granters, as well in the body of the deed as in the signature, as "*I. D. Haines & Bro.*," does not change the fact that I. D. Haines signed, sealed and acknowledged the deed for himself; nor can it alter the manifest intention of the party to convey his own interest. *Story on Part., secs. 94, 119, 120, and authorities there cited; 2 Hil. R. Est., ch. 84, secs. 10-14, and references; 9 Johns., 285; Statutes of 1855, p. 476, sec. 1.* We think the mortgage to Chavener was a good and sufficient conveyance of the legal estate of I. D. Haines in the property mortgaged, for the purposes mentioned in the instru-

ment; and that as to the interest of I. D. Haines, it was duly recorded and is prior to that of Wood. We also conclude upon the authorities above referred to, that it is a good, equitable mortgage as to the interest of R. H. Haines; because he had knowledge of and assented to its execution, and the money for the payment of which it was given as a security, was used in the partnership business. As between Chavener and R. H. Haines, the whole land was equitably bound for Chavener's debt; but it appears from the evidence that Wood had no actual notice of the equities subsisting between Chavener and R. H. Haines, and did not, in fact, know of Chavener's mortgage until long after his own had been executed. He was, nevertheless, chargeable with knowledge from the record of that mortgage, so far as the same was properly admitted to record; that is, according to our views, as to the interest of I. D. Haines; but as to the interest of R. H. Haines, Wood's mortgage is prior to that of Chavener, because, besides having an equity, as a condition, equal to Chavener's, he has also the legal estate, and, according to the maxim in equity applicable in such cases, is to be preferred. We hold, therefore, that the rulings and decree of the court below were correct, and ought, in this respect, to be affirmed. The relations of the parties to this decree and to the property involved have been discussed. This depends upon the construction of the statute. *Section 40 of the Code* provides that, in a suit of this kind, "any person having a lien subsequent to the plaintiff, &c., &c., *shall be made a defendant, &c.*" And section 412 requires the court to make "a decree in reference to such lien, and the debt secured thereby, as if the defendant were a plaintiff in the suit." Section 413, last clause of subdivision two, declares that such decree "shall be deemed a separate decree" as to each person having a separate lien, and it "may be enforced accordingly." We hold that this decree is, in respect to the several rights of Chavener and Wood, by a fair construction of the statute, to be regarded as a separate decree for each; and that, for most purposes, it leaves the

parties as they would be if there had been a separate suit and decree therein on behalf of each. Upon the question of redemption, it is claimed that, under the statute providing for redemption, the liens of these mortgages were merged in the decree, and, for the purposes of redemption, the parties have contemporaneous liens and there is no place for redemption. This point is disposed of by the opinion we have expressed above concerning the relation of the parties to each other and to the property involved in the decree. The priority of a party's lien is in no way affected by such decree. The decree may ascertain and declare what it was and legally ought to be, but cannot divest it. It is further claimed, that if Wood had a right to redeem, he could do so only upon the payment of the whole of Chavener's judgment and decree; since Chavener is purchaser on the sale, and the amount of his debt justly exceeds the amount of his bid. The money paid upon redemption was only the amount bid and interest, as required by statute. We do not think the claim here made should be allowed. *Section 298 of the Code* provides as follows: "A lien creditor may redeem the property within sixty days from the date of the order confirming the sale, by paying the amount of the purchase money, with interest, at the rate of two per centum per month, thereon from the time of sale, together with the amount of any taxes which the purchaser may have paid thereon; and, if the purchaser be also a creditor, having a lien prior to that of the redemptioner, the amount of such lien, with interest." The last clause of this section, providing that "if the purchaser be also a creditor, having a lien," &c., we think contemplates and refers to some other lien than that upon which the sale is made.

The object of a sale is to extinguish the specific lien upon the particular property sold by appropriating the property, or so much of it as is necessary to the payment of the debt. A purchase upon execution accomplishes this object, and divests the holder of the lien upon which execution issued, of any further claim; and by the purchase, a pur-

chaser acquires no rights as against a redemptioner, except to tack to his bid any lien he may hold, intervening between the judgments or decree on which the sale was made, another lien of the redemptioner, or which is altogether prior to the lien of the execution creditor. This is clearly so in case the purchaser is a stranger to the judgment or decree on which the sale was made, and it cannot be contended that, when a stranger purchases property at an execution sale, the execution creditor has a right to take the property from the purchaser by paying the amount bid and interest at two per centum per month, for the purpose of tacking thereto the unpaid balance of his judgment. We are unable to perceive any difference when the execution creditor is himself the purchaser. We do not think that an execution creditor, by becoming a purchaser upon his own execution, can alter the character and effect of the sale, or establish any new relation between a purchase on execution and the lien upon which it is based. By bidding in the property, an execution creditor elects to take the land of his debtor for so much as he bids, and to look to other property of his debtor for the balance of his debt. Upon this construction of the statute, and upon the facts in this case, we hold that Chavener is to be deemed to have a decree for the sale of the interest of I. D. Haines in the property mortgaged, and Wood to have a decree for the sale of the entire estate of both the Haines brothers in the property, subject, however, to the prior lien of Chavener upon the undivided half belonging to I. D. Haines; and that the sale is in effect the same as a sale upon several executions issued upon such decrees. Chavener, by his bid, became the purchaser of the whole estate; of the interest of R. H. Haines, absolutely, as to Wood, and of the interest of I. D. Haines, subject to redemption by Wood. The interest of R. H. Haines is not redeemable by Wood, because it was sold as upon Wood's execution, and he received the purchase money. The interest of I. D. Haines may be redeemed by Wood upon paying

one-half the amount of the money bid for the whole property and interest at two per centum per month; and the order of the court below is modified in conformity with these views. Costs in this court and in the court below to be paid by the appellant and respondent in equal shares.

Let the judgment be so modified.

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GEORGE H. MURCH, Appellant, v. JAMES M. MOORE  
and C. C. MILLER, Respondents.

*Appeal from Washington County.*

1. A domestic judgment does not fall within the statute prescribing ten years as a limitation upon judgments in United States courts, etc.
2. Upon the Statutes of Oregon it is in the power of a judgment creditor to keep his judgment alive until payment thereof is made.

JUDGMENT was rendered against the defendants in November, 1853, for \$725, in District Court of the United States for Washington county, and in April, 1865, the plaintiff filed his motion under the statute for leave to issue execution for the amount then due upon the judgment. Notice was duly served upon defendants who filed their objections alleging:

1st. That payment had been made.

2d. That the proceeding was barred by the statutes of limitations.

It was admitted that a payment had been made in 1854 of \$406.50, but denied that the proceeding was barred by the statutes of limitation. The cause was submitted to the court upon the question of limitation under the statute, and decided in the affirmative. That disposed of the case, and an appeal was taken to this court.

*W. C. Johnson, Esq.*, for appellant.

STRATTON, J. Does this judgment fall within the meaning of section five of the Code, which provides as follows?

"Actions to be commenced within ten years: 1. An action upon a judgment or decree of any court of the United States, or of any State or territory, within the United States." We think it does not. A judgment in this State is effected for two purposes: 1st. As the subject to support an execution within five years from its rendition; and, 2d. As a lien upon real estate for ten years. Upon the expiration of five years, a method is provided by which an execution may issue by leave of the court. The proceeding, in effect, is strictly analogous to the common law writ of *scire facias*. Section 292 of the Code provides that if an execution has not been issued upon a judgment for ten years, the lien thereof shall expire; but if leave is afterwards given, as provided in section 267, "from the date of docketing such order or a transcript thereof, the lien of the judgment shall begin anew, and continue in all respects as upon the first docketing the same." Under the provisions of these two sections of the Statutes of the State of Oregon, it is in the power of the judgment creditor to keep his judgment alive until it is discharged by payment, be that period long or short.

Judgment reversed.

GREEN B. SMITH, Appellant, v. LABAN CASE, Respondent.

*Appeal from Benton County.*

1. Contract made on Sunday is void.
2. Effect of subsequent ratification, or subsequent contract.

SMITH, loaned to defendant Case, \$800, for which Case executed and delivered his promissory note on Sunday; and on a week day he afterwards made a promise to pay plaintiff the money so received at the making of the note. The defendant demurred to the complaint, because it appeared that the note was executed on Sunday. The Circuit Court sustained the demurrer, and plaintiff appealed.



*Thornton & Kelsay*, for appellants:

1st. Subsequent promise need not be in writing; no statute requiring it. (*Chit. on Cont.*, 66; 9 *Pick.*, 341.)

2d. The subsequent promise rendered the respondent liable on demand. (*Chit. on Cont.*, 445; note 2; *Id.*, 447; note 4, 448, 789; note h; *Story on Cont.*, paragraph 619; 8 *Gray*, 553; 10 *Cush.*, 258; 2 *Parsons on Cont.*, 262. "G" "H.")

*Thayer & Burnett and Strahan*, for respondent:

4th. A note executed on Sunday, being prohibited by statute, is void: 6 *Watts*, 231; 13 *Met.*, 284; 16 *Pick.*, 247; 13 *Shipley*, 464; 12 *Met.*, 24; 7 *Blackf.*, 479; 24 *N. Y.*, 353; 10 *Met.*, 363; and either party may show that fact: 5 *Mass.*, 296.

5th. The new promise can give no original cause of action, if the obligation upon which it was founded could not have been enforced at law. (2 *Sandf.*, 311; *Edwards on Bills*, 339; 1 *Parsons Con.*, 361; 14 *Wend.*, 97.)

6th. There was no consideration for the new promise, and none alleged. (12 *Johns.*, 190; 4 *Johns.*, 235.) A moral obligation is not a sufficient consideration. (*Chit. Cont.*, 46-7; 2 *Johns.*, 277.)

7th. When the parties are in *pari delicto* the courts will not interfere to assist either. (12 *Met.*, 25; 17 *Mass.*, 257.)

PRIM, J. Section 653 of the Code provides "that if any person shall do any secular business or labor other than works of necessity or mercy, on the first day of the week, commonly called Sunday or the Lord's day, such person, upon conviction thereof, shall be punished by fine, etc." The note set out in the complaint being executed and delivered on Sunday, in violation of this statutory provision, is illegal and void, and therefore cannot be enforced in the courts. The contract being void the defendant could acquire no right of property in the money obtained under it; and the express promise subsequently made, as alleged, by him, we think is suffi-

cient to render him liable in assumpsit for the money had and received of plaintiff and for his use and benefit. It is urged that there was no consideration to support this promise, but we think the retention of this money belonging to plaintiff, is a sufficient consideration to support it. (*Adams v. Gray*, 19 Ver., 358; *Williams v. Paul*, 6 Bing., 653; *Dodson v. Harris*, 10 Ala., 566.)

The court below having sustained the demurrer, the judgment is reversed, and case remanded with leave to defendant to answer.

**CASES**  
**ARGUED AND DECIDED**  
**IN THE**  
**Supreme Court of the State of Oregon.**

**SEPTEMBER TERM, A. D. 1867.**

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**ERASMUS D. SHATTUCK, *Chief Justice.***  
**REUBEN P. BOISE,**  
**JOSEPH G. WILSON,** } *Justices.*  
**PAINE P. PRIM,**  
**ALONZO A. SKINNER,** }

**R. WILLIAMS, *Clerk.***

**[2 Oregon—18]**

**( 198 )**

... ..

## IN MEMORIAM.

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*To the Supreme Court of the State of Oregon:*

The undersigned having been appointed at a meeting of the bar of the State, to prepare and present suitable resolutions in reference to the death of RILEY EVANS STRATTON, late one of the justices of this court, respectfully ask that the following resolutions be placed upon the records of the court, which are in substance those placed in our hands by the Hon. P. P. Prim, at the request of the bar of the second judicial district in which Judge STRATTON resided.

### RESOLUTIONS.

It having pleased the Almighty disposer of human events to remove from our midst by a sudden but peaceful death, our esteemed brother, Hon R. E. STRATTON, one of the justices of the Supreme Court of this State, therefore

*Resolved, 1st.* That by this afflictive dispensation of Providence, the community in which he lived has lost one of its most prominent and useful citizens; society, one of its brightest ornaments; his family and wide circle of relatives, a most affectionate husband and friend; and especially is it true, that an office of great public trust and honor has become vacant, that was being filled by the deceased with marked acceptance on behalf of the public, and with faithful discharge of the arduous and responsible duties of his office.

2d. Although, in common with all the people of this State, we were startled by the suddenness of the shock,

and overcome with grief at the magnitude of our loss, both in the public and private relations which we all sustained to the deceased, yet it is our plain duty to bow with submission to the inscrutable decree of Him who doeth all things well.

3d. That as a mark of respect to the memory of the deceased, the bench and members of the bar be requested to wear the usual badge of mourning during this term of court.

4th. That a copy of these resolutions, duly authenticated by the clerk of this court, be transmitted to the widow of the deceased.

*All of which is respectfully submitted.*

L. F. MOSHER,  
S. ELLSWORTH,  
DAVID LOGAN,

*Committee.*

In the presentation of these resolutions, Mr. Mosher said:

The duty devolved upon me, on this occasion, excites emotions of peculiar sadness. At the last meeting of this court the deceased occupied the bench in the full vigor of manhood, and gave promise of a long and useful life. Now his place is occupied by another, and his brethren know him no more. He was my friend for many years, and I mourn for him. Our acquaintance dates from an early day in the history of southern Oregon. Judge STRATTON arrived in Scottsburg in the year 1852, and formed a partnership with A. C. Gibbs, Esq., and as the practice was limited in those days, he also engaged in other business. In 1854 he removed to Douglas county; was elected prosecuting attorney of what is now the second judicial district, and he also acted as United States

District Attorney for the Southern District of Oregon. At the adoption of the Constitution he was elected to fill the office of judge of the second judicial district, to which position he was re-elected in 1864, and held until his death. As a lawyer, he was a ready and forcible advocate, a manly and honorable opponent. As a judge, his mind was clear and apprehensive, and his integrity unimpeached; and, although in the new country which he chose for his field of labor, the opportunities of acquiring legal knowledge were meagre, his legal reputation steadily increased, both with the bar and the people, up to the time of his death. It is not alone as a lawyer and judge that he is regretted. The generous qualities of his heart, and his genial manners, endeared him to his acquaintances, and increased the number of his friends, who will long mourn his untimely death. In our affliction, however, we have the consolation of being able to believe that at the bar of the final tribunal, before which we must all one day appear, and from which there is no appeal, the record of our deceased brother will be found without spot or blemish. May he rest in peace!

On behalf of the court, Justice WILSON responded:

*Gentlemen of the Bar of the Supreme Court:*

RILEY EVANS STRATTON, late justice of this court, died on the 26th day of December, 1866. He was born in Tioga county, State of Pennsylvania, on the 29th day of June, 1821. He graduated with the highest honors in the class of 1847, being the first class of Farmers' College, Ohio, and was admitted to the bar in 1848. In 1852 he made his home in Oregon, where, in usefulness and with distinguished honor, he resided until his death. He came to the bench of the Supreme Court of Oregon in 1859, and was re-elected in 1864 for a second term.

The decease of Judge STRATTON nearly and very forcibly admonishes of the uncertainty of life, and reminds us that none are exempt from the certainty of death. One year ago he sat here as a justice of this court, ably, honestly, and faithfully fulfilling the duties of his office; endearing himself to the bar of the court by his kind, upright, and manly demeanor, and to his brother justices by the frank, honest assertion and support of his opinions, and the generous deference he constantly showed to those of his associates.

He was unusually affable and courteous, and most remarkably did he develop those qualities in the private as well as in the public walks of life; a genial companion, a true friend, a judicious counselor, and a conscientious judge. He walked among us that his life was an example most worthy of imitation; his memory, that of one whom we greatly esteemed and honored. As an associate in office, we ever found him guided by an honest conviction of duty and an unwavering sense of right. Eight years of official intercourse made this estimate of his character a certain conclusion. For the first time in the history of our State has death made a vacancy in the number of the justices of this court. We shall miss him in our consultation room, as a sound, discreet judge; in our daily sessions, as an esteemed and faithful associate; and in our life, as one whose genial manners and cordial greetings made the time of our meetings so cheerful and pleasant.

We join with you, gentlemen, in your full, expressive appreciation of his worth, in the magnitude of our material loss by his death; and in those earnest expressions of condolence with his widow, and relative, whose loss we cannot estimate.

We, therefore, deem it highly proper to comply with your request, and do order that the resolutions presented by your committee be entered upon our records, and



rounded with proper edging of mourning. That a copy thereof, with that of the proceedings in this court, be certified, under seal, to his widow; that the members of the court, of the bar, and the officers of the court, do wear the usual badge of mourning during this term of court; and that in respect to the memory of our deceased brother this court stands adjourned until to-morrow morning at nine o'clock.

BENJAMIN BEQUETTE, Respondent, v. THE PEOPLES' TRANSPORTATION COMPANY, Appellant.

*Appeal from Marion County.*

The absence of care on the part of the plaintiff, contributing to the injury, but not amounting to a want of ordinary care, will not excuse gross negligence in the defendant.

THIS action was brought in the Circuit Court for Marion county, to recover the value of a flat boat and skiff, which the plaintiff alleged had been destroyed while lying at the mouth of the Willamette river at Fairfield, through the carelessness of defendant's agent in the management of its steamer Fannie Patton.

In answering, the defendant denied the allegation of negligence, and averred negligence on the part of the plaintiff as the cause of injury. The replication denied this averment of negligence. Defendant's counsel asked the court below to give the following instructions to the jury: 1st. "Unless they find from the evidence that the plaintiff was negligent from any negligence, without which the injury alleged in the plaintiff's complaint would not have happened, the gross negligence on the part of defendant will not entitle plaintiff to recover." 2d. "That the least negligence on the part of the plaintiff contributing to the injury is a bar to the recovery by plaintiff, and entitles defendant to a verdict of no cause of action.

These instructions the court refused, but instructed the jury "that some negligence on the part of plaintiff in fastening his boats in an exposed position would not excuse gross negligence of defendant in running into and destroying the same." Defendant appealed from judgment for error by the court.

*Shaw & Holman*, for appellant, as to both points, cite *Wiles v. Hudson R. R.*, 24 N. Y. 480; *Haley v. E.*

*N. Y.*, 208; *Wiles v. Hudson R. R.*, 29 *N. Y.*, 315; *St. v. Hudson R. R.*, 24 *How. P. R.*, 97; *Sedgwick on* *v.*, 498, 498; *Catawissa R. R. Co. v. Armstrong*, 49 *n.*, 186; *Wright v. M. & M. R. R. Co.*, 4 *Allen*, 283; *mons v. Central O. R. R. Co.*, 6 *Ohio*, 105, and other

*Williams & Knight*, for respondent, cite as to first point: *Whacker v. C. C. & C. R. R. Co.*, 3 *Ohio*, 172; *Birge v. Iner*, 19 *Conn.*, 507; *Beers v. Housatonic R. R. Co.*, *Conn.*, 566. As to second point: *Fero v. Buffalo & S. R.*, 22 *N. Y.* 209; *Cook v. Cham. Tr. Co.*, 1 *Denio*, 4 *Abb. N. Y. Dig.*, 118; *Carroll v. N. Y. & N. H. R. Co.*, 1 *Duer*, 571; 3 *Ohio*, 172.

MINNER, J. The question involved in this case has been  
ughly and ably discussed by counsel, and numerous  
rities cited. After carefully collating and examining  
ose cases, we are of opinion that the court below did  
rr in refusing the instructions asked by defendant's  
el, or in giving those above set out.

persons using a public highway are bound to use  
ary care to avoid injury to the persons or property of

e position, that the least negligence on the part of the  
iff would excuse the grossest carelessness on the part of  
efendant, is not sustained by the weight of authority  
iolation of our sense of justice, and would be preju-  
to the interests of community.

Judgment affirmed.

JOSEPH N. DOLPH, Respondent, v. JOHN and SUSANAH NICKUM, Appellants.

*Appeal from Multnomah County.*

1. On appeal the return of service of notice may be amended.
2. Notice and certificate of service not amendable.

THE sheriff of Multnomah county made return of service of notice of appeal, thus: "I hereby certify that I served within notice, within said State and county, on the 23d of February, 1867, on the within named J. N. Dolph, by leaving a copy, prepared and certified to by me as sheriff, in a conspicuous place in his office in the city of Portland, county and State, between the hours of 6 A. M. and 9 P. M. on said day."

(Signed.)

*E. Semple*, counsel for appellants.

*Mitchell & Dolph*, counsel for respondent.

BY THE COURT. Respondent moved to dismiss the appeal for want of proper service of notice in this, that the return does not show that there was no person in said office to whom the copy might have been left. Upon cross motion of appellants, leave was granted to amend the return in respect to conform to the facts. The notice of appeal and certificate contained the following statement of errors relied upon to reverse the judgment:

"1st. Because it is contrary to law.

"2d. Because it is contrary to evidence.

"3d. Because it is based upon evidence improperly admitted and considered by the court; duly excepted to by appellants."

Appellants asked leave to amend the statement as to first and second heads; which application was denied.

e Code, Section 527, page 280, provides that the notice of appeal "shall contain the certificate of an attorney of the court to the effect that he has examined the judgment or decree and that the same is substantially erroneous, and in the particulars." Section 534 provides that the appellate court may reverse or modify "in the respect mentioned in the certificate, and not otherwise." Section 531 provides that the notice of appeal is made a part of the transcript. *Held*, the notice and certificate being a part of the transcript are not amendable in this court. That as in a pleading, so in a notice, parties are supposed to set forth in full effect their statement of errors; that the certificate should contain a particular statement of the error alleged, and in that respect it is erroneous. It should contain a reference at once to the point in law to which error applies, and to the material points of evidence, so that the other party may not be misled by matters in controversy. There is no such particular in either of the first two points in certificate. The court will not examine this case in those respects; the attention will only be given to those matters which properly come under the third assignment of error.

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THU LINDLEY, Appellant, v. M. and E. WALLIS, Respondents.

*Appeal from Lane County.*

of notice of appeal.  
for filing transcript.  
time of time for such filing.

The sheriff of Lane county served the notice of appeal in due time and made return thereof as follows:

Joseph Meador sheriff of Lane county, Oregon, served within notice of appeal by delivering a copy hereof pre- and certified to by me, and by attorney for appellant,

to Emmeline Wallis, one of the respondents, and by 1  
a copy hereof, prepared and certified in like manner,  
residence of Matthew Wallis, the other respondent,  
white member of his family, over the age of fourteen  
all of which was done in Lane county, Oregon, this 28  
of April, 1867." (Signed.)

*Kelsey & Walton*, for appellant.

*Ellsworth & Dorris*, for respondents.

BY THE COURT. Respondents moved to dismiss the  
for want of sufficient service; motion denied as to Em  
Wallis; and, upon counter motion of appellant, lea  
given to amend the return to make it conform with t  
as to the time of day when service is alleged to hav  
made upon Matthew Wallis.

1st. That an appeal having been perfected in the  
below, prior to the first day of a term of this court, th  
script must be filed in this court before the close of the  
day of the term, or be deemed abandoned.

2d. In case there is not time to complete the tran  
and file it within the time prescribed, an extension o  
may be obtained by proper application to the circuit  
or to the Supreme Court.

3d. The application for extension of time for com  
and filing the transcript, must be made *within* the tin  
scribed by law for the performance of these requireme

4th. The service of notice of appeal may be made  
upon the party or upon his attorney of record, residing  
the county where the trial was had. Outside of the  
the service can only be made upon the party.

5th. When the service of notice is by leaving a copy  
office of an attorney, or at the residence of the par

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NOTE.—The court affirmed certain rulings and constructions  
heretofore made, in addition to the 4th, applicable peculiarly  
case. REP.

rn must show that the service was made between the  
rs fixed by statute, in addition to the other prescribed  
visions.

th. The manner of such service of notice of appeal may  
n accordance with the provisions of title three, page 278  
he Code.

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EPHEN COFFIN, Appellant, v. HENRY C. COUL-  
SON, Respondent.

*Appeal from Multnomah County.*

ment of costs; kinds of money applicable thereto.

at the November term, 1866, of the Circuit Court for  
ltnomah county, Mitchell & Dolph obtained a judgment  
inst Coffin. After giving due notice of an appeal, Coffin  
lied to respondent Coulson, the clerk of said court, for a  
script in the case, at the time tendering to respondent  
ment for making the same; the tender was made in legal  
ency. Coulson refused to receive that kind of money,  
declined to prepare the transcript unless the charges  
efor were paid in coin. Coffin applied to the circuit judge  
a writ of peremptory mandamus, directed to the clerk,  
iring him to make and deliver the transcript to him. The  
ge at the hearing denied the writ and dismissed the peti-  
. Coffin appealed.

V. W. Page, Esq., for appellant.

Mitchell & Dolph, for respondent.

BY THE COURT. With the exceptions of paying certain  
s, and satisfying the cases provided for in the act com-  
ly known as the "Specific Contract Law," we know of  
distinctions in the relative value or uses of the different

kinds of money. In the Specific Contract Law expression is made of the payment of costs, and, while the duty is to be discharged in the kind of money specified, costs follow the general rule. The case before us does not come within any of the exceptions. The fees of officers are satisfied by proper payment in any of the kinds of money authorized by law. The tender was good.

The judgment below is therefore reversed.

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OREGON STEAM NAVIGATION COMPANY,  
Respondent, v. WASCO COUNTY, Appellant.

*Appeal from Wasco County.*

1. Assessment of property for taxation, how made.
2. The assessor and clerk alone may revise the assessment in what respects.
3. What authority is vested in the County Court over the assessment roll.

THE assessor of Wasco county, in August, 1866, appraised the real and personal property of respondent, assessable in that county, at \$349,200, and entered that amount on the assessment roll. Due notice having been given on the last Monday in August, the assessor and county clerk met and properly examined and corrected the assessment roll; and no objection or alteration was made in the assessment of plaintiff's property. In September, the assessor filed the corrected assessment roll with the county clerk, and at the October term, 1866, of the County Court, the assessor under the advice and order of the court, changed the valuation of plaintiff's property, on the assessment roll, from \$349,200 to \$500,000, upon which, at the rate of levy, there was a difference in amount of \$4,147, which sum was paid by plaintiff under protest. Under the demurrer to the answer only one additional averment was necessary: The averment in the answer that the true



e of plaintiff's property was \$500,000. Plaintiff insists Wasco county had no right to demand or receive from ntiff taxes on any greater sum than \$349,200. Defendant ns that the County Court, as the final tribunal, had a full t to increase the valuation of plaintiff's property to its admitted cash value, \$500,000. The action of the nty Court in increasing the assessment was had without notice to respondent or its agents. The Circuit Court uined the demurrer, and entered a judgment in favor of ondent for the amount paid under protest, to which entry idgment appellant excepted and appealed to this court.

*William Strong, Esq., for respondent.*

*James K. Kelly, Esq., for appellant.*

he points made in briefs of counsel are sufficiently indi- l in the opinion.

ILSON, J. The main question submitted is, as to the ex- and character of the jurisdiction of the County Court the assessment roll, after that roll shall have been return- y the assessor. The provisions in the Code, applicable e case, are these:

*Code, page 628, section 1, chapter 2:* "The assessor, after fying, etc., shall forthwith proceed and assess all the le property, etc., and shall return to such county clerk, such assessment roll, with a full and complete assessment ch taxable property, entered thereon, etc., and said lands own lots shall be valued at their cash value, taking into deration the improvements on the land and in the sur- ding country, the quality of the soil, etc."

ection 2. All the personal property shall be valued at lue in cash, etc."

ection 4. Each assessor shall give three weeks' public e, etc., that on the last Monday in August the assessor attend at the office of the county clerk, and, with the

assistance of said clerk, will publicly examine the assessment rolls, and correct all errors in *valuations*, descriptions, and qualities of lands, etc.; and it shall be the duty of the parties interested to appear at the time and place appointed; and if it shall appear, during such examination, that there are lands, lots or other property assessed twice, or assessed at more than its actual value, or assessed in the name of a person not the owner thereof, or any lands, etc., not assessed, the clerk and assessor shall make the proper corrections."

*Code, page 900, section 24, chapter 53*: "The County Board of each county shall, at the September term, examine the assessment roll of its county, and shall have power to correct the same, make alterations in the descriptions of lands, and upon such roll, &c., and make any other alterations or corrections in such roll as it shall deem necessary to make the same conform to the requirements of this chapter."

From the statutes, the process of assessment and the collection of taxes is this: The county clerk prepares a blank assessment roll; the assessor, taking that roll, calls upon each tax-payer, takes the oath of each tax-payer, examines the real and personal property; and from such oath, inspection, and valuation, quality and appearance, makes his judgment as to the cash value of the property, and, presumptively in the presence of the owner, enters that amount upon the assessment roll. After notice of time and place, at which all interested parties are supposed to attend, the clerk and assessor, as a board of revision and equalization, publicly examine the roll, and correct the same as to all errors in valuation, descriptions, qualities of property, as to double assessments, or persons to whom assessed; these are the only powers of that board. The assessment roll corrected is filed. At the next session, the County Board examines the roll; corrects the same; alters descriptions of property; makes such alterations and corrections as shall be necessary to conform the roll to chapter fifty-three, and then fixes the rate of levy.

The law relative to the manner and time of making assessments is in chapter two, three hundred pages in vance in the Code of chapter fifty-three, and separated from it by many subjects of legislation in nowise related to taxation, such as common schools, conveyances, corporations, domestic relations, etc. The assessor must, as indicated above, make up his judgment of the value of property; he is an officer of the county, and entrusted by his fellow citizens with this most important duty, for the reason as is presumed of his special fitness and capacity, and is supposed to take proper care for the interests of the county; and his judgment of appraisal of value is a *judicial* act, and can only be questioned as provided by statute, and in the absence of such provision is final. He should be made responsible for all acts except the exercise of his honest judgment. The law as to judicial acts, and their revision, is well settled. 4 *Barbour*, 14; 7 *Bar.*, 137; 3 *Daniq*, 119, and other numerous authorities. At the time of assessment the taxpayer is present, and, knowing the valuation made by the assessor, is either presumed to acquiesce in that statement or is notified thereof that it is his duty to appear at that tribunal, if there be any, fixed by statute for corrections. If he does not there appear, than any legal act made by that reviewing tribunal is as valid concerning his property as though he were present. The only authority for revision in taxation, we deem, is vested in the assessor and clerk, the last Monday in August, at the clerk's office. The law that a party cannot suffer by default until he has had a day in court is fully applicable to proceedings in assessment and taxation. In *Patten v. Green*, 13 *Cal.*, 329 the full court say: "We think it would be a dangerous precedent to hold that an absolute power resides in the supervisors to tax as they may choose without giving any notice to the owner. It is a power liable to a great abuse. The general principles of law, applicable to such tribunals, oppose the exercise of any such power. Any degree of strictness of procedure Oregon—14

cedure in these tribunals would be better than to give arbitrary power to a board as would authorize it, without notice or evidence, or opportunity to the tax-payer to be heard, to increase his taxes indefinitely, without any right of appeal. We hold, therefore, that the action of the board is void in raising the tax." This decision was made under a law expressly conferring the power upon the supervisors "to correct any valuation, either by adding thereto or diminishing therefrom." Further, that Court says: "The publication of notice of the sitting of the board amounts to no protection to the owner, for the sessions of the board may be held on the first Monday in August to the second Monday in September, and it could scarcely be expected that every tax-payer would wait upon the board to see if his taxes are increased. It seems, then, that such general notice is there insufficient to warrant the board to increase assessments, though full opportunity exists in the board to do so. Our law is different. The supervisors and the assessor constitute the only board who may change valuations by provision of law; and if law means any change they can only change by diminishing in double assessments over assessments; but nowhere can they increase a valuation once made. We can find no authority in the law conferring upon any tribunal to do so. The assessor made the valuation with a full knowledge of those facts which the law requires should exist to give him the rule for valuation. The supervisors may know nothing of them; and how could a more correct assessment be made at the court house than was made on the premises, with the property in full view? If the assessor is in his judgment how can that quasi board remedy it? The assessor abides by his decision; the clerk cannot overrule him; and we find no residuum of authority any where to settle their differences. By our law, the last Monday in August is fixed as the only time when those interested must appear and see to their rights in taxation. Upon that day we suppose the board might change the amount of valuation in the respects above mentioned, and in no other. In *Peo*

*synolds*, 28 Cal., 113, upon a very similar question with the  
e here, the Supreme Court says: "No intendment is to  
made in support of the acts of officers of inferior or limit-  
jurisdictions, where it appears that such acts were not  
*authorized*." Has there been found in any of the statutes

Oregon, above cited, a single inference indicating that  
assessment may be increased? There is an express  
provision that it may be lessened, but not a word as to  
increase. Acts without authority done by such officers  
e in the nature of things *coram non judice*, and void.  
our State the tax-payer, knowing his assessment and  
nscious that it cannot be increased, remains at home; and  
e fully concur with the two California decisions cited that  
without further notice, and without authority derived from  
e law, an increase of valuation stands opposed not only to  
ason, justice and sound policy, but it is unlawful. In  
ference to the subject of notice, and general con-  
struction of tax laws, see *Blackwell on Tax Title*, pp.  
, 41, 46, 144, 146, 251 302-311. The legislature  
ves to those tribunals their power and authority. If  
e legislature say that only such things may be done,  
on all other acts not therein contained or clearly  
plied are forbidden. The fault lies with the legislature if  
e proper tribunals may not increase an assessment mani-  
tly too low. This court cannot make the law, or supply  
its opinion what the law makers have designedly or igno-  
ntly omitted. They doubtless presume that counties would  
elect as assessors any but men whose judgment would  
protect the rights of all the citizens, by placing a true cash  
ue upon property. For his mistakes or ignorance, the  
ers in a county are measurably responsible. This reason-  
g as to the acts and authority of the assessor and clerk, in  
egree decides the main point, as to the power of a County  
urt. An express provision, and the only one in the law,  
thorizes the assessor and clerk to change valuations; and  
atever may be the authority vested in the County Court

to change assessment rolls, we think, that court could exercise such a power as to double an assessment with notice to a tax-payer, either presumed in law, or actual service. Wholly ignorant of such act the tax-payer must suffer his remedy to pass unimproved, and from no fault of his, suffer serious loss. It is unnecessary, but it may be proper enough, to express an opinion as to the power, for correcting an assessment roll, vested in a County Court. *Section 1, page 628, chapter 2, of the Code*, the legislature provides fully as to the manner, time and rules for *assessment and valuation* to property, and I find no such provision anywhere else; the officer, too, is clearly named whose sole duty it is to make that *appraisal*. The legislature, in *chapter 2, section 4 page 628, of the Code*, provided for *changes in valuation* when two officers were present to guard county interests when the tax-payer was present, and I think when that corrected roll was filed, all power of the assessor to change valuations ceased, and his duty nominally ceased. At the examination thereof, by the County Court, he is expected to be present, to assist that body in making any legal corrections to inform them as to defective descriptions or displacements of items on the roll; and with that his powers finally ceased for that year. In *section 24, chapter 53, page 900 of the Code* the legislature gave to the County Court its authority over the assessment roll. Change in valuation is not hinted at. The court has power to correct the roll, that does not infer the power to change assessments for the words change and correct are not equivalent in meaning; it may change descriptions of property. "And may make any other alterations or corrections in such roll as it shall deem necessary to make the same conform to the requirements of this chapter"

What does chapter 53 authorize or require? Title 1 declares *what property* is taxable; title 2, *where and to whom* property is assessable; title 3, the manner of making assessments, and in section 15 of that title, is the only reference to appraisal, and then it requires the assessor "to appraise

according to the provisions of the statutes relating thereto," idently referring to some other statute where such manner as indicated; and to none other than chapter 2d above ted. That valuation was an act fixed elsewhere; it was not ie of the requirements of chapter 53, but was one of chapter 2d alone. When made it is final unless provision is expressly made somewhere for its revision.

Evidently the power of the assessor ceases when, having completed the enumeration of assessments, he makes return of the roll and the same is filed in the County Court. (*O. S. Co. v. City of Portland*, 2 Oregon R.; *Col. Life Ins. Co. Supervisors, &c.*, 24 Barb., 166.)

The assessment roll becomes a record subject only to statutory alterations.

The County Court could change *descriptions*, because expressly authorized to do so; could change the roll to make conform to any of the formalities or rules of chapter 3, but not so as to conform to those of chapter 2d; for the county Court *may or may not* know the situation, locality, surroundings and qualities of property so assessed. By chapter second, if the assessor do not know he must inform himself of these facts, must swear the owner, make practical examination of the property, must distinguish between the value of articles of even the same species or class. How can the County Court do all this? We are of the opinion that the legislature has given us a defective law in respect to increasing assessments. Such as the laws are, as good citizens, we must accept them until changed, without any right to add thereto or detract therefrom. The County Court was evidently aiming at justice in their acts; undertaking to make the burden of taxation uniformly on all persons, in strict proportion to the cash value of the property by each one owned; but we think the court did not have the authority necessary to increase an assessment.

**The judgment is affirmed.**

**BARNEY TRAINOR, Respondent, v. COUNTY OF  
MULTNOMAH, Appellant.**

*Appeal from Multnomah County.*

**Money paid into a county treasury for the purpose of procuring a license to sell spirituous liquors, cannot be recovered back in an action for money had and received, on the refusal or failure of the County Court to grant a license.**

On the 15th day of July, 1866, wishing to procure a license for the retailing of spirituous liquors, Trainor dealt with the treasurer of Multnomah county, the sum of \$100 dollars as payment for a license. Subsequently he applied for said license which was refused him, and he then demanded a return of said sum of money which was also refused. Defendant demurred to the complaint containing averments, on the ground that it did not state facts sufficient to constitute a cause of action, and that there was a defect in the parties; that the county treasurer should be defendant.

The court below overruled the demurrer, and gave judgment for the plaintiff from which defendant appealed.

*Oronin, Stout & Reed, for respondent.*

*Hill & Mulkey, for appellant.*

**SKINNER, J.** The act of the legislature passed January 18th, 1854, provides that any person, wishing to procure a license to retail spirituous liquors, must give public notice for at least ten days, that, at the next term of the County Court he will apply for said license; must present to the court at said term a petition signed by a majority of the legal voters of the precinct in which the grocery is to be located, praying that said license be granted, and also produce the receipt of the county treasurer for the sum of one



red dollars if the license is for one year, or in the same proportion for a shorter period.

Having complied with all these requirements, the applicant is entitled to a license; and, if the same be refused, has his remedy by a resort in proper manner to the appellate or revisory court.

The payment of the amount required by statute, is a condition precedent to his applying for a license, and is not a deposit in the hands of the county treasurer, which can be withdrawn at the pleasure of the applicant, but goes at once into the county treasury, and becomes a part of the general county funds; and cannot be distinguished from the other funds of the county, and can never become the foundation for an action for money had and received, either against the county or its treasurer. We are, therefore, of the opinion, that the court below erred in overruling the defendant's demurrer to the complaint.

Judgment reversed.

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WILLIAM A. MILLS, Appellant, v. M. M. LEARN,  
Respondent.

*Appeal from Douglas County.*

1. The riparian owner is not the exclusive owner of the ferry right.
2. By statute he is preferred in the conferring of that franchise.
3. Ferry landings in the line of a continuous highway are a part of that highway.
4. The right and ownership of the ferry upon a public highway carries with it the right to land upon the banks.
5. What would be a consent for, or waiver of, such use.

THE complaint alleges that a properly established highway runs through plaintiff's premises, and that the Umpqua river crosses said highway on those premises; that defendant properly obtained a license to keep a ferry across that river, and the injuries complained of are that defendant used the

banks of the Umpqua river, within the lines of the public road, as places for landing from his ferry boats, and for taking up the same, without first obtaining permission; and wrongfully and unlawfully continued and threatened to continue to use the said banks; that plaintiff never had received compensation for such use. Plaintiff prayed for a decree enjoining defendant from committing such trespasses. Defendant demurred to the complaint for insufficiency, and after argument the court below sustained the demurrer, and dismissed the complaint. Plaintiff appealed, and the court stands on demurrer to complaint, and the error alleged sustaining the same.

*Kelsay & Watson*, counsel for appellant.

1st. Private property cannot be taken for public use without compensation first assessed and tendered. (*Constitution of Oregon, article 1, section 18.*)

2d. The soil under a public highway is the property of the owner of the fee, subject to the public easement, which is only the right to travel over the land. (16 N. Y., 97; *Wend.*, 111-133; 23 N. Y., 61; 24 N. Y., 658; 25 N. Y., 526.)

3d. The use of the termini of the road on the banks of the river, for landing places for a ferry, is an additional servitude, and requires additional assessment and compensation. (*Hil. Real Prop.*, page 45, sections 21, 22; *Angell on Easements*, paragraph 304; *Am. Law Reg.*, July, 1865, 522.) The proper remedy is by injunction. (16 N. Y.,

*W. R. Willis, Esq.*, counsel for respondent:

1st. Laying out highway, compensation, &c., *Code*, § 859; and this includes all incidents necessary for travel.

2d. County Courts may license a ferry, *Code*, § 868, sections 40-42; and the laying out of road and granting license for ferry gives the grantee a right to land his boats on the highway. (3 *Kent Com.*, n., p. 421; 4 *Am. Law Reg.*, 9, pages 516-17; 1 *Oregon*, 35.)

3d. Owner of land has the first right to keep the ferry, and neglecting to apply waives that right. (*Code*, 869, sections 44, 45, 46, 50.)

4th. Appellant has been compensated for the right of way across his land, including ferry landing, and has consented that another should have the ferry.

WILSON, J. At the December term, 1853, in the case of *Grant v. Drew*, 1 *Oregon R.*, 35, the Supreme Court of Oregon territory decided several questions which arise in this case. Under the law then, the proprietor of the land adjoining or embracing any water course, over which a ferry might be established, had the preference, if he made application, or others, to keep the ferry. The present law, *Code*, 869, section 42, declares not only a similar preference, but that no license shall issue to another unless, after notice of such application in writing, given to the riparian owner at least ten days prior to the term of court, such owner fail to appear and claim such license. That court declared that Grant, the riparian owner, had not the exclusive right to the ferry, and that he had failed to designate his preference to claim his right at the proper time, and it had been rightly conferred on another. After a full examination of the authorities, we here re-affirm the conclusions then made, that when a public highway crosses a stream of water it is not interrupted, but the water, and the soil beneath it, within the limits of the road, are a *continuous part* of the road; that when necessary for the proper use and enjoyment of the highway by the public, the ferries and bridges are also parts and parcels of the road. The present law provides for no terminations of a road, except the places of commencement and ending; the way is continuous; if streams of water intervene, they are not deemed interruptions, for the survey continues over them though they did not exist, and the distance is no greater or less by reason of their happening. Within the continuous limits, the public are entitled to have the way made safest for tra-

vel; to have hills lessened, forests removed, embankments made, and naturally impassable places made passable by bridge or ferry. From the varied adjudications hitherto on this subject, the general drift tends to the doctrine which we enunciate as the law in Oregon. Our statute recognizes the rule in our *Constitution, article 1, section 18*, and makes ample provision to compensate persons for those privileges in respect to roads, which the public require. Public interest demand a safe and free right of travel through and over the whole length of a highway. The owner of lands, through which it may pass, has been notified that the public require its location. He is well aware of the place of entrance upon and exit from his premises, and the general course thereof. Of the necessity of a ferry or bridge he is certainly apprised, and, with a full knowledge of the claim for a practical road, of the acts needed to make it such, and of all the incidents therewith connected, he makes a claim for damages for the full and perfect location of the highway; and now does the statute contemplate a claim for partial damages? He knows the extent of injury; knows, too, that by standing he stands secure of the right to keep any ferry on or adjacent to his lands, if he deem it of any sufficient value. It would be strange if, with all this knowledge, with these rights secured, he could afterwards say to the public that it had not compensated him for the privilege of using the ground at the edge of a stream in the road for the landing of those boats, when the competent authority deems best fitted for the convenience of the public. If his general claim for damages has been adjusted, or if he have failed to make such claim, we doubt that he has received constitutional compensation for the taking out of the road, and all its incidents. He had, we affirm, no natural rights, except the right of landing upon the bank of the stream, and the right to a private ferry; certainly his claim for damages covers the former, and the latter is his privilege, though a public ferry be established. The right is under the water, as well as the land at the edge of the stream.

is subject to the incumbrances of a highway, and their uses differ not; there is no line in a highway, on the different sides of which there are different rights or incumbrances. The franchise of a ferry rests with the State, and the right to locate a road is vested in the same authority, and both powers are jointly used in locating a highway, if necessary, and damages are claimed for the exercise of both, if claimed at all.

A brief reference to authorities sustains this view. In *Peters v. Kendall*, 6 Barn. & Cress., 703 (1827), the English courts held that the owner of the ferry need not have the property in the soil on either side; it was sufficient that the landing place was a public highway; it was a right incident to the ferry to use such landing place for the purposes of a ferry. Virginia authorities go very far that way. (*Somerville v. Wimbish*, 7 Grat., 205; *Patrick v. Ruffner*, 2 Rob., 209.) So *Mills v. Commissioners*, 8 Scam., 53, and from the collation of authorities, carefully made, Chancellor Kent, in the third volume of his Commentaries, note to page 421, declares this the better doctrine, that "this is the most reasonable conclusion upon the right to the use of a public highway to which a ferry is connected." The cases cited by counsel for appellant go mainly to this point, that a highway being established, and the public and the land owner having acquired rights and privileges incident thereto, such use and such rights cannot be taken by a private or public corporation for particular purposes, or be diverted to other and inconsistent uses, without compensation for such appropriation or diversion. To that doctrine we cheerfully subscribe; but those cases do not apply here. We deem the ferry a part of the road; without it, the road is useless, and the location has failed in its object. The landings are upon the highway and within its lines, and the distinction is a very shadowy one, between stepping from the land upon a boat, and from thence upon the land, and stepping from land to land, especially when all valuable rights are saved in other ways by our laws, perhaps as a part of a

compensation to the land owner. The owner of the land not go upon that landing and build abutments, or la wharf. Surely no diversion of use has been made, no appropriation different from the first great purpose of having a safe and speedy line for public travel and convenience. With this view decides the case in question, there is another view which belongs specially to this case.

If the right to land from a ferry boat on a highway upon appellant's land was his own, and not to be taken without compensation, certainly the public has notified him that an appropriation of that right was demanded, and by as strict a course of procedure as in laying out a highway, he was notified that, upon a certain time it would be appropriated unless he appeared and received that which would be in effect a view a compensation, viz.: The receiving of that franchise from the State which could only make the landing place of any value to him; compensation was assessed and tendered then. The law declares that he shall be preferred. He has no right to have a public ferry in any way, without a franchise; the landing is to him of no value otherwise. Being then conscious of that claim of appropriation to public use of his lands, he fail to appear and obtain, not only the view of landing from the stream, but also an exclusive ferry right, does he not waive any claim to compensation? Does he declare that it is of no sufficient value to compensate him for the trouble of asking for his rights? Or, does he not consent that what might be of value to him, may be given to another? And no court would hold other than that he had consented to such use. In this case the full compliance with the law had been made, and appellant had suffered such a course, when fully conscious of its effect. In either view he have taken, the judgment of the court below should be affirmed.

STATE OF OREGON, Appellant, v. DORVILLE  
BROWN, Respondent.

*Appeal from Clackamas County.*

1. The authority for punishing the crime of counterfeiting the coin of the United States, rests exclusively in the courts of the United States.
2. The offense of having implements, &c., adapted to the counterfeiting of the United States coin in one's possession, with intent to use the same for such purpose is not included in the crime of counterfeiting the coin.
3. State legislatures may make such possession, with such intent, an offense and empower the State courts to take jurisdiction over it.

In June, 1867, in Clackamas county, Dorville Brown was indicted and tried for having unlawfully and feloniously in his possession, moulds adapted and designed for coining and making counterfeit coin in the similitude of coin of the United States, &c. No question was raised as to the sufficiency of the indictment, and after trial and verdict of guilty, the counsel for respondent filed a motion in arrest of judgment on the ground that the indictment charged no offense cognizable by the State courts; claiming that, if a crime at all, it was one over which the United States had exclusive jurisdiction. The court below sustained the motion, and the State appealed.

*Hill & Mulkey*, for appellant:

1st. The indictment is framed under *section 591 of the Oregon Code*, providing, substantially, "if any person shall have in his possession or control any mould, pattern, &c., adapted or designed for coining, or making any counterfeit coin, &c., with intent to use the same in coining, &c."

2d. Authority of State courts over such cases. *Fox v. Ohio*, 5 How., 410; *United States v. Marigold*, 9 How., 560; *Territory v. Coleman*, 1 Oregon, 191.

*Stout & Reed*, for respondent:

1st. The United States courts have an exclusive jurisdiction of the rights to punish the counterfeiting of the coin of the United States, and all offenses necessarily included in that act. (*Article 1, section 8, sub., Cont. of the United States*)

2d. The 26th section of act of Congress, 1825, conferred jurisdiction on States; that Congress could confer no authority; that laws of the States, subsequent to 1825, could not certainly be held to confer jurisdiction. (5 *How.*, 20.)

3d. A State may punish for the passing counterfeit coin as well as may the United States. (*Moore v. Illinois*, 5 *How.*, 20.)

4th. The possession of tools for counterfeiting coin is included in the offense of counterfeiting itself, and the possession belongs to the United States Court. (5 *Mo.*, 421; 5 *How.*, 436; 9 *How.*, 560;) (1 *Story on Cont.*, 313, sections 43 & 44; and 2 *Story on Cont.*, 59, section 1123.)

WILSON, J: The State of Oregon has assumed the authority to declare as criminal certain acts, done with reference to the money of the United States, whether immediately or remotely connected with the act of producing the counterfeited coin, and the question is embraced in this inquiry: Is the possession of moulds and tools, adapted and designed for producing counterfeit coin, coupled with the intent of using them for that purpose, an offense distinct from the act of counterfeiting the coin itself? Various opinions, fortified by decisions of the courts, yet exist as to what would or would not come within the offense of counterfeiting the coin. When that question arose in the Supreme Court of the United States, the eminent judges thereof held to differing lines of distinction. The States have assumed to punish different acts, and a conflict of jurisdiction has been carried on, on the one hand, restricting Congress to the literal interpretation of the language in the Constitution of the United States, and, on the other, considering in the federal courts all matters connected with coinage.



money and providing for maintaining its purity and efficiency. We are not aware that the question in its present form has ever been in the United States Supreme Court. Its decisions have generally been concerning the jurisdiction over acts subsequent in commission to that of *making* the counterfeit coin; mostly to the uttering and passing of the false coin. State courts concede that, as to the acts necessary for the *counterfeiting*, that is, the *making* or *producing* of the false representation on metal of the designs found upon our coin, Congress has exclusive authority to declare the penalty, and the federal courts exclusive jurisdiction over its enforcement. Now it is farther conceded that the federal and State courts have jurisdiction over acts connected with the uttering and passing of counterfeit coin. These immediately succeed the *making* of the false coin; and both tribunals have control, doubtless, as we conclude, because the United States are bound to preserve the purity and value of the coin, and the act of uttering counterfeit militates against the preservation of confidence and safety in the money it adopts; and, because the States have full right to punish for the fraud and wrong done by one who knowingly imposes upon his fellow-man for a reality, that which is false and valueless.

The decision in the Supreme Court of the case of *Fox v. Ohio*, 5; *How.*, 410; 16 *Curtis*, 447; renders our labors essentially easier. The doctrine then declared was this: "We think it manifest that the language of the *Constitution*, *art.* 1, *sec.* 8, *sub.* 6, by its proper signification is limited to the facts, or to the faculty in Congress of *coining*, and of *stamping* the standard of value upon what the government creates or shall adopt as money; and of punishing the offense of *producing a false representation* of what may have been so created or adopted," and the reasoning of that court, subsequently in the same decision, clearly demonstrates how and why the federal and State courts may have jurisdiction over apparently the same offense; and also what is meant by that

amendment of the Constitution in respect to being twice in jeopardy of life or limb.

The counsel for respondent admit the correctness of that decision, and its substantial affirmance in *v. Marigold*, 9 How., 560; 18 *Curtis*, 261; *Moore v. Ill.* 14 How., 20; 20 *Curtis*, 6; and in the courts of the territory of Oregon, in *Oregon v. Coleman*, 1 *Oregon*, 191, the doctrine was clearly affirmed. The offense in *Fox v. Ohio* was a very closely related to the coinage of money. The counterfeit coin was made; was harmless so long as it never came into light. Its ill effects were only realized when it was put out to operate as good legal coin. These were successive offenses, the one was an offense against the United States, within its exclusive jurisdiction, as we have shown, "extends to the coining or stamping of the standard of value upon that which the government adopts as money." The other of a double offense, punishable by both the general government and the States, which make it a crime.

Where is the disparity or inconsistency in reasoning with this admission, we apply it to the case in hand. Certainly the mere having of moulds in one's possession would, if used, produce the impression found upon our coin is not a part of the act of coinage. These moulds might never be used, and no counterfeiting would happen. They might be kept with the full intention to use them in making false coin, and some controlling interference ever prevented the result. No counterfeiting has been done; the coin of the United States has not been tampered with or debased. If the initiatory steps had all been taken; those necessary moulds had been prepared, and the intent was just as well formed to commit the injury as it need be to accomplish the full act. The full act is the crime over which the United States has exclusive control. The attempt is an effort carried into a state of completion as would bring it within the definition of counterfeiting. It could well be made a crime, and yet not consummate that which is within the exclusive control of

United States. Under the ruling in *Fox v. Ohio*, the U. S. Supreme Court has no exclusive jurisdiction of that which is made the offense by our law. We know of no provision in the laws of the United States making the preparation and possession of such tools an offense. The State of Oregon, in the absence of such provision, may well make that possession, coupled with the intent to use them for an unlawful purpose, an offense; and provide that men should not only be punished for a result, but also for the preparation which is clearly intended to consummate such result. No question is raised whether it would be an offense abstractly. The question is, has or has not the federal courts the sole jurisdiction thereof. We hold it an act over which the States have a perfect authority. With these views it becomes necessary to reverse the judgment below and remand the case, with orders for the passing of sentence upon a verdict.

It is so ordered.

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CHARLES STOLL, Appellant, v. H. HOBACK,  
Respondent.

*Appeal from Multnomah County.*

1. Construction of section 64, page 595, of the Code.
2. Appeals do not lie from a judgment, by a justice of the peace, given for an amount less than twenty dollars, exclusive of costs.

APPELLANT commenced an action before a justice of the peace to recover the value of a small safe, alleged to be reasonably worth sixteen dollars in legal tender notes. Respondent filed an answer, admitting the claim of appellant, and setting up a counter-claim to the amount of twenty-seven dollars in legal tenders, with which appellant took issue in his replication.

The justice gave judgment in favor of appellant for the sum of sixteen dollars. Respondent appealed from the judg-

ment to the Circuit Court; and in that court appellant moved to dismiss the appeal because it was taken from a judgment given by a justice for a less sum than twenty dollars. The motion was overruled by the Circuit Court, and a judgment was given against appellant for costs and disbursements. Appellant took exceptions to ruling and appealed to this court.

*Mitchell & Dolph*, for appellant.

*O. P. Mason, Esq.*, for respondent.

**PRIM, J.** The question to be determined in this case is whether the respondent was entitled, under the Code, to a writ of appeal from the judgment of the justice of the peace, if the judgment rendered for a sum less than twenty dollars.

Section 64 of chapter 9 of the Code, 598, provides for appeals from the judgments of justices of the peace in the following words: "Either party may appeal from a judgment given by a Justice's Court in a civil action for a sum not less than twenty dollars; or, for the recovery of personal property the value of not less than twenty dollars, exclusive of costs, etc."

The word *sum* in this section evidently refers to the amount of the judgment given by the justice rather than to the amount in controversy between the parties as is claimed by the respondent. Then, under this section, we hold that if a judgment of the justice of the peace is given for a sum less than twenty dollars, both parties are concluded from the right of appeal and the judgment becomes final, although the amount claimed by the plaintiff or defendant may be a larger sum. It is insisted that this construction may produce hardship in some cases; but this is a matter for the consideration of the legislature, and not for this court.

**Judgment reversed.**

STATE OF OREGON, Respondent, v. JOHN FITZ-  
HUGH and JOHN C. HANNAN, Appellants.

*Appeal from Douglas County.*

1. Challenges to the panel of the grand jury are abolished.
2. The prisoners came into the ball-room in company with others; the district attorney asked of a witness: "State what all or any of these parties did in presence of the prisoners?" Objected to. The statement does not show what answer was made. It being possible for a competent answer thereto, this court will presume that the answer was competent and not error.
3. The district attorney asked of another witness: "Did you hear any conversation in presence of the prisoners by persons going with them to Champaign's, as to what they were going for?" Objected to. The record shows no answer. In addition to the last ruling, this court holds that the question was competent for the purpose of showing a conspiracy.
4. Dying declaration cannot be received other than those coming from the deceased person, for whose murder the indictment is found.
5. The court was asked by the defendants' counsel to give this instruction: "That any evidence of a combination between these defendants and others, or of a conspiracy between them and others, is inadmissible for any purpose whatever." The court refused, but gave this: "That a combination having been proved, the acts and declarations of the confederates cannot be taken as evidence of the guilt of these defendants, but may be considered by the jury as showing the intention of these defendants in going to Champaign's house."—*Held*, not erroneous.
6. Defendants' counsel also asked this instruction: "That the declaration of a witness, made at other times, inconsistent with his present testimony, are proper evidence for the consideration of the jury," which the court gave with this explanation: "That such evidence only tended to impeach the character of the witness for truth and veracity, but was not evidence of the facts stated in such declarations."—*Held*, not erroneous.
7. Defendants' counsel, on cross-examination of a State witness, asked him: "Were you present at a public meeting called for the purpose of hanging these prisoners without a trial?" and the court overruled the question.—*Held*, while it might have been legally allowed, yet the answer to this single question would not have shown that witness was unfriendly, and it was a question addressed to the discretion of the court, and is not such error as would reverse this case.
8. The verdict is not inconsistent with the indictment.

9. It is incompetent to assign as error the overruling of a motion for new trial on grounds alleged dehors the record; these were addressed to the discretion of the court. The Code provides, that "after hearing the appeal the court must give judgment without regard to the decision of questions which were in the discretion of the court below."
10. A recommendation by the jury of the prisoners to the mercy of the court, is not inconsistent with a verdict of guilty.
11. It is not error sufficient for a reversal, if the court should fail in awarding the full measure of punishment prescribed by law. It does not work a hardship to defendants.

THIS case was tried at a special term of the Circuit Court for Douglas county, held January 28th, 1867. The defendants were indicted for the murder of one D. F. Barringer, on which charge they were found guilty of manslaughter. Counsel for defendants assign these errors as relied upon to reverse this case:

1st. The Circuit Court erred in overruling the challenge to the array of the jurors, from which the grand jury was drawn at the special term.

2d. The court erred in overruling the demurrer at the special term.

3d. The court erred in its rulings on the trial of the case, as appears by the exceptions taken at the time.

4th. The court erred in refusing to allow the jury to have the pistol of Fitzhugh, and the ball taken from the body of Barringer, and a ball taken from said pistol, with them in the jury room.

5th. That the verdict is contrary to law, in that it is inconsistent with the indictment.

6th. The court erred in overruling the motion for a new trial.

7th. That the verdict is contrary to the evidence.

*Gibbs, Mosher & Chadwick*, for appellants:

The provisions of the statute in relation to the summoning and impanneling of jurors are certain, plain and positive. (*Page 380, sections 930-1-2 of the Code.*) The law does not permit the least departure from them. (1 *Oregon*, 267; 24

*Miss.*, 621; 18 *Johns.*, 212; 36 *Maine*, 128; 4 *Cow.*, 35; 17 *Ohio*, 221, etc.) While the statute abolishes a challenge to the panel, it does not interfere with one to the array. (3 *Bl. Com.*, 359; 9 *Johns.*, 261; 18 *Id.*, 512; 2 *Tidd*, 779.)

That in order to enable the State to prove a combination or conspiracy between the defendants and others, by whose expressions or acts a guilty intent may be shown, it should have been alleged in the indictment. (*Statute* 318, *sec.* 674; *Wharton Am. Cr. Law*, 647; *Roscoe*, 2d *Am. ed.*, 73; 2 *Russell*, 695.)

The state of mind and interest of the witness in respect to the party are always pertinent inquiries. (7 *Conn.*, 66; 16 *Mass.*, 185; 1 *Starkie En.*, 185; 9 *Cushing*, 361; 2 *Selden*, 345; 5 *Foster*, 114; 6 *Foster*, 363.)

The jury may take with them to their room the pleadings in the case, and all papers received in evidence, except depositions. (*Code*, 189, *sec.* 202.)

That the pistols, and balls, could, without any danger of undue influence, be admitted into the jury room; equally so with papers. The rejection of evidence tending in any degree to aid the jury in determining a material fact is error. (3 *J. J. Marsh*, 229; 5 *Ohio*, 485; 20 *N. Y.*, 412.)

The judge is required to make his rulings, and instruct the jury in public, and is not to communicate with them otherwise. (*Whar. Am. Law*, *sec.* 3149; 1 *Pick.*, 337; 14 *Ohio*, 511.)

Fitzhugh was indicted for murder, and Hannan for aiding and abetting him. There cannot be any accessory before the fact to manslaughter; that being in its character without premeditation. Upon motion for new trial, that the jury were permitted to use a copy of the Statutes, &c., in their room. (*G. & W. New Trials*, 70; 4 *Park Cr.*, 256, 319, 619.)

While the jury were in deliberation a meeting was held in their hearing at which the minister spoke of defendants as murderers. (12 *Pick.*, 496; 10 *Ferg.*, 241; 13 *Mass.*, 218; 2 *N. H.*, 474.)

The verdict is improper because accompanied with a recommendation to mercy. (2 *Yerger*, 60; *Code*, pages 191, 469.)

*J. F. Watson, District Attorney, and*

*W. R. Willis, Esq., for State.*

Irregularities in summoning, or neglect to summon the panel of jurors, will constitute no ground for new trial unless injury is affirmatively shown. (1 *Arch. Cr. Law*, 621-2; 2 *Graham & Waterman*, 153.

A party cannot assign as error in the Supreme Court the same grounds on which a motion for a new trial is made in the court below. (1 *Ogn.*, 163; *Code*, 482.)

In a common indictment for murder, charging no combination, evidence can be offered by the State that the alleged killing took place in the prosecution of an unlawful undertaking by several, not all charged in indictment.

After proof of such combination the declaration and acts of persons engaged in it, but not indicted, may be given to show the nature and design of the combination, when such acts and declarations were made in the presence and hearing of defendants. (*Whar. Am. Law*, sections 702-3; 1 *Archbold*, 409.)

It must appear, from the bill of exceptions, that the complaining party is injured by the admission or exclusion of evidence.

Statements of a witness conflicting with his testimony may be given to impeach him, but not as evidence of the facts as stated.

BOISE, J. The first and second assignments of error are to the same questions, and are treated together by the counsel for the prisoners in their argument. The demurrer assigned, as grounds therefor, 1st, That the grand jury, by whom the indictment was found, had no authority to inquire into the crime charged, because the sheriff failed to summon



the panel of the jurors furnished him by the clerk, excepting ten upon such panel. 2d, That the grand jury, by which the indictment was found, had no legal authority to inquire into the crime charged, because three of the grand jurors, to wit: D. C. Underwood, N. Imbler and John McCullough, who were drawn, sworn, and found the indictment, were not summoned by the sheriff, according to the statute in such cases made and provided.

These matters are urged as grounds of challenge to the array of the jury. We think at common law such irregularities would be embraced under the head of challenges to the panel of the jury, and are therefore abolished by our statute, page 184, section 179, where it is provided, "no challenge shall be made or allowed to the panel; a challenge is an objection to a particular juror."

We think the provision extends to the grand jury as well as to the trial jury, since both are drawn in the same list, and the grand jury selected therefrom. We think, also, if a party suffers the grand jury to be impaneled and sworn at a special term called to try his case, making no objection thereto at the time, that he cannot, after an indictment is found against him by such grand jury, avail himself of the irregularities here alleged, as a ground of demurrer to the indictment. He would at common law have been deemed to have waived these objections. We think, therefore, that these objections to the formation of the grand jury cannot avail the prisoners in obtaining a reversal of the judgment below.

The third assignment of error includes the exceptions taken on the trial of the case.

It seems from the report of the case, that the killing took place at the house of one Champaign, in the presence of a number of persons, who were assembled at a ball; also, that the prisoners came there on that occasion with a number of persons. "The district attorney called as a witness, George Benneth, who said among other things, that these prisoners

came into the ball-room at Champaign's in company with Solomon Culver, Robert Forbes, and Abraham Crow. The district attorney then asked the witness, "State what all or any of these parties did in the presence of the prisoners?" To which question the defendant's counsel objected, and the court overruled the objection, and this is urged as error. This question is an inquiry as to the conduct of this whole party of persons, including the prisoners. The bill of exceptions does not show what answer was made to this question. Suppose the answer was, that these prisoners, together with the other parties named by the witness, drew their weapons and commenced firing on the deceased, and killed him; then it would have been competent. Suppose the answer had been that those persons, named as accompanying the prisoners, had then declared that they came all together, including the prisoners, for the purpose of assaulting and beating certain of the persons assembled at the ball, it would have been competent for the witness to have given such declarations in evidence; and such an answer would have been responsive to the question. The court, not being advised what the evidence was, cannot presume that it was incompetent, when competent evidence might have been elicited by the question.

Another witness, Henry Colton, produced by the prosecution, was asked by the district attorney: "Did you hear any conversation in presence of the prisoners by persons going with them to Champaign's, as to what they were going for?" The question was objected to by the counsel for the prisoners, and the objection overruled by the court, and this is also assigned as error. It does not appear from the record what answer was given to this question, or, that the witness heard any such conversation as referred to in the question. It does not, therefore, appear that the exception was material so as to affect the substantial rights of the prisoners. The answer to the question should have been given so as to show that it was material and might have affected the rights of the defendants. We think the question

was proper; it was intended to inquire if there was any conspiracy between the prisoners and other parties to commit this crime, and, if that was the case, it would be competent to show it. Had the witness answered, that he did hear conversation as to the purpose for which they were going, he could have stated any threats he heard made in the presence of the prisoners. Suppose that Crow, one of the persons referred to, had said to the prisoners, that he was intending to do acts of violence when he should have arrived at Champaign's; that he was armed for that purpose; that prisoners did not object, and were armed also, and went on with him, and encouraged him by their presence, this would have been competent evidence to go the jury, as to the intent of the prisoners.

Another witness was asked by the district attorney to state what Robert Forbes, one of the persons who came with the prisoners, said to Barringer, in presence of the prisoners, as to what the whole party came for; we think this was also competent, for the same reasons as stated above. It appears that Forbes was wounded in this affray, and died on the next day. The defense produced a witness who said he was at Champaign's the next day after the affray; that he saw Forbes; that Forbes was dying; Forbes said, "This will be my last day here." Counsel asked this question: "State what Forbes said, at that time, as to what occurred at Champaign's, at the affray, and as to the manner of his death." The evidence sought by this question were the dying declarations of Forbes, as to the manner of his death, which was caused by a shot fired in the affray in which Barringer was killed. We do not think such declarations can be received, except as coming from the *deceased* person for whose murder the prisoners are indicted; and these defendants are indicted for killing Barringer, and not Forbes; therefore we think the evidence was properly excluded.

After the evidence was closed, the counsel for the prisoners asked the court to instruct the jury "that any evidence of a

combination between these defendants and others, or of a conspiracy between them and others, is inadmissible for any purpose whatever." This the court refused to do, but told the jury "that a combination having been proved, the acts and declarations of the confederates cannot be taken as evidence of the guilt of these defendants, but may be considered by the jury as showing the intention of these defendants in going to Champaign's house;" to which instruction defendants' counsel excepted. We do not think this instruction was erroneous. Persons can confederate together to commit any crime, and when evidence has been produced showing such conspiracy of action, it is competent to give in evidence the acts and declarations of co-conspirators, done and said in the prosecution of the common intent and in the perpetration of the crime. If two or more men agree to commit burglary, and are overheard on their way to the house which they intend to burglarize, openly stating their plans to each other, such declarations of one of the confederates can be given in evidence against the others, on their separate trial, without any conspiracy having been charged in the indictment.

Prisoners' counsel also asked the court to instruct the jury thus: "That the declarations of a witness made at different times, inconsistent with his present testimony, are proper evidence for the consideration of the jury." Which the court gave, but explained to the jury that such evidence only tended to impeach the character of the witness for truth and veracity, but was not evidence of the facts stated in the declarations, to which instruction counsel for defense excepted. We think this instruction correct; for the declaration of a witness, not on oath, is mere hearsay evidence. If it is proved by a witness who heard it, for the purpose of showing that the witness is either mistaken as to his evidence on oath or has been guilty of falsehood when not on oath and is, therefore, not reliable. If the rule claimed by defendants' counsel were to prevail, then the declarations of all casual and irresponsible persons, made in casual and careless

versations, when not under the sanction of an oath, would be evidence of facts which the same persons deny under oath. We think no such rule prevails.

There is another exception relied upon by the counsel for the prisoners. On the cross-examination of John Bazzill, a witness for the prosecution, defendants' counsel asked him this question: "Were you present at a public meeting called for the purpose of hanging these defendants without a trial?" to which the district attorney objected, and the court sustained the objection, and defendants' counsel excepted. We think the question might have been legally allowed by the court, as tending to show that the witness might have been hostile to the prisoners; it might have been followed by another question, whether he participated in such meeting, and advised violence to the prisoners, thereby showing a mind unfriendly to them; but, had he answered the question in the affirmative, it would not have shown that he was unfriendly, and this would have been the answer most favorable to the prisoners; and the rejection of the question by the court for irrelevancy would not be a ground of error to warrant a reversal of the judgment. It was one of those questions which, we think, was subject to the discretion of the court.

Another assignment of error is that the verdict is inconsistent with the indictment. The indictment charges both prisoners with murder, and their crimes are equal in degree. If one man strikes the fatal blow, and another is present assisting him to do it, he is as much a principal in the crime as is he who strikes the blow; and both may be found guilty of manslaughter, under the same indictment.

It is also assigned as error that the court overruled the motion for a new trial, which was founded on affidavit, disclosing certain alleged irregularities in the conduct of the jury after they had retired; and, also on errors occurring during the trial. As to these matters which relate to errors occurring during the progress of the trial, and excepted to at the time, we

have already considered them. As to those matters were contained in the affidavits filed in support of the for a new trial, they were questions of fact, and were addressed to the sound discretion of the Circuit Court, and are therefore not the subject of review here. It is competent to assign as error the overruling of a motion for a new trial on grounds alleged dehors the record; previous to the present Code such grounds were addressed to the discretion of the court, and our Statute now provides that "after the appeal the court must give judgment without regard to the decision of questions, which were in the discretion of the court below, or technical errors, etc." (*Code*, page 48, section 240, also section 246; *Newby v. Territory of Oregon*, 163; *Cline v. Broy*, 1 *Ogn.*, 89.)

It is objected, that the recommendation by the jury to the prisoners to the mercy of the court was error. We think there is no good reason for the belief that this recommendation was a condition to the finding the prisoners guilty. The parties were present and could have polled the jury. We think that is not a ground of error in this court.

The last assignment of error is that the sentence was not according to the statute, in this, that the court did not sentence the prisoners to pay a fine, as well as to be imprisoned.

In this case the court omitted a part of the punishment which was making their punishment lighter than that required; of this they cannot complain, for it does them no injury, and does not affect to their prejudice a substantial right. In the case of *Howell v. State*, the prisoner was sentenced to a punishment greater than the law awarded, and it was for that reason that this court reversed the judgment in that case.

Judgment is affirmed.

JOSEPH KNOTT, Respondent, v. ANN E. FRUSH, Administratrix of the estate of WILLIAM H. FRUSH, and others, Appellants

*Appeal from Multnomah County.*

1. A ferry license, granted to another than the riparian owner, is a mere personal trust upon conditions, and his liability cannot be removed by substitution.
2. Such license terminates upon the decease of the person to whom it was granted.

THE bill of complaint alleges that the plaintiff is running a ferry from the foot of Stark street, in the city of Portland, across the Willamette river to the terminus of the base line and Sandy road, by virtue of a ferry right purchased of James B. Stephens, who claimed under a charter from the legislature, and that the defendants are running a ferry between the same points without authority of law, and to the injury of plaintiff. The defense is that Ann E. Frush, as the administratrix of William H. Frush, is carrying on a ferry under a license granted to him in his lifetime by the County Court of Multnomah county, the period for which it was granted not yet having expired. James B. Stephens, from whom Knott purchased, was the owner of the land adjoining the river on the east side. Frush claimed no interest in the soil on either side.

No written briefs on file.

PERM, J. In this suit there is no material controversy about the facts, and the case turns on the question, whether the defense set up in the answer amounts to a legal justification. The only question raised by the answer is, does a ferry license, granted by the County Court under our statutes to a person other than the riparian owner, expire with the death of the party to whom it was granted? We hold that it does;

for the reason, that, under our statutes, such a franchise is a mere personal trust bestowed on the grantee, upon conditions imposed upon him alone; and his liability cannot be removed by substitution. (5 Cal., 471; 7 Cal., 287.)

We hold there is a distinction between the ownership of lands, embracing or adjoining streams to which ferry rights attach, and a license to keep a ferry for tolls.

The land with its incidents can be aliened, taken in execution for debt, or can descend to the heir-at-law; while a ferry license is a personal trust, and has none of these qualities.

Under our law no ferry license can be granted to any person, other than the owner of the land embracing or adjoining the stream where the ferry is proposed to be located, unless such owner shall neglect to apply for such license. (Or. Rev. Stat., sec. 42.)

This right or preference, which the law recognizes in favor of a riparian owner, on his death descends to his heir-at-law, as an incident to the land; while the license, being a personal trust, expires with the death of the licensee.

Then we hold that the license granted to Wm. H. Mann terminated with his death, and his administratrix had no legal authority to run the ferry for the unexpired term of such license, and therefore should be enjoined from so doing.

Decree affirmed.

## STATE OF OREGON v. J. C. MANN, Appellant

### *Appeal from Multnomah County,*

1. A game of cards, commonly called poker, is not a gambling game under section 666.
2. Section 666 is void for uncertainty, since it does not enumerate and describe the gambling devices intended to be prohibited.



THIS is a criminal action for a violation of section 667, of the Code of Criminal Procedure. The indictment charges that "the said J. C. Mann, on the 29th day of January, 1867, in the county aforesaid, did willfully and unlawfully permit a gambling device, prohibited by section 666 of the said Code, to wit, a game of cards commonly called poker; the same being a game of chance to be set up in a house by him occupied, and of which he had the control, for the purpose of gaming and playing a game of chance for money."

The appellant demurred to the indictment, on the ground that it did not state facts sufficient to constitute any offense; which demurrer was overruled, and the defendant pleaded not guilty. Appellant was convicted on this indictment and appealed to this court.

*Mitchell, Dolph & Smith, for appellant:*

Can an act be made criminal where neither the statute, the common law, nor any legal definition of the act show it to be included in the statute?

1st. A gambling device, to be prohibited, must be enumerated in the statute. (*Frisbie v. State*, 1 Ogn., 264.)

2d. It is a fundamental rule that no man shall incur any penalty, unless the act which subjected him to it is clearly both within the letter and the spirit of the statute imposing the penalty. (*Smith's Commentaries*, 839; 7 Cranch., 61; *U. S. v. Wiltberger*, 5 Wheat., ; 22 Barb., 267.)

3d. This statute is an exception to those of all the other States in not specifying anything as a gambling device. (*Whart. Crim. Law*, sections 2454-5, notes a, b, c, d, e, f, g.)

4th. To hold a defendant to answer and put him on trial for a violation of section 667, deprives the defendant of his constitutional right "to demand the nature and cause of the accusation against him, and have a copy thereof."

5th. It is not alleged that the "gambling device," &c., was adopted, designed, or devised for playing a game of chance for money.

6th. Because there is no allegation that the defendant permitted any gambling device to be set up. A device is something tangible; a game is not.

*Hill & Mulky*, for respondent:

If section 667 can be permitted to have any effect it is difficult to see why it does not prohibit all gambling devices adopted, devised or designed for playing games of chance for money; nor how it can be construed to prohibit devices which were unlawful at common law, and not those which were tolerated or did not exist, if these answered such a description.

That the game charged did answer such a description is a matter of affirmative proof.

If it were necessary for the statute to name the game forbidden, then the law is useless, for a change of name alone would evade the law.

The intention of the legislature must be carried out. (*Kent Com.*, 462-5-7.)

The game need not be named in statute. (*Com. v. King*, 3 Met., 131.)

PRIM, J. The indictment charges that Mann did voluntarily permit a "gambling device" to be set up in a house which he occupied or under his control, which was prohibited by section 666 of the Code of Criminal Procedure. The device specified in the instrument is "a game of cards commonly called poker." Section 666 of the Code is in these words: "All gambling devices of whatever name or nature adopted, devised or designed for the purpose of playing any game of chance for money, &c., are prohibited from being used, &c." It will be seen that the "game of cards commonly called poker" is not specified by name as one of the devices prohibited by this section; nor can it be considered a gambling device in the sense of the words used in this section; because, to be such, it must be something tangible, adapted, devised or designed for the purpose of play.

game of chance for money, &c. A game is nothing tangible, and is not adapted, nor can it be used in playing a game of chance. The game is the result produced by the use of the device; and the prohibition of the section is evidently against the use of the device instead of the result of it. It is insisted, with great earnestness on behalf of appellant, that the statute on which this indictment is founded is void, for uncertainty; for the reason that it does not enumerate or define the gambling devices which it undertakes to prohibit. A crime or public offense is some act forbidden by law; and it is a well settled rule of law that no one can be punished for doing an *act*, unless it clearly appears that the *act* sought to be punished comes clearly within both the spirit and letter of the law prohibiting it. The act constituting the offense should be clearly and specially described in the statute, and with sufficient certainty, at least, to enable the court to determine, from the words used in the statute, whether the act charged in the indictment comes within the prohibition of the law. Do the provisions of the statute in question do this? Can the court ascertain from all the words used in it, without resorting to evidence, what a gambling device is? We think not, because the term has no settled and definite meaning. It is nowhere defined in the Code, nor has it any common law definition. For these reasons, we think, section 666 of the Code of Criminal Procedure has failed to give a sufficient description of gambling devices to enable the courts to determine, with certainty, what was intended to be prohibited by the legislature, and is, therefore, void. Then it was error in the Circuit Court to overrule the demurrer to the indictment.

Judgment is reversed.

WILSON, J., dissented generally.

**WILLIAM H. DELAY and others, Appellants, v. WILLIAM W. CHAPMAN, Administrator of the estate of JAMES L. LORING, Respondent.**

1. The amendment to section ninety-three of the Code makes a radical change in practice, allowing equitable defenses to be made in actions at law.
2. The amendment is not in violation of section twenty-two article four of the Constitution.
3. It does not affect section 329 of the Code in the way of repeal, nor does it revise chapter five of the Code.

**PLAINTIFFS**, appellants brought an action of ejectment, claiming to have the legal title to the lands described in the complaint, and demanding the possession thereof as against defendant Chapman and his tenant who are in the possession. The defendant, Chapman, who represents himself as administrator of the estate of James L. Loring, deceased, answered the complaint: 1st. He sets out that he is administrator of said Loring; 2d. It is not true, as alleged in the complaint, that appellants are the owners, and entitled to the possession, &c., denying generally the allegations of the complaint; 3d. Defendant, for further answer, says that said James L. Loring in his lifetime, having the necessary personal qualifications, &c., became a settler on the lands in question, as a donee of the government of the United States, under the act of Congress of the 27th September, 1850, commonly called the donation law of Oregon; that said Loring settled on said land in April, 1852; that it was at that time vacant land of the United States; that on the 28th day of April, 1852, he duly filed his notification with the surveyor-general of Oregon, as required of a settler under the provisions of said act, and that he did everything required of him as a donation claimant up to the time of his death, which occurred in January, 1853. It is claimed by the defendant, Chapman, that

said land, by virtue of such settlement, and cultivation, and residence thereon, became, on the death of said Loring, a part of his estate, and descended to his heirs; and that he, defendant, took lawful possession thereof as administrator of Loring's estate, under the laws of Oregon, and that he still retains the same; that, as such administrator, on behalf of the heirs-at-law of said Loring, he did make the necessary proofs of compliance with the requirements of said act of Congress, by said Loring up to the time of his death; to entitle his heirs to a patent therefor, as required by the eighth section thereof, and that a patent certificate for said lands was duly issued to the heirs-at-law of said Loring, and delivered to defendant as administrator of said estate. The answer further charges, that Joshua Delay and Sarah Delay, the father and mother of William H. and Joseph Delay, the plaintiffs in their lifetime, and the plaintiffs since their decease, by certain false and fraudulent proofs made by them to the officers of the land department, succeeded in obtaining the issuance of a patent to plaintiffs William H. and Joseph Delay for the lands in controversy, as heirs-at-law of said Joshua and Sarah Delay, and, upon the false assumption that said Joshua and Sarah were the true and *bona fide* settlers on said lands, and had complied with said act to the time of their decease; which said issuance of said patent was and is a fraud upon the heirs of said Loring, and upon defendant's rights in administration aforesaid. The answer further charges, that plaintiff, Stout, if he purchased at all, purchased with a full knowledge of defendant's rights, and of the fraud alleged as aforesaid. The answer concludes with a prayer on behalf of said heirs and said estate, that said patent be canceled, and that the rights of the heirs-at-law of said Loring in said lands be ascertained and established, and the plaintiffs be forever barred from setting up any claim to said lands under the said patent to the heirs of said Joshua and Sarah Delay. The plaintiffs filed a demurrer to that part of the answer of the defendant which sets up an equitable

defense, and insists that such a defense cannot be interposed in an action of ejectment. The answer is filed under an amendment to the Code of 1866, to section 93, which amended reads as follows: "A material allegation in a pleading is one essential to the claim or defense, and cannot be stricken from the pleading without leaving it insufficient. When the facts stated in the pleadings present a case cognizable in a court of law, the case shall proceed as an action at law; but if the facts stated, either by the plaintiff or defendant, show a case requiring the interposition of a court of equity, the case shall proceed as a suit in equity. That part of this section from and including the word 'whereas' is the amendment, which is simply an addition to the section, making a radical change in the practice. The court has overruled the demurrer, and made a decree in favor of the defendant, and this case comes here on the issues raised by the demurrer to the answer.

*Stout & Reed, for appellants:*

We assume that the amendment, or what is claimed to be an amendment to section 93, is void.

If not so, then in cases such as respondent makes, the Code provides a special remedy, which is ample for his protection. (*Section 501, Code.*)

Again, if an entirely new case is to be made by the answer, it gives to the defendant the position of plaintiff, and requires him to reply the nature of an answer, and we are required to pass on our allegations when not denied by respondent.

*Mitchell, Dolph & Smith, for respondent:*

The facts set up in defendant's answer would be sufficient to entitle him to invoke the power of a court of equity in canceling plaintiff's patent. (*Section 501, page 273, Code.*)

The defendant is entitled to the same relief here as he would be were he plaintiff in a suit in equity. (*Page 12, section Laws of 1866, section 1.*)

BOISE, C. J. The alleged amendment to section 93 of the Code simply provides that when, in any stage of the pleadings in the case, the facts show, that, to determine the rights of the parties, the interposition of a court of equity is required, the case shall proceed as a suit in equity, without requiring the party to resort to his suit in equity in a formal manner.

It will allow equitable titles to be set up against legal titles in the same action. There can be no doubt as to the meaning of the amendment. The plaintiffs insist that this amendment is void because it was passed by the legislature in violation of *section 22 of article 4 of the State Constitution*, which provides: "No act shall ever be revised or amended by mere reference to its title, but the act revised or section amended shall be set forth and published at full length." The section is set forth at full length as amended. It does not revise any act of the legislature, but simply introduces a new feature into the practice, without abolishing any remedy that existed before. Without this provision, a defendant in ejectment, who had the equitable title, in order to avail himself of it, would have to resort to his suit in equity, and seek to enjoin the plaintiff from proceeding with his action at law until the equitable suit of the defendant could be determined. This statute is intended to allow him to interpose his equitable title by answer. Though this amendment to section 93 virtually unites actions at law, and suits in the same case, it does not violate *section 22, article 4 of the Constitution*, or any other constitutional provision.

It is an effort by the legislature to simplify judicial proceedings, and the law making power has the right to make the effort; and it is the province of the court to execute their enactments in good faith, though they may encroach on the forms of established practice.

It is claimed that the amendment is a repeal of *section 329 of the Code*; and that if it does so operate, it is a violation of *section 22, article 14 of the Constitution*.

We think this conclusion does not follow, for, if it be a repeal of section 329, it repeals it by implication, and it is neither a revision or amendment of it. Neither is it a revision of *chapter 5 of the Code*; for the remedy there provided still remains in full force, and can be resorted to as formerly at the option of the party who seeks to avail himself of an equitable defense.

We think, therefore, that this answer can be interposed in that form used in the pleadings, and therefore judgment below is affirmed.

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STATE OF OREGON, ex rel., A. ROSENHEIM, Appellant, v. HENRY L. HOYT, Respondent.

*Appeal from Multnomah County.*

1. Rules of order adopted by a city council are binding upon that body.
2. The offices of city councilman and city marshal are incompatible, and cannot be held by one person.
3. It is contrary to the policy of the law for an officer to use his official appointing power to place himself in office.

THE relator Rosenheim complains of defendant Hoyt, that he, Rosenheim, on the 31st day of July, 1867, was duly elected marshal of the city of Portland, by the common council of said city; that he duly qualified as such officer, and offered to perform the duties of such office; and he complains that the defendant, Hoyt, unlawfully holds the office of marshal and unlawfully refuses to give up the books, papers and property belonging thereto.

The defendant, after denying the allegations in complaint, for a further answer says that in June, 1866, he was duly elected marshal of said city and that he has held and exercised the duties of said office up to the time of said pretended election of the relator, and since; and says that said pretended election of relator is void, and he, Hoyt, holds over until his



successor is duly elected and qualified. He claims the election of relator is void because the said common council is composed of nine members; that the relator was at the time of such pretended election, and has ever since been a member thereof. That by the provisions of the charter of said city, it required five votes to elect a marshal for the city by the said council; and that the relator received but five votes, and that one of these votes was cast by himself. That at the time of said pretended election there was, among the rules of order adopted by said council for the government of its proceedings one which prohibited a member of the council from voting on any question in which such member was immediately interested; which rule is as follows: "Every member, who shall be present when a question is put, shall vote for or against the same, unless he be immediately interested, in which case, he shall not vote." For which reason, Hoyt claims that said election of relator is void. He also claims it is void, for the reason that said relator continued to act as a member of said common council at the time of his pretended qualification, and that he could not properly qualify as marshal while he remained a member of the council. To this defense, relator demurred, and the court overruled the demurrer, and the case comes into this court for trial on this same issue.

*Page & Chapman*, for appellant:

The right to the office depends upon the exercise by the common council of a legislative or political discretion, and the courts have no control over such discretion. (13 *Wend.*, 380; *Marbury v. Madison*, 1 *Cranch.*, 166-7; 1 *Curtis*, 380-1; *Charter*, chapter 10, section 139.)

The term of the office of marshal is determinable at the will of the council. (*Constitution*, article 15, section 2.)

An election or appointment annihilates the authority of the one holding at the pleasure of the appointing power. (*Bac. Abr.*, volume 2, 472.)

The prohibition contained in *section 30, article 4 of the Constitution*, refers only to senators and representatives.

The council is the sole judge of the regularity of its elections, and alone prescribes their manner. (*Espinasse N. P.*, 337; *Bac. Abr.*, volume 2, 143; *Charter*, sections 32, 23.)

Such election may be by ballot. (*Cons.*, article 2, section 15; *Espinasse N. P.*, 337.)

*Hill & Stout*, for respondent:

The common council is a legislative body, the creator of the legislature of the State, and can possess no power that that body does not possess. Congress is under a similar prohibition; and the common law is, that one having the power to appoint to an office cannot appoint himself. (*Charter*, section 5; *Constitution*, article 4, section 30; 7 *Bac. Abr.*, 14; 8 *Ibid.*, 60-1.)

Under the city charter, such an election would be contrary to public policy and justice. (*Charter*, chapter 2, section 1; chapter 3, section 22; chapter 7, sections 58, 71.)

Such election was illegal on general ground, as also under the charter and the rule cited. (*Rule of Order 14.*)

It was illegal to vote by ballot; and the yeas and nays should have been entered on the journal. (*Cons.*, article 2, section 15; *Charter*, chap. 3, section 26; *Ibid.*, 5, section 1.)

The council must first remove an incumbent for cause before they can proceed to fill the office. Upon their right to remove: *Chapter 2, section 8, Charter.*

The offices of marshal and councilman are incompatible. (7 *Bac. Abr.*, 313; *Harrison's Dig.*, 3974.)

The action of the council is in violation of the spirit of our institutions.

BOISE, C. J. There can be no question but the respondent, in voting for himself, violated the rule above quoted, and, without his own vote, he would not have had a majority. If such rule were binding on the council, then the election

would be a nullity. We are of opinion that such rule was binding, and one seeking advantage from its violation, should not be permitted to gain by his own wrong. As to the other point, that the offices of councilman and marshal are incompatible and cannot be held by the same person, we think admits of no question. The marshal is the executive officer of the council, and has to settle his accounts for fees and services with that body; and it would not be competent for him to pass on his own accounts, and vote money out of the city treasury into his own pocket. It is contrary to the policy of the law for an officer to prostitute his official position by using his official appointing power to place himself in office.

**Judgment affirmed.**



## CASES

ARGUED AND DECIDED

IN THE

# Supreme Court of the State of Oregon.

SEPTEMBER TERM, A. D. 1868.

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REUBEN P. BOISE, *Chief Justice*,  
JOSEPH G. WILSON,  
PAINE P. PRIM,  
WILLIAM W. UPTON, } *Justices*.  
JOHN KELSAY,  
R. WILLIAMS, *Clerk*.

JAMES RICKEY, Appellant, v. JOHN FORD,  
Respondent.

*Appeal from Marion County.*

1. The object of a statement under the Code in an appeal, is to make that a matter of record which before was not so.
2. A statement is not necessary in all appeals.
3. A motion to dismiss an appeal on the sole ground that no statement has been made, cannot be entertained.

THE points made on argument upon the cross motions are sufficiently designated in the opinion of the justice.

*J. Cartwright, Esq.*, for appellant.

*Williams & Willis*, for respondent.

UPTON, J. The respondent moves this court to dismiss the appeal, upon the ground that no statement of the case is annexed to the record and embodied in the transcript.

The appellant files a cross motion for a rule upon the clerk of the Circuit Court, directing him to send to this court the depositions and documents used in evidence on the trial of the cause.

This is an equity case, and it is urged in support of the cross motion that all the evidence used at the trial in the Circuit Court is in writing and on file in that court.

The motion to dismiss the appeal, and the argument in support of it, seemed based on the position that an appeal cannot be heard unless the grounds of appeal are exhibited in a statement of the case.

This position is not sustained by the language of the Code, nor is it consistent with the general scope and manifest intent of the statutory provisions in relation to appeals.

The object of a statement is to make that record which was before was not record, but rested only in the recollection of the court or counsel or the minutes or files of the court, it never has been considered necessary to embody matter of record in a bill of exceptions. (*Carman Guirado de John v. Jose Diego Sepulbeda*, 5 Cal., 149.) It is equally unnecessary to embody that which is matter of record in a statement.

Section 526 of the Code, which directs the mode of preparing a statement, introduced the subject by the words: "When the party who has the right to appeal wishes a statement of the case to be annexed to the record of the judgment, decree or order," he shall prepare such statement. This necessarily admits that there are cases in which no statement would be desired by the party appealing.

Section 531, in providing for a transcript, proceeds as follows: "The transcript is a copy, certified by the clerk, of the roll of final record, or the pleadings, orders, exceptions, papers and journal entries that constitutes such roll or record, together with the statement provided in section 526, if there be one, naming the other necessary requisites. This language shows that appeals are contemplated in which there is no statement." Section 533 provides that, "Upon an appeal from a judgment

ment, the same shall be reviewed as to the questions of law appearing upon the *transcript*." \* \* \* "And upon an appeal from a decree given in any court, the suit shall be tried anew upon and in regard to all questions, both of law and fact, presented by the *transcript*."

It is clear that in a law case, if the transcript discloses the existence of an error which was particularized or assigned in the certificate accompanying the notice of appeal, under *section 527 of the Code*, the court will review the question of law without regard to whether it is shown by a statement or not. And upon an appeal from a decree the case will be tried anew if any of the questions, either of law or fact, which have been pointed out by the notice of appeal, are presented by the transcript.

A case may have been determined upon demurrer, and the judgment roll may disclose every matter than can be of any avail to either party on an appeal. In such case it would be a mere waste of labor, and an incumbrance to the transcript, and the records of this court to prepare a statement. Or the point in controversy, although not otherwise a matter of record, may have been saved by a bill of exceptions regularly signed by the judge who tried the cause and filed with the clerk, within the time prescribed by law. In such case the bill of exceptions will have done all that is purposed by the provisions of statute in relation to the statement of the case. That is, it will have made a record disclosing fully what is the point or issue in question on the appeal, and all the facts necessary to the consideration of the question. In this case the evidence was taken by depositions, or at least reduced to writing before a referee, and is now on file in the Circuit Court. The appellant seems desirous that the findings of fact should be reviewed in this court, but he has failed to take the proper steps to make the written evidence on file in the clerk's office a part of the record. If he deemed an examination of all the evidence necessary to a proper trial of the cause, he should have filed a statement showing that it

was upon that evidence the cause was tried in the court below, and thus have embodied all the evidence in the record.

It is seldom that an examination of all the evidence is necessary for the purpose of determining a question on appeal; but that is sometimes the case and when it is the appellant can, by a statement, place the court in possession of all of it, so that the whole case may be heard *de novo* as if it were an equity case, as if no trial had ever taken place in the Circuit Court. When no such necessity exists, it is immaterial to the interest of the parties as well as inconvenient to the court to have the record encumbered with depositions and other writings that throw no light upon the question at issue; and it has not unfrequently been the case that the inconvenience was so great as to become a real hindrance to the trial of causes in this court. One of the advantages expected from the recent change in the law is, that the record may be divested of extraneous matter, and that the point in issue between the parties may be clearly presented without the labor of wading through accumulations of irrelevant matter. Exceptions saved in the haste and excitement of the trial can, by making a statement, be put in a satisfactory form. Frequently the various points and evidence necessary to explain them, can thus be more succinctly stated than could be done at the trial, and the appellate court is the better enabled to examine the real question at issue.

It is clear from the views above expressed that a statement is not in all cases indispensable.

A motion to dismiss an appeal on the sole ground that a statement has been made can not be entertained.

The case of *Cosgove v. Johnson*, 30 Cal., 509, is cited as sustaining respondent's motion. The ruling of the court in that case was virtually a dismissal of the appeal for want of merits and does not touch the question pending here. It decides that where no errors are assigned upon the judgment roll, and nothing except the judgment roll is brought



the transcript, the appeal will be dismissed; a rule of that court permitting a motion to dismiss for want of merits, although the appeal is regular, wherever the want of merits in appellant's case is obvious without arguments, upon a bare inspection of the transcript. But even under that rule no argument is permitted in that court, upon such a motion. A practice permitting argument would be virtually a trial of the case upon a preliminary motion, and in every case where the motion is not sustained, would necessitate a second hearing of the same matter.

The cross motion for a rule directing the clerk of the Circuit Court to send to this court the depositions and documents used in evidence on the trial in the Circuit Court must also be denied. Those papers have not been made part of the record, and no certificate the clerk could attach to them would give them that character or enable this court to look into them in determining the questions that may be disclosed in the trial of the cause on appeal.

Both motions denied.

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THE STATE OF OREGON, Appellant, v. THE OREGON CENTRAL RAILROAD COMPANY, Respondent.

*Appeal from Marion County.*

An order, made by the circuit judge, refusing leave to bring an action against a private corporation, is not one from which an appeal will lie.

On the 27th day of June, A. D. 1868, a petition was presented to the judge of the third judicial district, by Joseph Gaston, upon which the prosecuting attorney and petitioner asked leave to bring an action, in the name of the State, against the Oregon Central Railroad Company, for the purpose of avoiding the charter of that company, because, as alleged, it had offended against the law of its incorporation

in electing officers before sufficient subscription had been made to its stock, and that more than six months had elapsed after such pretended election, before such corporation commenced its operations, and for other grounds. The court refused leave, and an appeal was taken from that order of refusal.

*Hill & Kelly*, for appellant.

*Mitchell & Ellsworth*, for respondent.

WILSON, J. The jurisdiction of the court is found in article 6, article 7 of the Constitution of the State: "The Supreme Court shall have jurisdiction *only* to revise the *final decisions* of Circuit Courts." The legislature gave a construction to the words "final decisions," in section 525, page 250 of the *Code*, and for the purpose of this motion, we cite only the first part of the second clause, viz.: "An order affecting a substantial right, and which in effect determines the action in suit, so as to prevent a judgment or decree therein shall be deemed a judgment or decree." Clearly the appeal must be made at some stage in the progress of a case which then practically determines the proceedings.

The order appealed from here precedes any action, and is made a preliminary step to its inception, without which no action may not be begun. The intention evidently was to place some barrier to a privilege, whose too free use would involve the State in costs and trouble at the hands of litigants to prevent private parties from using the name and power of the State in enforcing fancied rights or redressing pretended wrongs, and for this purpose the courts or the judges, interposed between the desire for litigation and its commencement. The court is permitted to say in what manner the State of Oregon should seek to restrain the unauthorized working of corporations, and thus guard the public interest. The refusal of leave by the circuit judge does not prevent a party seeking permission from presenting another petition.

the same purpose, containing such reasons as would induce the judge to grant that which to him would be a willing duty.

*Section 352, page 237, of the Code*, confers upon the governor the power to grant leave for the institution of actions against both public and private corporations for similar causes, and no remedy is provided for any relief in case that officer should refuse leave. It cannot be that the legislature intended that the acts resting in the discretion of the law officers should be reviewed; while similar acts resting in the discretion of an officer, who need not be versed in the law, may not be reviewed. Again in section 357, page 239, the prosecuting attorney is empowered to proceed or not in a case at his discretion; and this, even though the court or judge had already given leave to bring the action, he may regulate, or render wholly null the permission of the court; thus demonstrating that the order of the judge cannot certainly be a judgment or order affecting a substantial right, thereby preventing a judgment or decree. That power is entrusted to another and inferior officer. By such granting of leave, the judge would say to the prosecuting attorney, I have thought it proper that this action should be commenced, and I recommend the parties to your discretion.

In addition to the general law regulating appeals the legislature has made ample provisions for appeal in all cases where the power of the court or judge is invoked in matters not properly coming within the terms, action or suit. In writs of mandamus, habeas corpus, and review, express authority is given for appeal, protecting all rights. This order does not come within either the word or spirit of the statute, defining what would be a proper decision from which an appeal would lie.

**The appeal is dismissed.**

JAMES McDONALD, Appellant, v. G. W. CRUSEN,  
Respondent.

*Appeal from Douglas County.*

What constitutes a filing of a paper.

The notice of appeal in the transcript showed these indorsements:  
"Not filed, for want of funds for fees. October 17, 1867. L. L. Williams, county clerk."  
"No funds furnished for fees. Don's credit not good. L. L. Williams, county clerk."

RESPONDENT moved to dismiss the appeal because no notice of appeal was filed within sixty days. Appellant interposed a motion asking that an order issue, directed to the clerk below, to certify the time when such notice was received by him and placed among the papers in the case.

*W. R. Willis, Esq.*, for appellant.

*S. Ellsworth, Esq.*, for respondent.

BY THE COURT. The clerk might, previous to receiving the paper offered for filing, demand the statutory fee therefor, and, in case of non-payment, take no farther notice thereof. He should demand his fees, and, in case of non-payment, decline the custody of the paper, and declare the grounds of his refusal. Having placed the paper among the files of the case, with the date of such reception, and his name indorsed thereon, it was a good filing, and the clerk was not authorized to place any such indorsements as these upon a paper committed to him. That act was improper. Had there been no appearance of date indorsed, we could only have permitted the showing of facts to be made upon which we might make some order or process directed to the court below.

We deem the order unnecessary, and hold that the paper was filed October 17, 1867.

**JAMES McDONALD, Appellant, v. GEORGE W. CRUZEN, Respondent.**

*Appeal from Douglas County.*

Judgment against prosecuting witness for costs and disbursements in a preliminary examination is void.

Upon appeal from a judgment upon demurrer below, it is the general rule that judgment of affirmance here is final; but this court will hold a discretionary control, in cases where cause is alleged for re-hearing or further proceedings below.

APPELLANT was prosecuting witness in a preliminary examination of persons charged with felony, before respondent, a justice of the peace, August 25th, 1865, and on the dismissal of the persons so charged, judgment was rendered against appellant for costs, &c. The justice then threatened to issue an execution, unless the costs, &c., amounting to \$129.85, were immediately paid; and the constable took into his possession, then and there, property belonging to appellant, and refused to deliver it up unless appellant would pay such costs to the justice. Appellant, under those alleged facts, paid the money. In August, 1867, appellant commenced an action against respondent to recover back the money, as having been paid under protest. Appellant had judgment in the County Court. On appeal to the Circuit Court for Douglas county, respondent had judgment of reversal and appellant took an appeal here.

*W. R. Willis, Esq., for appellant.*

*S. Ellsworth, Esq., for respondent.*

BY THE COURT. There is no authority given by the laws of Oregon under which a justice of the peace might, for any cause, render a judgment against a prosecuting witness in the

preliminary examination of a person charged with crime the costs and disbursements of the proceeding. That authority is only given to such officer in cases where a criminal action is entertained by him and proceeds to final determination.

The judgment in that case was wholly void.

We think there is sufficient set forth in the complaint to require an answer, and the judgment will be reversed.

Upon the matter of entering final judgment in such case here, or of remanding them for further proceeding below, we announce that:

Upon appeal from a judgment upon demurrer below, is the general rule that judgment of affirmance here is final; but this court will hold a discretionary control in cases where cause is alleged for re-hearing, or for further proceeding below.

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**PHILESTER LEE and ELIZA A. LEE, Appellants,  
THOMAS S. SUMMERS and ELIZA SUMMERS,  
Respondents.**

*Appeal from Linn County.*

1. When parties, having come to an agreement, reduce its terms to writing, no evidence of their contract can be received, other than the writing itself, or its contents; not in conflict with section 682.
2. A mere agreement to sell land does not constitute a license to a purchaser to enter.
3. A party, who would otherwise be estopped from setting up a particular fact, may avail himself of the truth, when the same is shown by his adversary's pleadings, and thus made a part of the record.
4. Rights of donee under a present grant from the United States.
5. Who may attack a patent from the United States.

THIS suit is instituted to compel defendant to execute a conveyance of the premises in controversy.

The complaint alleges, in substance, that on the 23d of October, 1850, the defendant, Thomas S. Summers, being in possession of 640 acres of land, known as the Summers' claim

contracted with plaintiff, Philester Lee, that if Lee would purchase the possessory right of a certain land claim which adjoined the Summers' claim, and was known as the Simons' claim and would surrender the east half of said Simons' claim to Summers, and pay Summers \$500 in five equal yearly payments, Summers would surrender to the plaintiff a specific parcel of the Summers' claim, which parcel is the land in controversy in this suit. That on the same day plaintiff purchased the right of Simons to the Simons' claim, and paid for it \$700, and surrendered the possession of the east half of it to Summers. That plaintiff moved on to the premises in controversy on the 23d of November, 1850, at defendant's request, and has continued to reside on it to the present time.

That said defendant, on the 14th of May, 1853, fraudulently proceeded to, and did, make his final proof at the land office in Oregon city, of his continued residence and cultivation of said tract under the donation law, knowing that he had not at any time resided upon or cultivated the same from the 23d day of November, 1850.

The answer after denying these allegations, avers that defendant settled on said Summers' claim in 1848, and has continued to reside upon and cultivate the same ever since that time, and avers performance of the acts constituting a compliance with the donation law; alleges that the following is a copy of the only agreement ever made by defendant, Thomas Summers, with the plaintiff, viz:

*Santiam, Linn County, Oct. 23, 1868.*

"An article of agreement made and entered into by and between Thomas S. Summers and Philester Lee, witnesseth:

"*Know all men by these presents*, That I, Thomas S. Summers, of the first part, do agree to let Philester Lee, of the second part, have the undivided half of my claim, including one-half of my soda springs, for the undivided half of the Simons' claim adjoining mine, and five hundred dollars in equal annual installments.

"In testimony whereof, we have hereunto set our  
and seals.

"THOMAS S. SUMMERS, [Seal]

"PHILESTER LEE, [Seal]

"Witness: Richard Cheadle."

The answer charges that Lee moved on to the premises in dispute in the night time, violently, with force, without consent and against the will of the defendants, and that the plaintiff's continuance thereon has been without defendants' consent and against their will. That the land in controversy is a part of defendants' donation claim, and as such has been set off as the wife's part.

The pleadings also show that on the 14th day of October, 1853, defendant, Thomas H. Summers, filed a notification claiming the whole of the Summers' claim, and on the 15th of the same month the plaintiff filed a notification claiming that part of it which is the subject of this suit.

The complaint contains the following allegation: "The contest between said plaintiffs and defendants, as donors and land claimants to said tract of land in controversy has been before the land office at Oregon city and before the commissioner of the general land office at Washington city, on appeal from the decision of the land office in Oregon city, the title of said tract of land was awarded to said defendants by said commissioner, by reason of the false and fraudulent statements and proofs made by said defendants before said land office and commissioner."

*J. C. Powell*, for appellants.

*Cranor & Helm*, for respondents.

UPTON, J. The ground of complaint in this suit is substantially that the decision there made was procured by "false and fraudulent statements and proofs made by the defendant before said land office and commissioner.



The proofs in this case show that on the 23d of October, 1850, the parties conferred together in reference to a sale, surrender or abandonment to Lee of some privilege or interest in the Summers' claim, and in their conference it was proposed that the adjoining land known as the "Simons" claim should be obtained by Lee, and that Summers should take an interest in that tract. Simons was then temporarily absent in the Atlantic States, and one Carrol claimed to have some charge of the Simons' claim. The evidence is conflicting as to Carrol's right or power in the premises. Lee applied to Carrol and Carrol agreed to sell Lee the Simons' claim for \$700. Lee accepted the proposition and paid Carrol \$700. It does not appear that any papers passed, or that Simons ever received the money. Lee and Summers, on the same day (the 23d of October), came to an agreement as to the terms upon which Lee should obtain an interest in the Summers' claim, and they went together to a Mr. Cheadle and asked him to reduce the terms of their agreement to writing. Mr. Cheadle drew up, and Lee and Summers subscribed, the writing of which a copy is above set forth. According to the evidence this is the last attempt at bargaining that took place between Lee and Summers. Summers testifies that, owing to opposition to the plan on the part of Summers' wife, he (Summers) informed Lee, within an hour after signing the paper, that he (Summers) would not consider the agreement binding, nor part with an interest in his claim. Lee went immediately to Marion county and remained there at his former residence a month. On the 23d of November, 1850, he returned with his family and pitched a tent on the premises in controversy. Summers learned this fact about nine o'clock of that evening and went to Lee's tent and ordered him to leave the premises.

It does not appear that Summers ever had possession of any part of the Simons' claim or that Lee was ever in possession of the east half of it, which, in the complaint, he alleges he surrendered to Summers. The evidence shows that some

months after Lee bargained with Carrol, Simons returned and held possession of the whole Simons' claim, 640 acres. But sometime later he abandoned the west half and Lee took and still holds that half.

Simons was a witness, and says, in evidence, on the trial, I took my claim in 1848, improved it in 1849, and sowed grain on it in 1850. In June, 1850, I went to the States for my family, returned in October, 1851, to my claim. Lee came to me and wanted me to leave it. He said he had bought it of Carrol, and sold part of it to Summers. He said: "If you don't leave it I cannot hold Summers to the trade." I remained, and am on it yet. I could not hold but half of it, and threw off the west half and Lee took it. I did not authorize Carrol to sell or take possession of my claim. I did not leave my claim in the care of any one. The evidence shows that the first hundred dollars was duly tendered by Lee and refused by Summers.

There is conflicting evidence on many matters of facts alleged in the pleadings. But the conflict is confined principally to matters which the court does not deem of vital importance in the determination of the case.

The plaintiff's possession must be referred to a claim of right asserted by him under the agreement made October 23d, 1850, or he must be deemed an intruder without color of right. The former is the more probable conclusion, and one warranted by all the circumstances of the case.

In considering whether such relations exist between Lee and Summers as set aside the patent issued to Summers, or hold Summers a trustee under a patent to the use of Lee, it is necessary first to ascertain what was the contract made on the 23d of October, 1850.

The theory presented in the complaint and urged by appellants' counsel is that the real contract was oral and was made on the same day, but before the writing was made, and that the terms of the agreement are not those stated in the writing.

When parties, after coming to an agreement, deliberately reduce its terms to writing and attest it with their hands, the rule is, that no evidence of their contract can be received except the writing itself or evidence of the contents of the writing. The rule in regard to correcting imperfections and mistakes in the writing and in regard to contesting the validity of the writing, which are briefly referred to in *section 682 of the Code*, are not in conflict with this general and fundamental principle of the law evidence.

Without examining the question whether the pleadings put in issue any alleged mistake or imperfection in, or the validity of, the writing above quoted, it is decisive in that respect that the evidence shows, beyond question, that both parties appeared and deliberately stated the terms of the agreement and caused them to be written down; and there is no evidence tending to show that those were not written correctly, or that they were not in accordance with directions given and assented to by both parties.

All previous proposals and offers merged in the agreement there assented to by the parties and solemnized by the signatures and seals. (*Code, section 682.*)

This writing cannot be regarded as an executed contract, or as evidence of a sale of land, but it is, by its terms, an agreement to sell. "A mere agreement to sell land does not constitute a license to the purchaser to enter." (*Erwin v. Olmstead*, 7 *Cow.*, 239; 9 *John.*, 35; 3 *Ib.*, 424.)

It was said in argument that the agreement was of such a character as to estop Summers from setting up title to the land.

But in this case, the plaintiff has alleged and proved the very fact which he says the defendant is estopped to plead or prove; that is, that the legal title is in the defendant.

A party who would otherwise be estopped to set up a particular fact, may avail himself of the truth when the same fact is shown by his adversary's pleadings, and is thus made a part of the record in the case. (*Sinclair v. Jackson*, 8 *Cow.*, 548, 586.)

On the 23d of October, 1850, the passage of the donation law was not yet made known to the parties, and that fact is entitled to whatever consideration it may deserve in construing the written agreement by the light of surrounding circumstances, and in ascertaining what was the intention of the contracting parties. But when their intentions are ascertained, their knowledge or want of knowledge in that regard is entitled to no further consideration.

For the purpose of arriving at their intentions, it is just to regard them as intending to deal with what is denominated a possessory right, or that species of title which one obtains by an actual possession, without any higher right.

For the terms of the contract we are compelled to resort to the written agreement; but in construing it the situation of the parties and their means of knowledge may be properly taken into consideration. But it is not perceived how the circumstances tend to give the agreement the character of an executed contract.

If the parties believed Summers had no title but bare possession, it may be construed as an agreement that he would abandon his intention of acquiring that particular tract of land, or the half of it, and leave it open to the possession of another, and his failure to do so may have been a breach of the contract; but in that case he would be answerable for damages and his breach of the agreement could be redressed by a judgment in money for the amount of damages suffered.

But having ascertained what was the agreement actually made, we are to consider what was the actual condition of the parties at the time.

On the passage of the donation law, which was before the making of this agreement, Summers was a settler on and a part of the then public lands known as the Summers' claim, and he was qualified to take as a donee under section four of that act.

The act is in words of present grant, and actually conveyed to him the legal title to the premises. (*Fremont v. United States*, 17 How., 559.)

"When Congress grants lands in words of present grant," the legal title passes to the grantee. (*Wilson v. Jackson*, 13 *Pet.*, 499; 6 *Cranch*, 128; 8 *Ib.*, 244; 12 *Pet.*, 454; 2 *Wheat.*, 198.)

The cases just cited show that the title vests immediately in the donee; not the less because the title vests in him conditionally and subject to be defeated by his failure to comply with the law, nor because the boundaries are yet to be determined by survey.

By *section 329 of the Code*, substantially the same doctrine is declared as the law of this State.

As a necessary consequence of this doctrine the legal title to the premises had vested in Summers when his bargaining with plaintiff, Lee, commenced.

Had this been a suit for the specific performance of a contract, and had the appellant proved that he was in a condition to transfer to the defendant an undivided half of the Simons' claim according to the terms of the written agreement, and that he did so transfer it, the case would involve a consideration of the rights and disabilities of tenants in common claiming and attempting to acquire and hold land under the donation law.

But that is not the case made by the pleadings, and the appellants in their argument disclaim any such object. They seem to rely on showing, under *section 501 of the Code*, that the patent was wrongfully issued to the defendants.

That section expresses in a condensed manner what has always been the rule and practice of the United States courts in equity cases concerning public grants of land.

It has always been the practice when a patent has been "wrongfully issued to another" that the party claiming adversely as purchaser or "donee of the United States" may maintain a suit to have the patent canceled. And that when the party entitled shall have established his claim he will be deemed to have the legal title. And by the doctrine of relation, it will take its beginning from the date of his settle-

ment, or from the first of those steps necessarily taken by him in perfecting his title. (*Lessieur v. Price*, 12 *How.* 1; *Patterson v. Winn*, 11 *Wheat.*, 380; *Polk v. Wendell*, 13 *Cranch*, 87; *Bagnell v. Broderick*, 13 *Pet.*, 436, *Stark*, *S. C. U. S.*, 1868.

But this right to set aside a patent cannot be exercised by a stranger to the title.

Although the donee may have disqualified himself by taking the grant, one having no right to claim the land, a grant from the government will not be allowed to set aside the patent for disability. (*Curle v. Burrell*, 2 *Sneed*, 62.)

Under the rulings above cited, and under *section 501 of the Code*, the right to resist a patent rests only with the patentee, and those who are in an attitude lawfully to resist it under the government.

This subject is ably reviewed by Judge Field in the case of *Moore v. Wilkinson*, 13 *Cal.*, 487, where it is held that a patent cannot be set aside except in favor of "those who had title at the time such as to enable them to resist successfully any action of the government respecting it."

If all doubts were removed as to the plaintiff, PLUMMER, Lee, having complied on his part with the written agreement, and if he was an actual purchaser of an undivided lot, the Summers' claim that fact and the possession shown in the case; if under that agreement, would not place him in an attitude to sue under *section 501 of the Code*, as a person claiming a specific parcel of "real property as a donee in the United States." For if he went into possession under the agreement, he went into possession as a tenant in common with another, thereby admitting himself not in a position to claim as a donee, and consequently not in a condition to attack the patent issued to Summers.

The contract alleged in the pleadings is not supported by the proofs, and this failure cannot be deemed a cause of defense under sections 94, 95, and 96 of the Code. The

of evidence is against the conclusion that the plaintiff on his part complied with the contract established by the proof.

The case does not show the plaintiff to be so connected with the title as to be able to attack the patent.

On each of these grounds the decree of the Circuit Court should be affirmed.

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JAMES HEATHERLY and MARY J. HEATHERLY,  
Appellants, v. HENRY G. HADLEY, and HENRY  
C. OWEN, Respondents.

1. Construction of pleadings.
2. In pleading a former suit or action in bar, it is necessary to state facts showing what was the matter determined in the former suit or action.
3. What a sufficient service of summons and complaint.
4. In addition to a doubt as to the effect of the officer's acts in making service, the fact that no *certified* copy of complaint was served would be sufficient to make such attempted service invalid.

THIS is a suit to set aside a decree of foreclosure. After replication filed, the defendants moved for a decree upon the pleadings. The motion was granted and the plaintiff's appeal.

The complaint states that in 1863 James Heatherly was indebted to sundry persons to the aggregate of \$12,110 on promissory notes, and defendants, one or both of them, were *sureties* on the notes. Plaintiffs, who were husband and *wife* to secure defendants, mortgaged to them real estate of value of \$20,000 and assigned to them a certain note of \$5,000. Plaintiffs and defendants, at the time of *executing* the mortgage, made a written agreement that plaintiffs might sell parcels of the land at stipulated prices and apply the proceeds to pay the debts. The complaint proceeds; "And plaintiff alleges that it was further agreed in said agreement that defendants would forbear foreclosing said mortgage the space of one year from date of said agreement,

which by mistake was omitted to be inserted in said or written agreement."

Defendants, within the year, commenced their foreclosure suit and obtained a decree for \$9,228, and interest thereon at 15 per cent, per annum, and for a sale of the mortgaged premises; and afterwards plaintiffs became purchasers. The complaint alleges that plaintiffs did not owe defendants more than \$2,394; that plaintiffs were not served with summons in the foreclosure suit, and had no notice thereof, and that the sheriff did not give due notice of sale.

The complaint and answer each purport to set out the items of debit and credit, showing what was the state of the accounts between the parties.

The answer denies the material allegations of the complaint, except the defendants being sureties, of the mortgage and written agreement and the foreclosing of the mortgage. It avers that Heatherly's indebtedness to them exceeded \$9,228, and proceeds to say, that the decree of foreclosure "made no allowance for the \$415, charged as paid on the Cumming's mortgage or the \$450 paid on Humphreys' and Cooper debts; or it may have properly included the Rosenblatt debt. (The pleadings show that the Rosenblatt judgment of \$500 was in judgment in favor of defendant, Heatherly, against these plaintiffs, rendered in the County Court in the foreclosure suit.)

The answer alleges that Heatherly and wife were not served with summons and complaint by the sheriff in Lane county, as appears by the return, setting it out as follows:

"I hereby certify that I have this 14th day of October, 1863, served the above summons by leaving a certified copy thereof, with a copy of the affidavit and complaint, produced by the plaintiff's attorneys, in the hands of Mary J. Heatherly, wife of the defendant, James Heatherly (she being a white person above fourteen years of age), at his usual place of abode, in Lane county, Oregon.

"T. J. BRATTAIN, Sheriff.



The summons was directed to both defendants. The answer alleges that James Heatherly knew of the judgment of foreclosure a short time *after* the confirmation of the sale.

The answer then, apparently with some purpose of showing former adjudications, in bar of this suit, says: "That all the matters and things in this suit alleged \* \* \* have been substantially and full and finally adjudicated in former suits and proceedings in courts having full and competent jurisdiction thereof, between these parties, which said former suits and proceedings said defendants now and here plead in bar to this suit, to wit: A suit in equity determined in the Circuit Court of Lane county, April term, 1865," and proceeds to name other suits in a similar manner. The pleader then, in the body of the answer, proceeds to give "notice that on the trial of this suit, if any there shall be, they will give in evidence the court records and papers in said suits and proceedings, the answer of Norris Humphrey on writ of attachment relating to the Wait note, and the records and papers in the original foreclosure suit, with such other records and other proofs as may be deemed necessary to maintain the defense."

The replication denies the several allegations of new matter contained in the answer. The denial of the sheriff's return of service being that plaintiff has not sufficient knowledge or information to form a belief.

*Walton & Chapman, for appellants.*

*S. Ellsworth, for respondents.*

UPTON, J. The various points presented in this case may be resolved into three questions:

1st. Does the complaint, if taken as true, entitle the plaintiffs to equitable relief?

2d. Does the new matter set up in the answer, if taken as true, present a complete defense?

3d. Do the denials presented in the answer or represent issues requiring evidence in order to a proper determination of the case.

A court will, upon motion, render a judgment or for the defendant on the pleadings where the complaint to allege sufficient facts, or where the answer states showing a complete defense and these facts are not denied the replication.

The complaint, if taken as true, shows an unsettled between the parties, and the defendants claiming the tiffs' property under an alleged foreclosure against the tiffs in a suit in which they have not been served with and which was commenced before the cause of suit right to sue originated, the decree being for a larger than was just.

It needs no argument to show that the complaint, if taken as true, to entitle the plaintiffs to relief.

If the denials meet these allegations of the complaint, issues thus raised must be determined upon evidence. Such denials, be they ever so full, afford no ground for a decree upon the pleadings. If the pleadings present vital in the case, those issues must be tried and the case be determined upon proofs.

If, however, there is new matter constituting a defense set up in the answer and not denied by the defendant, in that case the decree of the Circuit Court was affirmed. It is, therefore, important to consider what new matter avoidance is set up by the answer.

The first part of the answer that can be looked upon as a statement of new matter relates to the situation of accounts between the parties at the rendition of the decree. But that part of the answer contains a virtual admission that the decree was taken for too great an amount. Each of fact proper to be pleaded should be stated in a direct manner, so that issue may be taken upon it by direct denial of the matters alleged. It is not sufficient to state a set

alternatives and allege that some one of them is true; much as, that one of them may be true, or may have happened. Facts should be stated without argument or reasoning in reference to them or their effect. This part of the answer is not only defective in naming several different items and alleging that one of them may have been included in the decree without asserting that any particular one was so included. But the admission that the decree "may have included" a particular demand or sum of money that was not owing, goes away with all advantage it was possible for the pleader to derive from allegations relating to that subject, upon the principle that the allegations of a pleading are construed more strongly against the pleader.

It is not always the case that a court of equity will open a judgment or decree where the proceedings have failed to conform to the rules of law. It is usually required of the party attacking a decree that he show that it is for too great an amount or in some other manner is inequitable, and that a trial of the cause will place him in a better position; in other words, he must not only show that his legal rights have been disregarded, but he must show himself entitled in equity to the relief demanded. The admissions of this part of the answer are a virtual confession of merits in this plaintiff's suit, provided his legal rights were invaded or disregarded in obtaining the decree of foreclosure.

The next statement in the nature of new matter is the reference to former adjudications. The answer contains no efficient pleading of a former suit or action, and it is in no way aided by the notice there set out, both because the substance of the notice, if stated in proper form, would be wholly sufficient, and because nothing in our system of pleading justifies the introduction of such a notice in the answer. Neither the matter plead nor the notice present an issuable fact in regard to a former suit.

The plaintiff is not called upon to deny the defendant's contention to "give in evidence, the court records and papers

in said suits and proceedings." It is equally erroneous to call on the plaintiff to admit or deny the conclusion that all the matters and things in this suit alleged have been substantially and fully and finally adjudicated in "former suits and proceedings" or in "a suit in equity determined in the Circuit Court of Lane county, April term, 1865," between the same parties.

In pleading a former suit or action in bar, it is necessary to state facts showing what was the matter determined in the former suit. (*Logan v. Talmage*, 14 John., 501, 511; *Fowler v. Hait*, 10 John., 111.)

Before the court will draw a conclusion that all the matters and things in this suit alleged have been adjudicated in a former suit, it must be informed what was the subject matter of the former suit. It is necessary that the pleadings contain such allegations of fact as to advise the court what were the issues determined or the matters adjudged in the former suit. To state simply that they are the same that are presented in this suit is the statement of a conclusion. If the replication had been silent in regard to former suits there is not sufficient in this part of the answer to have justified granting the motion for a decree upon the pleadings.

The allegations in regard to service of summons and in regard to a confirmation of sale, although the former meets an allegation by the complaint, may be treated as new matter. If the defendant in the former suit was duly served with process and failed to object to a confirmation of the sale, it may be reasonably urged that the order of confirmation should not be disturbed. The sufficiency of the confirmation as well as that of the decree under which the sale was made depends on the sufficiency of the service.

The complaint alleges that plaintiffs were not served with process. Had the answer simply taken issue upon that proposition it would have rendered a judgment on the pleadings improper. But the defendant goes further and shows the manner of service by setting out the sheriff's return in *haec*

*verba*. The replication professes to deny the return by declaring plaintiff's want of knowledge. There is much reason for the position that when one can obtain information by inspecting the records and files which are within convenient distance, and in a case in which he is a party, such denial should be treated as sham, and the court will treat this case as if the sheriff's return was not denied. In this case the pleadings do away with all presumptions of law by presenting the facts upon which depends the question of jurisdiction of the person.

The law in force in 1863 required service of summons to be made by "delivering a copy thereof, together with a copy of the complaint prepared and certified by the plaintiff, his agent or attorney," "to the defendant personally; or, if he be not found, to some white person of the family, above the age of fourteen years, at the dwelling house or usual place of abode of the defendant." The grounds of objection to the service are the following:

1st. It is claimed to be a good service on both Heatherly and his wife, although only one copy of summons or complaint was delivered.

2d. It was not served personally on Mr. Heatherly, and it does not appear affirmatively that he was "not found."

3d. It does not appear that the copy of the complaint was certified by any one.

In regard to the first objection, it may be said that no more was done than was necessary to obtain service on the wife; and there is reason to doubt whether it is a compliance with the spirit and intent of the statute, which seems to contemplate that a white person of the family over fourteen years of age will exercise a discretion, and notify a person stopping at the same house when a copy is left for such person. If Mrs. Heatherly was informed that the proceeding was intended as a service upon the husband, as well as upon herself, and that fact could be, in any proper way, made to appear, the objection would have less weight. But a decision of that point is not indispensable in this case.

To the second objection it is answered, and the court with reason, that the plaintiff cannot raise the question. His complaint shows affirmatively that at the time of the alleged service he was not in the State, and of necessity was not to be found in the county.

On the third point, it is to be observed that the defendant is presumed to state his case as favorably to himself as the facts will warrant, and he has not shown a strict compliance with the law. He was apprised by the complaint that the mode of service was a point relied upon by the plaintiff. In a copy which was actually certified by the plaintiff, his agent or attorney, the presumption is that the answer which produced the writ to set out the mode of service would have so stated.

Whether a judgment or decree, in a case where the defendant was served with a true copy of summons and complaint, would be defective on the sole ground that the copies were not certified, it is not necessary here to decide. In this case there is reason, on the face of the return, to doubt whether either the sheriff, or Mrs. Heatherly, at the time the writ was made, considered the proceeding a service on Mr. Heatherly. There is nothing in the case to show that he had any personal knowledge of the proceedings until after the decree was rendered. Service by leaving a copy at the dwelling-house, although good if made in strict pursuance of the statute, is not of a character to induce a court of equity to infer any implications or inferences in its favor, even if the court has the power to do so. Under the circumstances of this case the court is of the opinion that the want of a certificate of service is such a failure to comply with the law as to render the writ invalid as to the husband.

In this case it should not be overlooked that had the writ been perfect on both defendants there are issues of fact and mistake, which, if found in favor of the plaintiffs upon trial, would have justified the opening of the decree in the foreclosure suits. (*Bruen v. Howe*, 2 Barb., 586; *Hughes v. King*, 3 Ib., 616.)

The case made by the pleadings presented issues of fact which the Circuit Court should have proceeded to try, and the court erred in sustaining the defendants' motion for a decree upon the pleadings.

The decree of the Circuit Court should be reversed.

THE EAGLE WOOLEN MILLS CO., Appellant v.  
THOS. MONTEITH & HARVY D. SMITH, Re-  
spondents.

*Appeal from Linn County.*

1. One cannot dispute a title which he sets up, and upon which he bases all his right.
2. The deed of a corporation must be sealed with the corporate seal.
3. Such conveyance must purport to be the act of the corporation.
4. It is not sufficient that an agent declares that he does the act for and on behalf of the principal; the principal must grant the land.

THIS is a suit to restrain the defendants from selling certain real estate upon an execution, then in the hands of the defendant, Harvy D. Smith, sheriff of Linn county, sued out of the Circuit Court in favor of defendant, Monteith, against a corporation called the Linn County Woolen Mills Company.

From 1861 to 1863 there existed a partnership firm called by the same name, viz: Linn County Woolen Mills Company. On June 19, 1863, nearly or quite all the individuals composing the partnership became stockholders in the corporation of that name then created, and the copartnership ceased on forming the corporation. The property upon which the execution was levied consisted of two parcels of land, one of which included a water power, was the more valuable, and had been occupied by the partnership firm, and afterwards by the corporation known as the Linn County Woolen Mills Company. The second parcel was conveyed June 1, 1864, by William McHargue and wife, Andrew J. Warren and wife, and A. S. Bassett and wife, to "the president and directors of the Linn County Woolen Mills Company and their successors in

office for the use and benefit of the Linn County Woolen Mills Company."

The first parcel was conveyed May 3, 1861, by Black McHargue and their wives to H. J. C. Averill (and others named), trustees of the Linn County Woolen Company and their successors in office.

It is not shown that any conveyance was ever made of the copartnership to the corporation of the same name. On its formation the corporation came into possession and the same continued until the making of the deeds "I" and "S" in after mentioned.

In March, 1865, the factory of the Linn County Woolen Mills Company burned down, and that company, being in embarrassed and failing circumstances, was indebted to several persons, among whom were the defendant, Monteith. The grantees named in the deeds marked "I" and "S." were individuals who were then president and directors of the Linn County Woolen Mills Company, with a view to the satisfaction of those grantees preferred creditors, made those two deeds.

The deeds are in the following form:

*"Deed 'I.' No. 4.*

"This deed, made the 29th day of March, 1865, between Wm. McHargue, the president of the board of directors of the Linn County Woolen Mills Company, and A. S. Bassett, Claiborne Hill and H. J. C. Averill, the directors of the said company, parties of the first part, and John Brown, Wm. Smith, Silas Powell and Elias Keeney, parties of the second part, witnesseth, that the parties of the first part, for and in consideration of the sum of three thousand (\$3,000.00) dollars paid, the receipt of which is hereby acknowledged, have granted, bargained and sold unto the parties of the second part, the following described premises, to wit: (Description.)

"In testimony whereof the said Wm. McHargue, as president, as aforesaid, and the said A. S. Bassett, Claiborne Hill and H. J. C. Averill, of the said parties of the first part



and in behalf of said Linn County Woolen Mills Company, have hereunto set their hands and affixed their official seals on the day and year herein written.

"WM. MCHARGUE, *President*. [Seal.]

CLAIBORNE HILL,  
A. S. BASSETT,  
H. J. C. AVERILL, } *Directors*. [Seal.]

Edward R. Geary, } *Witnesses.*  
E. A. Ellis,

"Deed 'S.' No. 5.

"This indenture witnesseth that we, the president and directors of the Linn County Woolen Mills Company, that is to say: Wm. McHargue, president, and H. J. C. Averill, A. S. Bassett and Claiborne Hill, directors, for the consideration of \$1,200, to us paid, have bargained and sold, and by these presents do bargain and sell and convey unto Hugh L. Brown and Edward R. Geary, jointly, the following described premises, to wit: (Description.)

"To have and to hold the said premises, with the houses, improvements and hereditaments thereon and thereunto belonging unto the said Hugh L. Brown and Edward R. Geary, their heirs and assigns, forever. And we, the president and directors of the Linn County Woolen Mills Company, do hereby covenant to and with the said Hugh L. Brown and Edward R. Geary, their heirs and assigns, forever, and that said president and directors of the Linn County Woolen Mills Company, is the owner, in fee simple, of said premises; that they are free from all encumbrances, and that the said company will warrant and defend the same from all lawful claims whatsoever.

"Witness our hands and seals this 29th day of March, A. D. 1868.

"WM. MCHARGUE, *President*. [Seal.]

H. J. C. AVERILL,  
A. S. BASSETT,  
CLAIBORNE HILL, } *Directors*. [Seal.]

A. E. Ellis, } *Witnesses.*  
A. Andrews,

The former of the two deeds describes the parcel of first mentioned, and the latter the second parcel.

The grantees named in deeds "I" and "S" executed conveyance to the plaintiffs.

The defendant, Monteith, prosecuted his demand against the Linn County Woolen Mills Company to judgment, issued execution upon which the defendant, Smith, advertised both these parcels to be sold on the 13th of April, 1866, the property of the corporation, the Linn County Woolen Mills Company.

The complaint alleges that the plaintiff is seized in simple of the premises, that plaintiff is now and for a time has been owner and in possession thereof, and has owned a woolen factory thereon of the value of \$100,000. By way of a more particular specification of title, the plaintiff asserts that "the said real estate had been by said Linn County Woolen Mills Company sold and conveyed in good faith and for a valuable consideration, by proper deeds on the 9th day of March, 1865, a part to John Brown, William B. Smith, Silas Powell and Elias Keenay, for the consideration of \$3,000, which said deed is marked 'I,' attached to and made a part of this complaint. The residue, on the 29th day of March, 1865, to Hugh L. Brown and Edward R. Geary, for the consideration of \$1,200, which said deed is marked 'S,' attached to and made part of this complaint."

The answer denies the allegations of ownership; denies any sale of the premises by the Linn County Woolen Mills Company; denies that deeds "I" and "S" are the deeds of that company.

Alleges property in the Linn County Woolen Mills Company and avers "that the said Linn County Woolen Mills Company has not been divested of the title to said real estate or any part thereof."

The replication denies the material allegations of the answer, and declares that "It is not true that the said corporation, the said Linn County Woolen Mills Company,

It has been divested of the title to the said real estate mentioned in the said plaintiff's complaint." The pleadings contained no averments which it is not necessary here to particularize.

*W. Strong, Cranor & Helm*, for appellants:

A race of diligence among creditors is not fraud. (1 *Ogn.*, 44.) To the position of defendants, that plaintiff has a perfect legal title and could not seek relief in equity, a full answer is found. (*Code*, section 500, page 278.) To the claim of defendants, that deeds four and five were not authorized by the company at a meeting of stockholders, it is a full answer that the proof shows that the directors had been accustomed to transact all the business; and *Code*, section 8, page 661, settles that question.

That by deeds four and five the property levied on was never in the corporation, as it could only take in its corporate name. (*Ang. & Ames on Corp.*, sections 99, 100.)

That the deeds of the directors convey the legal title of the corporation to the grantees, under whom plaintiffs claim. (1 *Pick.*, 417, 428; 18 *Curt.*, S. C., 322.)

That if the deeds are not sufficient to convey the legal title, they do convey an equity that will be protected against a creditor in a judgment subsequent to the date of the attempted conveyance. (*Miller et al., v. W. & W. R. R. Co.*, 36 *Vt.*, 2; 30 *Vt.*, 167.)

*Powell & Logan*, for respondents:

Deeds four and five are not the deeds of the corporation; not executed in the corporate name; have no corporate seal thereon, but are in the name of the president and directors, with their private seals. (10 *Wend.*, 88; 23 *Wend.*, 435; 7 *Nw.*, 452, n. 1, 454; 4 *Hill*, 351-7-8, n. 359; *Red. on Railways*, 553; *Story on Agency*, 180-1.)

Those officers had no interest in said property by virtue of their office, and hence could not pass any by their private

deed. (*Story on Agency*, 182; 1 *Par. on Cont.*, 119, n. 6.) A corporation can only express consent by its seal. (1 *Black. Com.*, 475.) A body corporate can only act as prescribed by the law enacting it; its agents likewise. (2 *Johns.*, 119; 15 *Johns.*, 358, 383; 2 *Cowen*, 678, 699; 6 *Paige, C.*, 60; 3 *Barbour, ch.* 207; 4 *Paige, C.*, 481; 22 *Cal.*, 150.)

UPTON, J. The plaintiff is not in a position to raise the first point suggested in appellants' brief; that is, that the legal title was never in the Linn County Woolen Mills Company.

The complaint shows the Linn County Woolen Mills Company to have been in possession of the premises, and traces the plaintiff's alleged title through and from that company, and does not claim under any other better or adverse title. In favor of a defendant, possession is a good title against all the world unless a prior possession or better title be shown.

The plaintiff comes into a court of equity praying relief in favor of a title which, from his own statement, comes to the plaintiff through the Linn County Woolen Mills Company.

One will not be permitted to dispute a title which he himself sets up, and upon which he predicts all his rights.

If it were true in fact, and appeared in the case, that the Linn County Woolen Mills Company never had title to the premises, it would be questionable whether a sale under an execution against the property of that company could create a cloud upon the plaintiff's title. It may well be questioned whether it does not devolve on the plaintiff to show affirmatively that the legal title or some other assignable interest is in the Linn County Woolen Mills Company, to enable the plaintiff to maintain this suit; upon the principle that otherwise a sale under the execution would not create a cloud.

The next and principal point made in the case involves a much more important and difficult question, namely: Whether the deeds marked "I" and "S" were effective to transfer the interests of the corporation.

the appellant claims: 1st. That they are the deeds of the corporation and conveyed the legal title; and, 2d. If, from defect in their form and substance, they come short of conveying the legal title, they convey an equitable interest which should be protected in this suit.

It is claimed that the deeds, considered with reference to the situation of the parties at the time of their execution, show that the parties intended the instruments should operate to convey the property to the grantees in satisfaction of the claims respectively held by them against the corporation, the Linn County Woolen Mills Company. There is reason to believe such was the intention of the officers of that corporation; and if this was a suit against the Linn County Woolen Mills Company, with no intervening interest to complicate the case, that consideration might be decisive, upon the principle that "equity treats a thing as done which ought to be done," and "things agreed to be done as actually performed." Between the plaintiffs and the Linn County Woolen Mills Company, if the officers acting within the scope of their duties had placed the plaintiffs in a position in which the plaintiffs were without other remedy, there is no doubt equity would reform the deed or compel a new deed from the corporation.

This case differs in many respects from the suit of a vendee against a vendor, where the vendee has parted with the purchase money in good faith and gone into possession under a defective conveyance. In this case, if the deed is inoperative and void, the debt is not canceled, but is still good in the hands of the plaintiff's grantors against the company.

The transaction was an attempt to obtain a strictly legal advantage on the part of plaintiffs' grantors over the claim of the defendant, by being made preferred creditors. At its commencement the plaintiffs' grantors and the defendant stood upon an equal footing as creditors of the Linn County Woolen Mills Company, each having the right to resort to legal measures to secure the payment of his claim to the

exclusion of the other. It is not sufficient that the County Woolen Mills Company *intended* to pay one preference to the other. It is only sufficient to give that such claim was actually paid.

If the defendant had sued out an attachment interdict to levy it, and had actually taken what he thought was necessary steps to constitute a levy before the execution deed, if the levy proved defective, the defect would be the less fatal because made in good faith, or because the County Woolen Mills Company believed it a good levy. It surrendered possession on account of it.

Upon the same principle, if the Linn County Woolen Mills Company intended to divest itself of the legal title in favor of the plaintiffs' grantors, and to make them preferred creditors, and actually did so divest themselves of title, without fraud, before the defendant Monteith created a lien on the premises, Monteith's claim is groundless. An intention to sell, without an actual sale, would not deprive Monteith of his right as a creditor to levy on the property.

Nor will the fact that the plaintiff has made valuable improvement change the rights of the parties, or create an equity.

When the parties were each simply creditors of the County Woolen Mills Company, their rights and the justice and justness of the claim of each were equal, each resorted to such measures as he thought legal and judicious to secure payment of his demand. In pursuing those measures neither has reposed any trust in the other, and neither has made himself responsible to the other by inducing the other to act on his or their representation. If either has acquired additional legal rights there is no superior equity to prevent one party from having the benefit of the legal right acquired. The decision of the case must depend on the legal rights of the parties. The legal rights of the parties depend on whether the instruments marked "I" and "S" are s

convey the intent of the Linn County Woollen Mills Company to plaintiffs' grantors.

Argument is not necessary to establish the position that a deed of a corporation must be sealed with the corporate seal. But it does not follow that the seal must be of any particular form, or that it must be impressed on the instrument in any particular manner. It may be, like the seals used in this case, the word "seal" surrounded by a scroll. If it is in fact the seal adopted by the corporation as its corporate seal, it is sufficient. In the case of *Mill-dam Foundry v. Toovey*, 21 Pick., 417, one of the seals was held to be that of the corporation, although other parties joined in the execution of the instrument, and the seals "consisted of a wafer of a small bit of paper stamped with the common desk seal of a merchant."

If the instrument is in fact sealed by the corporation with its corporate seal, it is immaterial that there are other seals attached to the same instrument, and that there are more parties than there are parties executing the instrument. Nor are there words expressly stating that the corporation has affixed its seal indispensable. This is distinctly held in the case here cited.

The case of *Bank of Metropolis v. Guttschlick*, 14 Pet., is cited by appellant, sustains the position that a corporation may make a binding contract without using its corporate seal, if a case can be said to sustain a position that is not controverted by either party. But it does not intimate that a corporation can make a conveyance of land without using its corporate seal. In that case the important and controverted facts were "The Bank of the Metropolis, through the president and cashier, is hereby pledged, when the above sum (that is, the amount of a certain note) is paid to convey the lot in fee simple to said Earnest Guttschlick, his heirs or assigns for ever." The instrument did not purport to convey land. It was a mere agreement to sell.

The question did not arise whether or not a corporation

could make a conveyance without the use of its corporate seal. It was objected "that the agreement sued on, is averred to have been made by the bank 'through the president and cashier' without averring their authorization by the bank to make it." In determining the question the court say: "When, then, it is averred that the bank, by them, agreed, this averment in effect imports the very thing, the supposed want of which constitutes the objection; because upon the assumption stated, the bank could have made no agreement but by agents having lawful authority. Nay, it would have been sufficient in our opinion, that the bank agreed, without the words 'through the president and cashier,' for it is a rule in pleading that facts may be stated according to their legal effect. Now the legal effect of an agreement made by an agent for his principal, whilst the agent is acting within the scope of his authority, is, that it is the agreement of the principal." The action being assumpsit to recover back money paid in pursuance of the contract, the title having failed, it was objected that plaintiff's remedy was in covenant. The court overruled that objection and says, "although the agreement is under seal, it is not the seal of the corporation but that of the president and cashier."

The cases cited by the appellant do not sustain the position that the deeds of the directors convey the legal title of the corporation, and it may be assumed as settled law that the deeds do not have that effect unless they are deeds of the corporation.

There are several particulars appearing on the face of the deeds marked "T" and "S" that aid in determining whether they are the deeds of the corporation or the deeds of individuals.

One of these circumstances, and perhaps the least one, is that the number of seals correspond to the number of individuals who describe themselves as "the parties" of the first part. One that appears of weight is, that in the attesting clause they declare, in the one deed, that they "have here-



unto set their hands and affixed their seals," and in the other "witness our hands and seals," using the plural both in regard to the number of seals and the number of individuals executing. But a still stronger indication that it is not the deed of the corporation is that its signers declare, both in the body of the instrument and the attestation, that they act "for and in behalf of the Linn County Woollen Mills Company." If an agent or attorney execute the deed of a principal he must execute it in the name of the principal. (*Spencer v. Field*, 10 Wend., 88.)

If this was intended as a deed of the corporation, the corporation should have been one of the parties to the contract. But the four individuals who subscribe their names are declared to be the parties of the first part. They describe themselves the one as president, and the other three as directors, but it is themselves that they declare "have granted bargained and sold." The language does not import a sale by the corporation, but they declare that *they* have granted, bargained, and sold the premises *for* the corporation. The corporation alone can perform that act. The conclusion is unavoidable that the parties executing the instrument intended the seals used as their individual seals, and not that they were, or believed they were, then attaching the corporate seal to the instrument. In *Stone v. Wood* 7 Cow., 454, Wood describes himself as agent of I. and R. Raymond, but it was held that Wood, and not the Raymonds, was bound. In *Fowler v. Shearer*, 7 Mass., 19, the instrument was in this form: "Know ye that I, Abigail Fowler, of, &c., and also as attorney to John Fowler, in consideration, &c., have given." It was held that this was not the deed of John Fowler. Parsons, Chief Justice, said in that case: "If an attorney has authority to convey lands, he must do it in the name of the principal. It is not sufficient that he declares that he does it for and in behalf of the principal; the principal must grant the land or it is not granted."

This doctrine is too thoroughly established to admit of question, and authorities are abundant that sustain the position.

The same rule governs in regard to corporations, both public and private. (*Story on Agency*, sec. 149; *Bank of Columbia v. Patterson*, 7 Cranch, 299, 388; *Damon v. Inhabitants of Granby*, 2 Pick., 345.)

The decree of the Circuit Court dismissing the bill should be affirmed.

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JOHN M. SHIVELY and Wife, Appellants, v. JAMES WELCH, Respondent.

*Appeal from Olatsop County.*

1. It is incumbent on a party, seeking relief in equity against a mistake in a writing, to establish the mistake by proofs precluding all question, and that the mistake was contrary to the intention of the parties.
2. The agreeing to make, or the making of a quitclaim deed, does not prevent or estop the maker from purchasing subsequently an independent title, and holding the same property.

The history of the case is fully set forth in the opinion of the justice.

*Olney & Elliott*, for appellants:

Jurisdiction of courts of equity over questions of mistake. (*Story Eq. Jur.*, volume 1, sections 151, 152, 155, 156; *Story Eq.*, volume 2, sections 783, 784, 790, 1040, 1057.)

*W. Lair Hill*, for respondent:

On same point. (*Hunter v. Bilyew*, 30 Ill., 248; *Loe et al. v. Hovey*, 3 Allen, 331.)

**KELSA, J.** The pleadings in this suit are the amended complaint, the answer thereto and the replication to the answer. The complaint and answer raise two main issues. 1st. Did the appellants, on the 18th day of February, 1881,

mistake, insert and include in the conveyance, executed by them to respondent on that day, lots Nos. 5, 6, 7, 8 and 9 of block 114, in the town of Astoria, Clatsop county, Oregon, contrary to the intention of the parties? 2d. Were the appellants the equitable owners of the lots just designated at the commencement of this suit? All the issues raised by the answer and replication are substantially those raised by the complaint and answer. It is assigned as error that the Circuit Court decreed that no mistake was made by the appellants on the 18th of February, 1860, in the conveyance then by them executed to respondent so far as respects lots 7, 8, and 9, in said block 114. This court having examined the transcript, find that, on the 18th day of February, 1860, Welch and Shively having, prior to that time, had a settlement respecting the title to a tract of land known as *Shively's plat, of Astoria*, in Clatsop county, undertook to settle the difficulty by deeds and agreements to divide the

That, by the terms of this settlement, Welch was to settle the controversy in the land office, and Shively was to make the patent to the land from the United States government; that Shively and wife were to convey by deed to Welch and wife, such portions of the land as were by the settlement to belong to Welch; that a similar adjustment, as to the part of the tract of land, had been attempted by the parties on the 13th day of March, 1850, when each made a conveyance to the other of their respective shares. That the settlement of 1850, as far as it went, was to be the basis of the settlement of February 18, 1860, except that, in the transaction of 1860, deeds were to pass only from Shively and wife; that in the deeds of 1850, the whole of block 114 was conveyed to Welch by Shively; that as to lots 7, 8, and 9 in block 114, the court finds that there was no agreement, prior to the execution of the deed of February 18th, 1860, to reserve except these lots out of the deed, and that as regards the instrument, that instrument cannot be charged with mistake. Therefore, there was no error in the decree of the Circuit Court.

in that particular. While it cannot be denied that there is some conflicting evidence in regard to lots 7, 8, and 9, inserted in the deed by mistake, yet the weight of the evidence was against that conclusion. To entitle a party to the aid of a court of equity, reforming a written instrument, it is incumbent upon him to establish the error or mistake by proofs, so satisfactory in their nature as to preclude the question. Equity tolerates nothing less. Further, it must be fully shown that the part omitted or inserted in the instrument was omitted or inserted contrary to the intention of the parties. Relief will not be granted whenever the instrument is loose, equivocal or contradictory, or, when in its terms it is open to doubts and opposing presumptions. (1 Story's *Equity*, secs. 155, 157; 38 *N. Y.*, 676.)

The second error assigned is as follows: Admitting that the error on the first point, the court erred in not decreeing the property in said lots 7, 8 and 9 to appertain to Charles W. Shively by virtue of their purchase from Charles W. Shively. Charles W. Shively purchased them from Ezra Fisher, respondent, who was the owner of said lots in said block. From the evidence submitted, the court finds that the respondent did, in 1846, enter into a contract with Fisher to make him a quit-claim deed to the lots referred to, when he should acquire a title from the United States government; that Fisher did attempt to sell the lots to Charles W. Shively on the 30th day of April, 1855; that in April, 1861, Charles W. Shively attempted to convey them to John M. Shively, appellant.

It is admitted that John M. Shively became possessor of the legal and equitable title of the United States to the lots in dispute, and had the title when the appellants received the deed of 1860. Welch's contract with Fisher only bound him to make a quit-claim deed to the contested lots when he should receive a title from the United States government. The title of Welch to the lots was not acquired by him from the United States government, but from the appellants, and was not within the agreement with Fisher, nor in any

affected by the matters therein. Appellant is not therefore entitled to any relief against the defendant below. (2 *John. Cases*, 202.)

Finally, it is assigned that the court erred in overruling the motion, by appellants, for a modification of the decree in this suit, so that the same should be without prejudice to any other subsequent suit or proceeding, for or concerning said lots 7, 8 and 9 in block 114.

We think the court did not err in overruling the motion, first, for the reason that the lots named were not inserted in the deed of 1860 by mistake; secondly, because John M. Shively, appellant, was the grantee of the United States, and had the legal and equitable title when the appellants made the deed of 1860.

Decree is affirmed.

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**MILLER BROTHERS, Appellants, v. BANK OF  
BRITISH COLUMBIA, Respondents.**

*Appeal from Multnomah County.*

**Who may confess a judgment against a private corporation.**

**Judgment by confession without action requires a statement; otherwise, such a judgment after action brought.**

**Judgment by confession, regular upon its face, can only be impeached by suit in equity for fraud, &c.**

**Judgment debtor, or his representatives, in case of his death, the proper persons to object to the confirmation of sheriff's sale.**

**On** the 2d day of July, A. D. 1867, the Bank of British Columbia commenced an action in the Circuit Court of the State of Oregon, for Multnomah county, against A. I. Bloch and the Oregon City Paper Manufacturing Company, upon a promissory note for \$10,000.40, dated Portland, Oregon, March 19th, 1867, executed by said manufacturing company,

and payable to the order of A. I. Bloch, and by him indorsed to the Bank of British Columbia.

The summons was served on A. I. Bloch and A. J. Apperson, secretary of the Oregon City Paper Manufacturing Company, on the 2d day of July, 1867, and on the 3d day of July, 1867, confession of judgment was made by A. I. Bloch and James D. Miller, the president of the Oregon City Paper Manufacturing Company, which confession was duly signed and acknowledged by the latter as president of the company, and by A. I. Bloch.

W. W. Page, attorney for the bank, assented to the confession of judgment for and on behalf of the bank. Whereupon judgment was entered against said defendants, A. I. Bloch and the Oregon City Paper Manufacturing Company, for \$10,000.40 on that day. Miller Brothers are junior judgment creditors by virtue of a judgment obtained against the Oregon City Paper Manufacturing Company, on the 18th day of July, A. D. 1867, by default, for the sum of \$1,147.12 in currency, and \$289.22 in gold coin. The summons was served on James D. Miller, president of the company, on the 9th day of July, 1867, and judgment was entered by the clerk in vacation. On the 7th day of September, 1867, the property of the Oregon City Paper Manufacturing Company was sold by virtue of an execution issued upon the judgment in favor of the Bank of British Columbia for \$1,400, in gold coin, to A. I. Bloch. A notice of motion by Miller Brothers to set aside and vacate the judgment in favor of the bank, and to oppose a confirmation of the sale to Bloch, was duly given, and came on for hearing on affidavits, &c., at the November term of the Multnomah Circuit Court.

On the 21st day of December, 1867, the Court overruled the motion and confirmed the sale. Appellants duly excepted to the decision and appealed therefrom to this court. Miller Brothers introduced on the hearing below an affidavit setting forth certain alleged fraudulent acts on the part of the bank, Bloch, and the company; that Bloch was the real owner of

the note, and that their proceedings were to secure Bloch and defraud Miller Brothers, rather than to collect a debt due the bank.

*Mitchell, Dolph & Smith*, for appellants, claim:

That the company had no right to confess a judgment, because it was not conferred by act of incorporation. (*Code*, 659, section 5; *Sedg. on Constitutional Law*, 339, &c.; 4 *Peters*, U. S., 152, 168; 40 *Barb.*, S. C., 256.)

The statute merely designates the person who may execute the confession when the act of incorporation gives such power. (*Code*, 672, 235.)

Plaintiffs are junior judgment creditors, and have a right to assail the judgment by confession, and that by motion, and may set up fraud. (7 *How.*, *Pr. R.*, 448; 30 *Barb.*, 117; 10 *Paige*, ch. 243; 13 *Wend.*, 236; 8 *Paige*, ch. 349; 16 *Abbott*, *Pr. R.*, 548; 4 *Johns.*, 143.) For powers of a corporation, see 38 *Barb.*, 181; 4 *How. U. S.*, 553; 3 *Cranch*, U. S., 166; 2 *Cow.*, 678, and others cited.

As a judgment by confession, it is defective in statement. (2 *Ogn. Rep.*, *Richardson v. Fuller*; 9 *How. Pr. R.*, 61; 2 *Kernan*, 215; 18 *Cal.*, 576; 30 *Barb.*, 117.)

*Page & Thayer*, for respondents. (No brief furnished.)

KELSAY, J. It is assigned as error, in the first instance, that the Circuit Court held that the president of the Oregon City Paper Manufacturing Company, above named, had authority to confess a judgment against the company. We think this objection is not well taken, for the reason that, when an action is against a private corporation, confession of judgment must be made by the person who at the time sustains such a relation to the corporation as would authorize the service of a summons upon him. (*Code*, page 201, section 248.) The company was a private corporation. (*Code*, 658.) The service of a summons upon the president of a private corporation was authorized at that time, and is now.

(*Gen. Laws of 1866, page 9, section 54, sub. 1.*) The confession of judgment being by the proper officer, the presumption is that he was duly authorized (*Code, page 337, section 766, sub. 15*); and there being no proof to the contrary, the presumption remains.

It is also assigned as error that the Circuit Court held the statement of facts sufficient to authorize a judgment by confession. We hold that, after an action has been brought, a confession need not state the facts out of which the indebtedness arose. (*Code, page 201, sections 247-8-9-50.*) Otherwise, such statement is necessary. (*Sections 251-2-3.*)

The confession and assent thereto were in writing subscribed by the proper parties making the same, and acknowledged by each. It is claimed that this must be regarded as a confession of judgment by statement, for the reason that, on the part of the bank, it was so characterized. It cannot be so regarded. The character and effect of a confession are fixed by law; and, notwithstanding a party may designate the transaction by another name, the legal effect is unchanged.

It is again assigned that the Circuit Court erred in holding and not considering the affidavit filed by Miller Bank to sustain said motion. We think the court did not err at this instance; for the reason, that the confession and assent were regular, and can only be impeached by a showing of equity on the ground of fraud, &c. When the judgment is irregular, then a motion supported by affidavit to set it aside will lie. (*3 Johns. Cases, 279.*)

Finally, as regards the objections to the confirmation of the sale, the *Code, page 217, section 293, sub. 1 and 2, provisions 1.* "The plaintiff in the writ of execution shall be entitled to motion therefor to have an order confirming the sale, at the term next following the return of the execution; or, if not returned in term time, then at such term, unless the judgment debtor, or, in case of his death, his representatives shall appear with the clerk, ten days before such term, or, if the writ



turned in term time, then five days after the return thereof, objections thereto." 2. "If such objections be filed the court shall, notwithstanding, allow the order confirming the sale, unless, on the hearing of the motion, it shall satisfactorily appear that there were substantial irregularities in the proceedings concerning the sale, to the probable loss or injury to the party objecting; in the latter case, the court shall disallow the motion, and direct that the property be re-sold, in whole or in part, as the case may be, as upon an execution reversed of that date." The debtor filed no objections as herein provided, and no irregularities having been shown, the Circuit Court committed no error in confirming the sale.

Judgment is affirmed.

MES F. BYBEE, and T. B. YOUNG, Respondents, v.  
THOMAS L. BURBANK, Appellant.

*Appeal from Multnomah County.*

Money was deposited with a stakeholder, conditioned that if the horse "A" should win, the money should be paid to respondents; and if the horse "B" should win, then it was to be paid to another party. The issue between answer and replication was, did the horse B win?—*Held*, that a finding, under the pleadings, by a jury was equivalent to a finding that neither horse won; and either party could withdraw their money from the stakeholder. Presumptions of proper findings of fact arising from verdict.

THIS is an action to recover money, claimed to have been deposited with defendant by the plaintiffs, a part in gold coin, and the remainder in legal tender notes. The answer alleges that the money sued for, to wit, \$290 in gold coin and \$10 in legal tenders, was deposited with defendant by plaintiffs as their part of a certain wager of \$580 in coin and \$20 in legal tender notes; which plaintiffs on the one side, and Jones & Kirk on the other, one-half by each

party, had bet on a certain horse race, to be run on day of July, 1868, between two horses named Yellow and Young's horse.

It was stipulated between said parties that, if Jacket should beat in the race, the said wager was to be delivered by defendant to Jones & Kirk; but if Young should beat, then it was to be delivered to plaintiffs. Answer alleges that Yellow Jacket did beat Young's horse in the race, and that defendant then paid the wager to Jones & Kirk.

The replication denies:

1st. That Yellow Jacket beat Young's horse in the race.

2d. That defendant paid the money to Jones & Kirk.

On these issues there was a trial by a jury, and a verdict for plaintiff for \$290 in coin and \$10 in legal tender.

It is alleged as error:

1st. That the court below refused to arrest the judgment on the verdict.

2d. That the court rendered judgment against defendant and in favor of plaintiffs.

#### *D. Logan, Esq.:*

If a wager is legal neither party can rescind the contract, or recover back the money until the wager is determined. (2 *Parsons on Cont.*, 139, 261; 21 *Ill.*, 244.)

After the event the plaintiff, in order to recover the money, must make a clear case of his right to the money to enable him to recover in an action at law; that is, must show that he was the winner in the race.

After a legal wager is determined, the money must be paid to the winner, and the loser cannot recover his stake. (*Ohio*, 54; 2 *Smith L. Cs.* 305.)

#### *Stout & Thayer, for respondents:*

The plaintiffs had a right to demand their money at any time before it was actually paid over to Jones & Kirk, and if they had won it, in pursuance of the agreement.

wer, for the agreement was illegal. (2 *Parson's Cont.*, 201, *note*; 4 *Barb.*, 524; 4 *Johns.*, 442.)

The allegations in the pleadings, taken together, are consistent with this finding of facts:

1st. That the money was deposited with defendant upon a wager under the agreement in the answer.

2d. That the race was run.

3d. That Jones & Kirk's horse did not beat in the race; the allegation being denied in the replication.

4th. That defendant undertook, when the money was deposited with him, to deliver it to the plaintiffs on demand.

5th. That demand had been made while the money was in his hands, and that he had refused to deliver it.

BOISE, J. It is urged by the appellant that if the jury find that Yellow Jacket did not beat Young's horse it would be a finding, under this issue, that Young's horse won the race, for it is not so alleged in plaintiffs' replication; and, therefore, it would be an even race, which would be still undetermined and undecided, and that the money could not be recovered of the stakeholder while the bet was pending.

Conceding, for this argument, that wagers are legal and binding contracts, these parties, as the pleadings show, agreed to run this race on the 4th of July, 1868, and that the winning party should have the wager; and it appears that the race was run. If the race was run and neither horse beat, it was an even race, and neither party would be entitled to the wager, and each party would have a right to withdraw the deposit from the stakeholder.

In this case the jury must be presumed to have found that Yellow Jacket did not win the race, and that defendant still had the money deposited with him; for everything must be presumed in favor of the regularity of their verdict.

These issues being determined in favor of the plaintiff by the jury, we think he was entitled to judgment.

**Judgment is affirmed.**

E. W. RHEA, Appellant, v. UMATILLA COUNTY  
Respondent.

*Appeal from Marion County.*

1. When the duties of an assessor commence.
2. The assessor and county clerk form a tribunal from whose a writ of review may be taken.
3. Having sought a reduction in assessment from that tribunal the decision being adverse to him, it is too late for appellant to seek and obtain redress in Circuit Court after the lapse of more than six months.

In June, 1865, appellant was the owner of 350 head of stock in Lane County, Oregon, which stock, on the 1st of June, 1865, was assessed in that county, and the tax was paid by appellant, and a receipt of the sheriff taken therefor. About the first of August, 1865, the said band of stock was taken to Umatilla county, Oregon, and kept there for the purposes of increase and sale, and were assessed there. Appellant claims that said second assessment was illegal, and that he appeared before the clerk and assessor of that county, at the proper time, and made proof of former assessment and payment of tax thereon, but that those officers refused to correct the assessment by remitting the same. Appellant further claims that he applied to the County Court of Umatilla county, at its September term, 1865, and made full disclosure of the facts, but that said court refused and omitted to correct said erroneous assessment. The tax levied thereon in 1865, not having been paid, was included in the delinquent list in 1867, which list, with proper warrant attached, was given to the sheriff, who levied upon a portion of said stock, and, under protest of appellant, sold the same and paid the amount of the taxes due. Appellant sued the county of Umatilla, in trespass, to recover damages for such expenses, laying the amount at \$1,000.

Umatilla county demurred, generally and specially to the complaint. Special reliance is placed on the argument

on the point "that the complaint does not state facts sufficient to constitute a cause of action." The court below sustained the demurrer, and gave judgment for defendant there- and plaintiff appealed here.

*Ellsworth & Walton*, for appellant.

*Bonham & Lawson*, for respondent.

No written briefs furnished.

**WILSON, J.** The appellant insists upon these positions in argument: That the assessment in Lane county was a valid one, and the tax levied thereon proper. That the assessment in Umatilla county was without authority of law; and the levy by the sheriff, and sale, were illegal. That Umatilla county, by its agents, having caused the injury, and received the benefits, should respond in damages.

These points respondent denies, and, as a bar to this action, claims that appellant has mistaken his remedy.

From the laws relating to assessors it would seem that their duties commence immediately after the first Monday in July, of the year of their election, but it is not clear as to such time in the second year of their term. The question, whether the assessment of Lane county was not premature in his assessment of appellant's stock, is obviated by reference to the law providing for the taking of the quinquennial census. *Code* 1865, *section 6*, reads thus: "It shall be the duty of assessors to enter upon the discharge of their duties, on or before the 1st day of May, of each year in which they are required to comply with the provisions of this act."

The year 1865 was the year designated for taking the census, and the assessor was acting lawfully on the 29th day of May in that year; and, upon such assessment, appellant could have been forced to pay the tax levied.

It is of no importance for us to pass upon the legality of the assessment made in Umatilla county, since the decision

here does not turn upon the priority or peculiar leg the two assessments.

After completing the assessment of property, the on the last Monday in August, sits with the county clerk and board of equalization, for the purpose of correcting assessments, as to valuation, &c., at which time, if it appears that any property has been twice assessed, or assessed beyond its actual value, the quasi board shall adjudicate upon the same and make all proper corrections. This is the only authority known to our laws having any such original jurisdiction. The conclusion to which they come upon this proper matter, as to valuation, &c., is in the nature of a final judgment, and is entered as a matter of record upon the assessment roll. From their supervision the roll goes to the county Court to serve as a basis for the levy of taxes, and the jurisdiction of that court over the roll for corrections extends to all formal matters. The quasi board of equalization passes upon the whole assessment roll, and it is their decision that determines the value of all property prepared for taxation.

We think the clerk and assessor constitute a tribunal upon whose decision a revision may be had under section 573, page 295 of the Code, which reads thus: "In no case shall any party to any process or proceeding before any officer or tribunal may have the decision thereof reviewed for errors therein, as in this title prescribed, except as otherwise." The last clause of section 580, page 296, chapter 10 provides: "In no case shall the writ be granted unless the application therefor be made within six months from the date of the decision or determination complained of." The clerk and assessor sit as a tribunal after notice has been given that they will then make an assessment of valuations, and any aggrieved property owner ought to appear and seek redress for wrongful or incorrect assessments. When they do so seek a correction and are satisfied with the decision, the law provides no other remedy but to avail themselves of the writ of review; and

within six months after the decision. Suppose for a moment that appellant could have sought redress by a decision of the County Court, as he claims to have done, and there received an adverse decision. By section 875, page 367 of the Code, "the decisions of the court" (the County Court) in the transaction of county business "shall only be reviewed upon the writ of review provided by this Code." Appellant avers that in due time, in the fall of 1865, he made application for redress to both the clerk and assessor, and to the County Court, and, in both tribunals the decision was adverse to him. He made no opposition to that decision until in the year 1867 when the sheriff, armed with a warrant for the collection of delinquent taxes of 1865, seizes and sells his property for those taxes. For two years an adverse decision has stood unreversed. That decision was upon record as though it were a judgment, and the tax warrant was literally an execution issued on it. It seems to us that, having a proper and speedy remedy at hand by which his rights could be protected, appellant has suffered an adverse decision by a tribunal having proper jurisdiction to mature into a finality; and is now too late to claim what he then might well have done. If this conclusion be true, the sheriff of Umatilla county is a valid process based upon a proper adjudication; and if he certainly committed no trespass by seizing such a portion of appellant's property as would realize on sale the amount of taxes due. In coming to these conclusions we find it unnecessary to say upon any question as to the form of the action. We think the appellant has no proper standing in court in this case.

**Judgment is affirmed.**



PATRICK HOGAN, Respondent, v. PHILIP WYMAN,  
W. H. TIDD, and GEORGE P. WREN, Appellants.

*Appeal from Multnomah County.*

1. A witness to a will is not disqualified thereby from taking the will, a trust estate, in which he has no beneficial interest.
2. Where the legal estate is vested in the executors merely for the purpose of sale and conveyance, it is not absolutely necessary that they should qualify fully, or should report their proceedings to the Probate Court.

On the 23d of August, 1866, Patrick Hogan, the respondent, being in possession of lot six, in block twenty-four, in the city of Portland, filed his complaint against the appellants to quiet his title to said lot, as against the appellants.

In 1850, Daniel H. Lownsdale, then the owner of the premises, conveyed it to said G. P. Wren; and Hogan alleges, in support of his title, that Wren sold the same to Tidd & Anderson, and delivered to them possession of the premises, but failed to execute to them a deed. The consideration for the sale by Wren was work performed for him by Tidd & Anderson. That Anderson sold his interest to Tidd; Tidd to B. F. Starr; Starr to McNulty, and McNulty devised the said premises to McCormick & O'Neill, as trustees for the use of the Roman Catholic church, with full power to the trustees to sell the same for the use and benefit of the church. The said trustees took possession, under said deed, and sold the said lot to the plaintiff, who took possession. It is alleged that the possession has accompanied this title of title all the time since the sale by parcel from Wren to Tidd & Anderson.

In October, 1865, Wren and wife conveyed said premises to defendant, Wyman, for the consideration of two hundred dollars, which conveyance plaintiff claims was fraudulent.



void as against him, and that Wyman, at the time of conveyance to him had notice of his, Hogan's, equities in the premises.

Decree below for respondent.

*W. Chapman, Esq.*, for respondent, claims that:

1. Payment of purchase money and delivery of possession entitles the party to conveyance.

2. All the right of Mrs. McNulty passed to the devisees by her will, and they could sell without farther orders or commissions.

*McNulty & Mulky*, for appellants:

1. Showing that the possession of Hogan's tenant alone was sufficient to Wyman, it was only notice of the deed from McCormick & O'Neill, and that, when examined, failed to show notice in the grantee. (*Wyncoop v. Cowing et al.*, 21 Ill., 570; *Wyncoop v. Norcross*, 14 Pick., 224; 8 U. S. Dig., 66.)

2. As to executor's sale, *statute of 1855, page 345, sections 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.*

3. In *Wren v. J.* The case presents a question of fact which must be determined from the evidence; and this court finds that the equities of the respondent, as above stated, are fully supported by the evidence; and that Wyman, at the time of his purchase from Wren, had notice of these equities belonging to the plaintiff.

4. As to the execution of the will of Mrs. McNulty, it is sustained:

1. That McCormick, being a witness to the will, could not be a trustee under it; that witnesses to wills are disqualified by the *Statute, page 388.*

As McCormick had no beneficial interest in the but was merely a conduit to pass the property to the we think he had no such interest as would disqualify

2d. That the executors did not qualify by giving b

This we think was unnecessary; as the property v them by the will, they had the legal estate and could it, to fulfill the trust imposed on them.

It was unnecessary for them to make a report of t to the Probate Court.

This was a trust estate, and it is the peculiar d court of chancery to see that the trust is properly by the trustees; and the court will not allow a trust for the want of trustees to execute it. Suppose this l left to endow a college, the property might have rem the hands of the trustees and their successors for man and then been sold for the benefit of the institutio exigencies should demand, and those proceedings wo been without the jurisdiction of the Probate Court.

The decree is aff

**JAMES B. STEPHENS, Appellant v. JOSEPH B**  
Respondent.

*Appeal from Multnomah County.*

The reservation in a sale of a ferry franchise read thus: " grantor and his family shall have all their ferrying a ferry free from all charges or demands forever."—Held, t those words, the grantor might engage in any ordinary and enforce his right of ferriage.

In March, 1861, Stephens was the owner of a fer chise across Willamette river at Portland, in Mu county; which franchise he then sold to Knott, rese the indenture of sale, signed by both parties, the righ riage to himself and family, on the boats of Knott, t tee, free of charge forever.

The words of the reservation are "that said James B. Stephens and his family shall have all their ferrying across said ferry, free from all charges or demands forever." Some time in March, 1868, a person, claiming to be the servant of Stephens, demanded a crossing at said ferry with certain loads of lumber, and was refused, and Stephens brought this action to recover for the non-compliance of Knott.

It appears from the report of the case, that at this time, 1868, Stephens was the owner of a saw-mill on his land, on the east bank of the Willamette river, opposite Portland, and that he owned timber adjoining said mill; that he had a contract with one New to the effect that New was to run said saw-mill, cut, and haul the logs at his own expense, and deliver the lumber on the mill yard. Stephens was, by the agreement, to take the lumber from the mill yard, and deliver it in the city of Portland, at his own expense; when the lumber was to be sold, and the proceeds divided equally between Stephens and New. Stephens hired one Guile to haul this lumber to Portland, at a certain stipulated price, he, Stephens, agreeing to pay the ferriage.

Knott obtained a judgment in the Circuit Court for costs, and Stephens brings the case here on appeal.

*Hogan & Shattuck*, for appellant.

*P. Friedenrich, Esq.*, for respondent.

BOISE, J. By the contract Stephens was to haul this lumber to Portland. He could have hauled it with his own team as the same as any other product of his farm, if he had not been engaged in furnishing vegetables for the Portland market. It is true that New had an interest in the lumber when it was in Portland, but he had no interest in the hauling for that was the business of Stephens alone, and it made no difference to New who paid the ferriage. Stephens and New had a common interest in the lumber when in the market prepared for sale; but they had no common interest or obli-

gation in the manufacturing and delivery; each had his separate part to perform. Suppose New had owned one hundred thousand feet of lumber on the east bank of the Clatskanie river, and Stephens, being a teamster, had contracted to haul it at three dollars per thousand to Portland, he could claim ferriage under such a contract, then he could claim it as well if he had agreed to haul for one-third or half of the lumber, there would be no difference in the principle.

The question now is whether, under the reservation in the deed of Stephens to Knott, Stephens would be entitled to engage in the general business of hauling for hire across the ferry. The words of the reservation are general and of the broadest signification; no limitation is specified, and the parties had undertaken to include all ordinary business which Stephens should engage, they could not have used more apt language to convey such a meaning. We are, therefore, of the opinion that the hauling of the lumber, under the circumstances shown in the report of this case, comes within the meaning of the reservation, and that by its terms Stephens was entitled to have it ferried by Knott.

The judgment is reversed.

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STATE OF OREGON ex rel., SCHOOL DISTRICT NO. 29,  
Respondent, v. LESTER HULIN et al., Appellant.

*Appeal from Lane County.*

1. School districts are public corporations coming under section 237 of the Code.
2. An action for the purpose of annulling their corporate existence must be begun by direction of the governor of the State.

THIS action was brought to set aside a school district corporation, No. 29, on the relation of school district No. 29 to have its corporate existence declared void, for

ularities alleged to exist in the proceedings, by which district No. 38 was laid out and organized.

*Ullsworth & Dorris*, for appellants, allege as error below: d. The action is commenced against the clerk and director of school district No. 38, contrary to law, as will appear in the answer of defendants below, appellants here, which is not desired by plaintiffs.

That by *section 352, page 237 of the Code*, the action must be brought by and with the consent of the governor.

*Strahan, Walton & Willis*, for respondent, claim that the action is not commenced as alleged, but against certain persons assuming to act as a corporation.

JOHNSON, J. Without proceeding to consider the alleged irregularities complained of this court is of the opinion that the action was not legally instituted in the court below, so as to deprive that court jurisdiction of the subject matter of the controversy. School districts are public corporations, and their corporate existence cannot be annulled except as provided in *section 352, page 237 of the Code*, and the action for that purpose must be directed by the governor of the State. His official sanction does not appear to have been given in this case.

The court below, therefore, having no jurisdiction to try this case, its judgment is erroneous and must be reversed.

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S. PARTLOW, Respondent, v. WILLIAM SINGER,  
CHARMAN & WARNER, Appellants.

*Appeal from Clackamas County.*

The Statute, section 25, page 144, revives the old rule, that a payment by one joint debtor or joint contractor, on the indebtedness, revives the liability as to all.

2. In case of a payment on bill, bond, note &c., the limitation to run from the time of the payment.

PARTLOW commenced this action in the County of Clackamas county, against defendants, on a promissory note executed by defendants to him on the first day of January, 1859. The complaint sets out a payment of ten dollars on said note, March 25th, 1861; the suit was commenced on March 25th, 1867. To this complaint, defendants, Charman Warner, demurred on the grounds: 1st. That the action had not been commenced against the defendants, Charman Warner, within the time limited by law; and 2d. That the complaint did not state facts sufficient to constitute a cause of action. On the argument of the demurrer it was admitted by both parties that the payment of ten dollars, mentioned in the complaint, was made by defendant Singer without the knowledge or consent of the other defendants, Charman Warner, or either of them. This admission was entered on the record, and so found by the court in its decision of the demurrer. The court overruling the demurrer, the defendant, Charman Warner, the only one served with process elected to stand the case whereupon the court gave judgment for the plaintiff. The defendant appealed to the Circuit Court, and there the judgment below was affirmed, and defendant, Charman Warner, brought the case here on appeal.

*S. Huelat, Esq., for appellants:*

1st. A payment by one joint, or joint and several signers on a promissory note, in that note does not in any wise bind the other signers: *Van Keuren v. Parmelee*, 2 Coms. 18; *Shoemaker v. Benedict*, 11 N. Y., 176; *Winchell v. Van Keuren*, 18 N. Y., 558; *Bell v. Morrison*, 1st Peters' U. S. 451; 2 *Parsons on Cont.*, p. 358-9-60-1, &c.; 11 *Minn.* 138; 20 *Tex.*, 77; 11 *Foster N. H.*, 219, and authorities.

2d. The admission of one of two joint contractors on a contract when they are not partners, cannot deprive the other of his defense when both are sued on the contract. (2 Coms.,

ed. That section 25, page 144 of our Code will virtually read section 24, same page, if any other construction is put on it than is given in New York to section 24.

*Johnson & McCown*, for respondent:

The only reasonable construction of our statute (section 25 above), is that a payment by one joint maker of a promissory note, without the knowledge or express consent of the other maker, takes it out of the statute of limitations as to all the makers, when the payment is made after the note is due. *Winchell v. Bowman*, 21 Barb., 448; *U. S. Dig.*, vol. 20, sections 7-8, page 649; 19 Ark., 692; 9 Conn., 496; 38 Maine, 387; 14 Pick., 387; *Whiteaker v. Rice et al.*, 9 Minnesota, 387, based upon a statute precisely like ours.

BOISE, J. From the statement of the case, the only question for determination by this court is, did the payment by the defendant made March 25, 1861, so renew the note as to take it out of the operation of the statute of limitations? Were our statutes silent on this subject, we think there is no doubt of the weight of authority is that a payment on a note, by one of two joint makers, does not operate to renew the note as to the other joint obligor, who was not privy to the payment.

It has been held in New York that "there is no mutual agency between joint debtors by reason of their joint contract, which will authorize one to act for the other so as to discharge the liability." Such has been the settled law in that state since the case of *Van Keuren v. Parmelee*, 2 Coms., 387, decided in 1849. The same doctrine has been held by the Supreme Court of the United States, in *Bell v. Morrison*, 1 Peters, 351, where that court says that, after the dissolution of a partnership, one partner cannot bind his co-partners by a new promise to pay a debt, which, without such promise, would be barred by the statute of limitations. In *England*, it was held that a part payment by one of several

original joint debtors or contractors, either of principals or sureties, upon the original debt, revives the remedy against the other parties, although they are sureties only. (*Chisholm v. Bank of England*, 103 U.S. 418, 434.) The same doctrine was held in Maryland in *Massachusetts*; but in the latter State the rule has been changed by statute. It has been strenuously urged in argument that our statute can be so construed as not to overthrow the doctrine, now so well established by the weight of modern authority, "that a promise or payment by one contractor does not bind his co-contractors so as to release their liability;" and this is the sole question here. This requires an examination of *section 25, page 144, of the Code*, which provides: "Whenever any payment of principal or interest has been or shall be made upon an existing contract, whether it be bill of exchange, promissory note, bond, or other evidence of indebtedness, if such payment be made after the same shall have become due, the limitation shall commence from the time the last payment was made."

In this case the note was due at the time of the payment. The statute is silent as to the several liability of the parties making the payment, and any obligor to a note may properly make a payment on it; and, as the statute fixes the time when the limitation *shall commence*, we think it was the intention of the legislature to revive the old rule, reviving liability on all on a payment made by one of several joint debtors. We do not see how any other construction could be put upon the statute without violating the ordinary interpretation of language.

Ordinarily, the statute begins to run when the note is paid. In this case the statute fixes the time at the date of the payment, and such plain language can have no other significance. With the same statute, such is the rule in *Minnesota* (*9 Minn.*, 13.) We think, therefore, that the judgment of the court below was in accordance with the statutes, and is affirmed.



OREGON IRON COMPANY, Appellant, v. J. C. TRULLINGER, Respondent.

*Appeal from Clackamas County.*

A & B conveyed to C a water power, &c., thus: "With all the water privilege which can be obtained (by 'C') by building a dam below the saw-mill of B, and to flow back the water to the foot of the present overshot wheel of B.'s mill, and to use all the water which naturally flows below said mill in said stream, unobstructed by A & B. &c."—Held, to mean the water as it flows in the stream below from the saw-mill, when the same was in operation.

In 1864, respondent and one A. A. Durham were the owners of Sucker creek and Sucker lake, of which it is the outlet. Sucker lake is about two miles long and one-fourth of a mile wide. Sucker creek, flowing from the lake, empties into the Willamette river at Oswego, in Clackamas county, and is a small stream in summer; and the distance from Sucker lake to the Willamette river is but a few hundred yards.

At the time of making the contract, the proper construction of which is in controversy in this case, there was a dam across Sucker creek at the point where it issues from the lake; by means of which dam, the waters of the lake were raised some eight or nine feet. When the winter rains prevailed the dam was filled; and the water propelled a saw-mill, then belonging to said Trullinger and Durham. The water so saved in the wet season was sufficient to run the saw-mill during the dry season, and was a valuable water power, and was so considered by Trullinger & Durham. Being so possessed of said water power and mill, and being the riparian owners of said lake and creek, they entered into a written contract, or conveyance by which Trullinger and Durham, and Durham and wife conveyed to one H. D. Green a piece of land near the mouth of said creek, and below their saw-mill and dam, "together with all the water privilege

on Sucker creek, the outlet of Sucker lake, which can be obtained by building a dam above the land described as above stated), and below the said Durham's saw-mill, a point to be selected by the said Green, his heirs and assigns, he having the right, which is hereby granted, to construct and maintain a dam of any length and height and to back the water to the foot of the present overshot wheel of said saw-mill; and the right at all times to use all the water which naturally flows below said saw mill in said stream, not obstructed by the parties of the first part, their heirs and assigns."

Afterwards Green conveyed his interest to the plaintiff, who have constructed a dam, and built and put in operation a blast furnace for the reduction of iron ore; and use the waters of said creek for the purpose of operating their machinery; and it appears that it was for the purpose of doing these works, that the land and water power were purchased of defendant and Durham.

The further statement of the case is found in the opinion.

*Wm. Strong, Esq., and Logan & Shattuck, for appellants.*  
No authorities cited.

*Mitchell, Dolph & Smith, for respondent:*

The owner of the land upon a stream not navigable for the reasonable use of the water, and may build a dam, and obstruct the momentum of its fall upon his own land. (3 Kent 439; 2 Hill. Real Est., 101, 102 and 103; 2 Washb. Est., section 40.)

Where the owner of an entire estate sells a portion thereof, the purchaser takes the portion sold with all the benefits, subject to all the burdens, which appear at the time of sale to belong to it, as between it and the part retained by the vendor. 21 N. Y., 505, and cases there cited.

In construing the deed the court will resort to extrinsic circumstances, &c. (1 Barb., 639; 3 Barb., 79; 13 N. Y., 569; 6 How. Pr. R., 817.)

The court will look at the whole instrument and there-  
under the true meaning. (2 *Cowen*, 781.)

General words are restrained by the particular occasion.  
(*Johns*, 420; 5 *Cowen*, 468.)

The literal import of words, when inconsistent with the  
intent intention of parties, will be disregarded. (*Kelly v.*  
*Don*, 3 *Duer*, 291, 309.)

BOISE, J. Appellant contends that by the terms of this  
conveyance, it has a right at all times to enjoy the natural  
flow of the water in said creek, unobstructed by the defend-  
ant's dam; that is to say, that the words, "which naturally  
flows below said saw-mill in said stream, unobstructed by  
the parties of the first part," &c., mean as the same was in a  
state of nature. If this view should be entertained as correct,  
then the defendant and Durham sold to Green all their con-  
veyance over the water in said lake and creek, and in effect  
abandoned their saw-mill and dam, and water power apper-  
taining thereto. If this were the understanding, why the  
reservations in the conveyance, limiting Green to the right to build  
a dam at a point below said saw-mill, and also limiting him  
to let water by his dam, only to the foot of his overshot  
wheel of his saw-mill? These reservations and limitations  
are inconsistent with the theory, that it was the intention of  
the parties to the conveyance to convey away to Green the  
control of the water at and above said saw-mill. We think  
the court below gave the right construction to the convey-  
ance, and that the words, "which naturally flows below said  
saw-mill in said stream," mean the water which flowed from said  
stream when the same was in operation. Any other construc-  
tion would necessarily defeat the objects of the conveyance;  
the evidence shows that without the aid of the defendant's  
dam to husband the waters of the wet season, the water  
power of plaintiff would be comparatively useless, not being  
sufficient to run the machinery during the summer.

Judgment is affirmed.

STATE OF OREGON, Respondent, v. SANFORD  
and R. H. TAPP, Appellants.

*Error to Lane County.*

1. On an action on an undertaking for bail, it was not error the discharge by parol of defendant.
2. A statutory undertaking for bail is not a recognizance, simple promise to pay money on certain conditions.
3. When the undertaking has been signed, and a formal just completed in presence of the magistrate, it is sufficient.
4. It was not a substantial error to permit the magistrate at of trial to append his certificate to the undertaking.

THIS action is brought upon an alleged violation part of defendants of their undertaking as bail in a action.

The judgment of the Circuit Court was in favor plaintiff for the amount expressed in the undertaking and costs. The defendants appeal.

One R. G. Fry, had been held to answer upon a ch assault with a dangerous weapon. The defendants sub an undertaking which was in the form prescribed in 287 of the Criminal Code. The undertaking was dat subscribed by the defendants as sureties in the prese the magistrate taking the bail. These defendants at th time justifying as such bail by affidavit, duly subscri sworn by them before the magistrate and by him ce The undertaking was received by the magistrate, and upon the defendant was discharged, and the magistrate mitted the undertaking, with the other papers in the o the Circuit Court in accordance with section 411 of the

The magistrate neglected to certify in writing that dertaking was taken and acknowledged before him, a made no written order directing the sheriff to discha defendant.

On the trial of the cause the Circuit Court permitted the plaintiff to prove by parol that the defendant was discharged at the time the undertaking was signed; this is assigned as error.

The court in the course of the trial permitted the coming magistrate, who was present, to append to, or endorse on the undertaking his certificate that the undertaking was taken and acknowledged before him, which is also assigned as error.

The appellant also assigns as error the instruction to the jury that, "if the undertaking was signed in the presence of a justice an acknowledgment was not necessary."

*W. R. Willis, Esq., for appellants:*

The undertaking, when filed in the Circuit Court, is a matter of record and cannot be amended in a collateral proceeding. (4 *Denio*, 534-5-8-9 and 44; 2 *Johns. Chan.*, 205.) The gist of this action being matter of record, it must be proven in that form alone. (4 *Met.*, 423.) Section 267 and pp. 485 and 486 of the Code, require that the undertaking be signed by the sureties in the presence of the magistrate taking the bail and acknowledged before him, and he must append thereto his certificate, &c. (4 *Denio*, 437; 4 *Iowa*, 189; 3 *Iowa* 189; 1 *Oregon*, 308.) The discharge of the prisoner, the allowance of bail and acknowledgment of the sureties are material facts, and must be alleged in the complaint and proven by record.

*F. Watson, District Attorney:*

The making of the indorsements is a ministerial act, not judicial; defendants have done all necessary acts. These acts are apparent from the complaint and bond, and the answer expressly admits the execution of the bond, and defendants are estopped. Issues raised by answer are immaterial. The record shows defendant Fry was admitted to bail. (4 *Iowa*, 189.) Objection concerning justices' entries immaterial. *Statutes*, 585, sec. 5, sub. 12; *Statutes* 478, sec. 215.)

promise of future payment, the party becoming surety required to acknowledge a past indebtedness, or in words to confess a judgment. The record thus made, produced as evidence to sustain the action directed to be commenced, is held to be conclusive. In those cases it has still required that the form should be "an acknowledgment of indebtedness to the people" or the State. (*People v. Dell*, 6 *Hill*, 506.)

The undertaking prescribed by our Statute is radically different in form and substance and retains nothing of the nature of the confession of a judgment or a recognition. It is a simple contract, a conditional promise for the payment of money, to be sued upon as is a bond or promissory note.

In such an undertaking when is the contract completed? When it is signed by the parties, placed in the hands of the magistrate, and the defendant discharged; or when the magistrate shall have appended his certificate?

The law positively requires a justification by affidavit before the defendant has a strict right to his discharge. It has never been held that the want of the affidavit can be set up as a defense in an action upon the undertaking.

The law makes it the duty of a magistrate to certify to the acknowledgment of a deed, and he may be liable if he neglects or declines to do so; but the deed is good between the parties before he certifies. In case of a deed the certificate of acknowledgment is taken as proof of the execution, it has never been held that in the absence of a certificate in case of a defective one, it is error to prove the execution by parol.

When a party comes before a committing magistrate and deliberately subscribes to such a promise as is set out in the undertaking, and makes the formal affidavit of justification as bail, he cannot in good faith set up that he has made no acknowledgment. He thus makes all the acknowledgments that the statute expressly requires of him, all that the law seems to contemplate, and all that is consistent with

ature of the transaction. When the agreement is signed, and in consideration of the promise, the defendant is discharged, the contract is made and completed; new rights are acquired, new obligations are assumed, and there is no reason why the failure of an officer to perform a subsequent ministerial act should invalidate the contract.

The case in 30 *Cal.*, 627, is cited as maintaining a contrary opinion from that here expressed.

The instrument under consideration in that case is called a recognizance in the legislative act that provides it, and it is evident that the court so treated it, and based the opinion upon that view of the instrument. There is no reason to think the court would have come to the same conclusion, if the instrument under consideration had been deemed to be, the undertaking in this case, simply a conditional promise for the payment of money at a future time.

Whatever reasons there may be under the Criminal Code of that State for the conclusion arrived at in regard to the instrument under consideration, the courts of that State have held, in regard to undertakings in civil cases, which are substantially like the one here presented, and in regard to bail bonds, that parties executing them cannot take advantage of want of compliance with the statute in certifying, justifying, approving, &c. Such subsequent acts being treated not essential to the binding force of the contract. (*People v. Edwards*, 9 *Cal.*, 293; *Dore v. Covey*, 13 *Ib.*, 506; *People v. Carpenter*, 7 *Ib.*, 403.)

See also *Turner v. Billagram*, 2 *Ib.*, 522, and *McDermott vs. Isbell et al.*, 4 *Ib.*, 113, as to the propriety of allowing a party who has had the benefit of the contract to raise similar objections.

The case of *People v. Kane*, 4 *Denis.*, 534, cited by appellant, sustains the views here expressed in regard to the difference between a simple contract and a recognizance, and shows that the reason for the rules of practice applicable to recognizances totally fails when applied to this case, Per-

mitting the magistrate to append his certificate at the was not an error affecting a substantial right, and there error in the charge to the jury.

The judgment should be affi

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ALVAN FLANDERS, Respondent, v. WILLIAM K.  
Appellant.

*Appeal from Umatilla County.*

When a bill of items of account is filed under section 82 of the if the same be deemed insufficient or defective by the other, the proper practice is to move that the same be made more or definite.

FLANDERS sued Ish on an account for goods, wares annexing to the complaint a condensed bill of items, giving them to some extent. Ish served a notice upon Flanders' counsel to furnish a specific bill of items. No such bill was given to Ish or his counsel. Upon the trial, counsel for the appellant objected to the introduction of any testimony as to the specific items of goods, on the ground that no bill of items had been furnished after notice served. The court overruled the objection and admitted the testimony. Flanders' counsel excepted to the ruling and appealed his case. Here, judgment having been given for respondent below, we reverse the verdict.

*O. Humason, Esq.*, for appellant.

*J. K. Kelly, Esq.*, for respondent.

BY THE COURT. The *Code*, page 159, section 82, provides: "A party may set forth in a pleading the items of an account therein alleged, or file a copy thereof with the pleading, verified by his own oath, &c. If he do neither, he shall deliver to the adverse party, within five days after a de-



hereof in writing, a copy of the account, verified as in this section provided, or be precluded from giving evidence hereof."

A bill of items of a general character had been made a part of the complaint, as provided in that section, and respondent had so far complied with the statute that he could not be deemed as in default. If the bill of items, so in the record, was deemed insufficient or defective by the adverse party, we think his remedy was, not in treating the bill filed as of no moment, but in moving that the same be made more definite and certain. By the last clause in section 82, the court was authorized "to order a further account when the one filed or delivered is defective."

We think the Circuit Court ruled properly and the judgment is affirmed.

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JOHN CATLIN, Respondent, v. JOSEPH KNOTT,  
Appellant.

*Appeal from Multnomah County.*

Interest is allowed on mutual accounts, except after the settlement thereof and the striking of a balance.

CATLIN, in his complaint, avers that Knott was indebted to Lawrence, on a verbal contract, in the sum of one hundred and fifty dollars, for labor and services, and sues, as agent of Lawrence, with a written order from him. The complaint is brought, both on an express contract for that sum, and *quantum meruit*, averring the services to be worth the sum of two hundred and fourteen dollars. Knott answered, denying such contract with Lawrence, and averring that, if any such contract existed, it was a joint one with several persons, including Knott, and dependent upon a condition, that, if Lawrence, as an attorney, should gain a certain law

suit, then pending, he should have \$150; otherwise, not, and claimed a payment of \$20.

The record shows that a demand was made upon the defendant for the *whole amount*, and, that without farther words, the defendant said he had paid Lawrence \$20. In Justice's Court the plaintiff had judgment for \$214.25. On appeal in Circuit Court the plaintiff obtained judgment for \$162.30, being principal and interest.

Two grounds of error are principally relied on: :

1st. That there was no evidence of any assignment of the claim to the plaintiff by Lawrence, of the claim sued on; and,

2d. That the verdict was for a greater amount than the law could be rendered by law.

*Stout & Reed*, for appellant:

*7 Hill*, 577; *Story on Bills*, section 3; *12 Johns.*, 291; *Pick.*, 163.

*John Catlin, Esq.*, for respondent:

*Parsons on Cont.*, 381; *22 Pick.*, 291; *7 Wend.*, 10.

WILSON, J. We think that the finding of the jury is conclusive of any question as to the real contract between the parties, and they must have found the averments in the plaintiff's complaint as substantially proven. It was not necessary that any written order from Lawrence should be offered in evidence; it was sufficient if the jury were satisfied that Lawrence was the real owner of the claim, by purchase, for a valuable consideration.

It does not appear from the record here, that the defendant ever had any distinct understanding or agreement as to the amount of indebtedness on the one side, or of claim on the other. In fact, though Knott claims he had paid Lawrence twenty dollars, he denied any indebtedness, and seemed to think he ought to recover that amount back. Plaintiff claimed for the whole amount, although from the plaintiff's testimony there was this payment made. It is very evident that

no mutual understanding as to any certain amount of difference between them.

The Code, page 755, section one, provides: "That the rate of interest in this State shall be ten per centum per annum, and no more, on all moneys, after the same become due on judgments and decrees for the payment of money; on moneys received for the use of another, and retained beyond a reasonable time without the owner's consent, or on money due upon the settlement of matured accounts, from the day the balance is ascertained, &c." The mode of settling matured accounts involves the examination of the same by the parties, and the arrival at an understanding of the amount remaining due from the one party to the other as an adjustment thereof. It becomes a settlement, and in such cases only is interest allowed to run. We think this case develops no such action of the parties, and no such mutual understanding, and, of course, no interest accrued. The court below erred in allowing the claim for interest.

The judgment should be modified, and respondent only recover the amount of one hundred and thirty dollars.

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**W. CRAIG, Appellant, v. JOSEPH MOSIER,**  
Respondent.

*Appeal from Marion County.*

The recorder of the city of Salem is *ex officio* a justice of the peace within the city limits.  
Construction of section 883 of the Code as applicable to such officer.

CRAIG sued Mosier on an account for thirty-eight dollars.  
The action was brought before C. N. Terry, recorder of the city of Salem, county of Marion, and *ex officio* justice of the peace.

Craig resides within the city of Salem, Mosier within the precinct of Abiqua, in the same county. Service was exe-

cuted by Wiley Chapman, as city marshal and constable, defendant made default, and judgment was rendered for thirty-eight dollars. Defendant then sued out a writ of review, and in the Circuit Court obtained a reversal of judgment, and Craig, plaintiff below, appealed.

*Bonham & Lawson*, for appellant:

1st. The charter of Salem made the recorder a justice of the peace within the city of Salem.

2d. As such justice he had jurisdiction hereof. (*Harris*, 2 Oregon, 1866; art. 4, sec. 23, Constitution of Oregon; *Howard's N. Y. Code*, 49, 85.)

*Williams & Willis*, for respondent:

That defendant did not reside within the limits of the city of Salem, and was not found therein.

WILSON, J. This court has decided in the case of *Wilson v. Harris*, 1866, that the legislative assembly could lawfully make the recorder of a city a justice of the peace within the city limits and the only question presented here is whether such creation place him within the general provisions relating to justices of the peace, and give him as ample jurisdiction? By Statute, amended section 883, *Laws of Oregon*, page 40, except for the recovery of a penalty or for the enforcement of a fine, "the jurisdiction of a Justice's Court does not depend upon where the cause of action arose, provided, that the plaintiff or defendant shall reside in the precinct where the action is commenced; or, personal service can be had on the defendant in any precinct in the county, and if the defendant does not reside in the State, the action may be commenced in any precinct in the State." If the recorder became invested with the act of the legislature, with full jurisdiction as a justice of the peace, then there is no doubt that this action was properly brought and determined. It becomes a mere matter of construction of the section 883.

In granting charters to cities, and in creating municipal corporations, the legislative assembly do not intend to sever the political relations already existing, that a city within a county is now, territorially and politically, as formerly, a part of the county, still liable for its share of the public bur-  
den, and only obtains certain local rights, such as better improvement of highways, more protection against danger from fire, disease, violence, etc., with the power to pass local laws applicable to the new State, not inconsistent with general ones. So its officers are local in their jurisdiction; they exist because of the charter, where that fails to cease. Within the prescribed boundary, the incumbents of these offices are clothed with sufficient authority to exercise fully the powers, and perform all the duties thereof, and more. The legislature can confer upon the city recorder powers of a justice of the peace, and his duties will be perfectly consistent with both offices, but these powers only exist within such territorial limits as are given to him as recorder. These *quasi* special laws are to be construed strictly. They change existing states and conditions, institute new relations, and must be subject to the construction consequent upon laws thus operating.

We think he is a justice of the peace only by reason of a municipal constitution; when he ceases to be recorder, he is no longer a justice of the peace. When he resigns the office of recorder, he need not resign that of a magistrate. He performs the duties of a magistrate only where he may act as recorder.

Suppose, as is often the case, that a city is created out of parts of several counties. These counties have governments independent of each other; the officer of one has no authority in the other, except as may have been expressly and specially provided. The residents in that city may each separately carry on the relations to their respective counties, and assume those consequent upon the municipal condition. The recorder of such a city would, under the construction

claimed by appellant, be a justice of the peace, with a jurisdiction extending over several counties, and co-extensive with their limits. Such an office is inconsistent with the general law. His residence within the city is in one of these counties; he could not vote for the county officers in the county; he is not liable to general taxation save in his own. By reason of the city charter he enters into new relations with the citizens of other counties; is interested in, and liable to the provisions and laws affecting, alike, territory in these counties; but this is only because of the charter. We think the charter was intended to restrict the authority of a recorder or justice, to the city limits. When a person resides or is within the corporate limits, he becomes for the time being subject to the local laws in force there; may be prosecuted for riding upon the sidewalks; be served with any process authorized by law; be sued before any officer having jurisdiction, and have the judgment enforced against him.

With this construction, the process, issued by the recorder in this case, was inoperative in Abiqua precinct, and could not compel the appearance of Mosier. Mosier had not placed himself within the jurisdiction of that officer any more than would a citizen of Polk county, in an action brought by a magistrate in Marion county, when he had never crossed the Willamette river eastward.

It is not necessary to say anything about the service of the summons. The marshal had no greater jurisdiction than service than had the recorder over the case.

The recorder is only justice of the peace within the city limits, and the court below properly interpreted his authority.

**Judgment is affirmed.**

**W. C. JOHNSON and J. D. DEMENT, Executors of the  
Estate of Wm. C. DEMENT, deceased, Appellants, v.  
THE CITY COUNCIL OF OREGON CITY, Re-  
spondent.**

*Appeal from Clackamas County.*

The possession and control over property, if an estate, by an executor or are those of an owner, for purposes of assessment and taxation.

The situs of invisible and intangible personal property is with the owner.

Notes, mortgages, &c., of an estate being under the control of an executor living in an incorporated city, though the same may be deposited outside the city, are liable to assessment and taxation for corporate purposes by the city.

PLAINTIFFS, as executors of the estate of Wm. C. Dement, 1867, had in their possession \$30,000 in the shape of notes and mortgages, upon which the city council of Oregon City used to be assessed and collected a tax amounting to \$270. The appellants claimed that this property was not liable to assessment and taxation by the corporate authorities, and brought this suit to recover back from the city the tax collected. The facts as they appear in the findings of the Circuit Court are substantially thus:

W. C. Johnson, one of the executors of said estate, at the time of the death of W. C. Dement, and ever since, has resided in Oregon city; and at his office in said city the business of said estate is, and always has been mainly and principally conducted. John D. Dement, the other executor, at the death of W. C. Dement, also resided in Oregon city, and continued to reside there and in Portland, until he removed to San Francisco, California, in 1866, where he now resides. Ever since he left this State said Johnson has exercised the entire control and management of the business of the estate.

This \$30,000 was money loaned by said executors which was evidenced by certain promissory notes and mortgages

taken by said executors, and were in the actual custody of said W. C. Johnson until a short time before the assessor of said corporation commenced the assessment for 1867, when Johnson took said notes and mortgages and deposited them a short distance outside the city limits; he retained the control of them for all purposes, and the right to the actual possession of them at any moment, and collected interest on them in all respects precisely as he did when they were in his office. From these facts the Circuit Court found as a conclusion of law that appellants could not recover in the action. Plaintiffs appealed.

*W. C. Johnson, Esq., for appellants:*

The city charter only authorizes the council to levy a tax upon property actually within the city limits. (*Hoyt v. Com. of Taxes*, 23 N. Y., 224; *New Albany v. Meekin*, 3 Ind., 481; *Wilkey v. City of Pekin*, 19 Ill., 160; *Johnson v. City of Lexington*, 14 Monroe, 648; *Cutting v. Hall*, 21 Vermont, 152; 29 Cal., 533.)

*S. Huelat, Esq., for respondent:*

W. C. Johnson was the sole acting executor, and had the same property in the goods of the deceased that the principal had when living. (1 *Black. Com.*, 11 Book, 426.)

The charter provided for levying taxes upon all real and personal property actually within the corporate limits of the city, *made taxable by law for county or territorial purposes.*

By statute, an executor shall be assessed for all personal property held by him in such representative character.

By statute, personal estate includes, among other things, "moneys and gold dust on hand or on deposit, either within or without the State; all debts due, or to become due, from solvent debtors, whether on account, contract, &c."

That the *situs* of invisible and intangible personal property is with the owner, and nowhere else; it is the debt that is taxable and not the security. (16 Cal., 167; 23 Cal., 138.)



PRIM, J. The question for decision here is, whether this thirty thousand dollars due the estate on notes and mortgages was liable to assessment and taxation under the authority granted to the city council by the act of incorporation. It is claimed that it was not; because, it is said that it was not actually within the corporate limits of the city at the time of the assessment and levy of this tax. The act of incorporation provides that the city council shall have power to levy and collect taxes for general corporation purposes, upon all real and personal property *actually within* the corporation limits of said city, made taxable by law for county and territorial purposes. (*Subdiv. 2, sec. 2, art. 4 of Charter.*) *Article 6, sec. 4 of the Charter*, speaking of the duties of assessors, says he shall make, at a time mentioned, "a correct list of all the real estate within said city, and the personal estate of all citizens thereof, with the valuation thereof, which he shall certify and return to the city council." Said list and valuation thereof shall be made in the "manner prescribed by law for assessing and collecting county and territorial taxes." The State law provides that an executor or administrator "shall be assessed for the real estate held by him in such representative character, at the full valuation thereof, and for all personal property held by him in his representative character." (*Sec. 19, p. 895, Code.*)

*Section 3, page 894 of Code*, provides that the terms personal estate shall include, among other things, "money and gold dust on hand, or on deposit, either within or without this State, all debts due or to become due from solvent debtors whether on account, contract, note, mortgage or otherwise." After the removal of John D. Dement from the State to the city of San Francisco, his co-executor, W. C. Johnson, evidently became the sole executor of this estate for any and all purposes, connected with the taxation of the property belonging to it within this State; and, therefore, we think the property of this estate was properly and legally assessed in

his name in his representative character of executor. (Sec. 9, p. 895, Code.)

The whole of this thirty thousand dollars was money loaned out, and was a debt or debts due the executors on notes and mortgages; and that W. C. Johnson, who had become the actual and sole executor, had control of them and resided and kept his office within the corporate limits of the city. While the assessment was being made by the corporate authorities, these notes and mortgages were temporarily deposited outside of the corporation limits, and therefore it is claimed that they were not *actually* within the city limits; but we apprehend this could make no difference, as it is the *debt* that is taxable, and not the notes and mortgages; they are merely the evidence of or security for the debt or debts due the executor. (16 Cal., 167; 23 Cal., 188.)

We are aware it has been held in a number of States, that personal property of a visible and tangible character may have another *situs* than that of the residence of the owner for the purposes of taxation; yet it seems to have been universally held, that property of the invisible and intangible character, such as debts due, choses in action, &c., is, and must necessarily, from the nature of the property, be with the person of the owner. Then, W. C. Johnson being the sole acting executor, and the legal owner of the debts due this estate, and his residence and place of business being within the corporate limits of this city, we hold that this \$30,000 is personal estate *actually* within the corporate limits of the city, within the meaning of the words of the charter, and therefore liable to assessment and taxation for general corporate purposes.

**Judgment is affirmed.**

JOHN D. BOON, Appellant, v. JOHN B. McCLANE,  
Respondent.

*Motion on Appeal from Clackamas County.*

1. The jurisdiction of the Supreme Court of this State is *only appellate and revisory*.
2. A final decree having been rendered in this court in 1863, and a mandate sent to the court below, and one of the parties having died in 1864, this court will not now entertain a motion to substitute the heirs and representatives of deceased and make them parties.

At the September term of this court in 1863 this suit stood for hearing on an appeal from the final decision of the Circuit Court of Clackamas County, and a revision of that decision was then made in this court by rendering a final decree against the respondent, John B. McClane; from which decision he sued out a writ of error from the Supreme Court of the United States. In 1864, and before this writ of error reached a hearing in that court, John D. Boon died. This fact coming to the knowledge of that court, and no steps having been taken there to have the heirs of Boon made parties, that Supreme Court dismissed the writ of error for that cause, and sent a mandate to this court, with direction to carry out its decree. Before that mandate was filed in this court, respondent by his attorneys, Strong & Smith, filed his motion asking that Martha J. Boon, and the other heirs of John D. Boon, specifying them by name, be made parties to this suit in place of J. D. Boon, deceased. A special appearance was made for Henry D. Boon, one of the heirs, and resistance made to the granting of the motion.

*Strong & Smith*, for the motion.

*Williams & Kelly*, contra.

No printed briefs filed.

PRIM, J. The court is of the opinion that this motion should be overruled, for the reason that this court has no jurisdiction to entertain it. This Supreme Court has no jurisdiction except such as is given it by the Constitution of the State. The first part of section six, of article seven of that instrument, is in these words: "The Supreme Court shall have jurisdiction *only* to revise the *final* decisions of the Circuit Court," etc. This is plain and sufficient, it seems to us, without further comment. It will be readily seen that the jurisdiction of this court is *only appellate* and *revisory*, and without any original jurisdiction whatever. The final decision of the Circuit Court was before this court on appeal, at the September term, 1863, and its revisory powers were then exhausted by making a final determination of the case in this court, and sending its mandate to the Circuit Court, with directions to carry out its decree.

*Section 37, of the Code, page 146, is cited by counsel for respondent to sustain this motion; but, it will be seen at once, that this section is inapplicable, for two reasons: First, because this suit is not pending in this court; and secondly, because the application to review, if the suit were pending, was not made within one year from the death of John D. Boon, as that section provides. For these reasons the motion is overruled.*

Justices BOISE and WILSON did not participate in this hearing, having been counsel in the original case.

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SAMUEL STANNIS, Respondent, v. D. W. NICHOLSON, Appellant.

*Appeal from Benton County.*

1. A judgment becomes a lien upon real estate from the time of its docketing, subject to the known equitable rights of others in the premises.
2. What would be notice sufficient to put a purchaser upon inquiry.

3. A purchaser with full knowledge or notice of equitable rights will not be permitted to protect himself against those rights; but his title will be postponed to them.

THIS suit in equity was instituted to quiet the title and possession of Stannis, the respondent, to a certain piece of land, containing about eighty acres, situated in Benton county, Oregon.

In September, 1858, W. J. Robertson was the owner of this tract of land, and about that time respondent made a contract to purchase it for \$480. Respondent paid the purchase money, took the bond of Robertson for title, and immediately entered into possession thereof, and made valuable and lasting improvements on it. Afterwards, on the 27th of January, 1860, Robertson confessed a judgment before the clerk of the Circuit Court of Benton county, for \$255, with interest at three per cent per month in favor of appellant, Nicholson, which judgment was duly docketed on the same day. Appellant caused an execution to be issued on said judgment on the 3d day of November, 1860, and the land sold thereon on the 29th day of December, 1860, at which sale appellant became the purchaser; and afterwards, on the 6th day of April, 1861, received the sheriff's deed for the said land, and had it duly recorded.

On the 26th day of September, 1860, in pursuance with the terms of the bond previously given, Robertson conveyed the land by deed to respondent, which was also duly recorded. It appears that before the confession and docketing of said judgment, and the sale of the land on execution, Nicholson had full knowledge of the facts that Stannis had bought and paid for the land, as heretofore stated; that he was in the possession and occupancy thereof, and had made said improvements. The Circuit Court found the equities in favor of Stannis, and entered its decree accordingly, from which Nicholson appealed here.

*Odeneal & Simpson, for appellant:*

1st. That Robertson was merely an equitable owner under a bond for a deed, which bond did not and could not give him possession. (*Session Laws*, 1855-6, page 69, sections 5, 6.)

2d. The possession of Stannis not being warranted by law was no notice to appellant. (6 *Barb. S. C.*, 116; 3 *Kern.*, 183.)

3d. The contract of Stannis should have been acknowledged and recorded to impart notice to appellant. (*Stat.* 1856, p. 523, sec. 35; 10 *Paige*, 346.)

4th. Stannis, not being in legal possession, and the registry law not having been complied with, *actual* notice was necessary to appellant before judgment. (8 *Pick.*, 154.)

5th. Confession of judgment was an implied contract to sell the land to appellant. (4 *Cow.*, 599.)

6th. Appellant, being first on the record, should prevail. (4 *Kent.*, 202; 3 *Kern.*, 183; 1 *Dana*, 168; 8 *Mo.*, 479; 11 *Mo.*, 77; 4 *Bibb*, 78; 2 *Green*, 52.)

7th. Purchase money was not paid until after the docketing of the judgment against Stannis. (17 *Barb.*, 137.)

*J. Strahan, Esq.*, for respondent:

3d. Appellant, having purchased with full knowledge of respondent's equitable title, will not be permitted to defeat his just rights by his own iniquitous bargain. (*Story's Eq. Jur.*, secs. 395-96; 1 *Johns. Ch.*, 566; 2 *Johns., Ch.*, 155, 160; 1 *Pick.*, 164; 3 *Pick.*, 150; 2 *Paige*, 300; 5 *Johns. Ch.*, 33; 6 *Paige*, 388; 11 *Wendell*, 448.)

4th. *Statute of 1855, page 522, section 26*, only protects subsequent purchasers in good faith for a valuable consideration. These cannot be pretended here. (3 *Pick.*, 153; *Story's Eq., Jur.*, secs. 397-8-9, 400, 410, n. 3, 1502-3, *note.*)

5th. Lien of a judgment is subject to all equities which exist at the time of its recovery. (3 *Kern.*, 181-90.)

PRIM, J. The judgment confessed by Robertson in favor of appellant was docketed on the 27th of January, 1860, which thereby became a lien on the land in dispute from that

date; but at the time this lien took effect, respondent was in the possession and occupancy of the land under a contract to purchase the land, entered into prior to that time with the judgment debtor Robertson. The purchase money had been paid, and Robertson had executed a bond obligating himself to convey the legal title at some future time. Then, it will be seen that the equitable title to the land in question was already in respondent at the time appellant's judgment lien commenced to run, consequently his judgment lien was subject to all of the known equitable rights of respondent in the premises at the time. This principle seems to be well established by authority. In the case of *Moyer v. Hinman*, 3 *Kernan*, p. 183, the court says "that this position is so well established by authority as to have become an elementary doctrine in this branch of the law of real estate."

Appellant afterwards caused an execution to be issued on his judgment, and had the land in dispute sold on execution, at which sale he became the purchaser, thereby, as it is claimed, reducing his lien to an absolute legal title. It appears, while this was being done, respondent was in the possession and occupancy of the land, and had made valuable improvements thereon by fencing, &c., which was sufficient at least to put appellant on inquiry whether he had actual notice or not.

Be this as it may, it appears that he had full notice of the equitable rights of respondent. Under these circumstances, a court of equity will not allow appellant to protect himself against the equitable claims of respondent; but his title, thus obtained, must be postponed or made subservient to that of respondent. It would be gross injustice to allow him to defeat the rights of respondent by his own unjust proceeding. (*Story's Eq., Jur.*, 395-6.) We think the Circuit Court very properly held appellant to be a trustee for the use and benefit of respondent.

**Decree affirmed.**

DOLPHUS B. HANNER and others, Appellants,  
SILVER, Administrator of the estate of Finice Ca  
ers, deceased, Respondent.

*Appeal from Multnomah County.*

1. County Courts have no authority to determine what person is entitled to the realty, and to make partition of the realty of the decedent.
2. The control of an administrator over real estate, under the Code of 1888, is limited to the cases mentioned in sections 1161 and 1162 of the Code.
3. In proceedings for partition of real property the particular persons whose interests in the property must be designated, and also the interest of persons

THE complaint in this case, as a petition, was filed in the County Court of Multnomah county, sitting in probate. It alleges that the real name of decedent was Finice T. Tamm; that he died possessed of valuable real estate in that county, and left first cousins upon his mother's side, as his legal heirs; that such first cousins, and the children of such first cousins, are his sole and legal heirs; that petitioners are purchasers from certain of those heirs, are owners in fee of certain specified undivided part of the estate of said decedent, and that Hanner is the attorney in fact of some of the heirs.

The prayer is, that proofs may be taken to show to whom said estate belongs, and that the administrator be ordered to surrender to the petitioners their distributive shares of said estate. The petitioners state the particulars of their relationship to the decedent, and that of their co-heirs. They specify their alleged distributive shares. The administrator demurred, assigning for causes, that the court is without jurisdiction; a want of proper parties, and that the complaint does not state facts constituting a cause of suit. The demurrer was sustained in the Probate Court, and on an appeal



therein to the Circuit Court, that decision was sustained, and an appeal was taken here.

*Gibbs & Parrish, Lancaster & Wait*, for appellants:

That the power rests in the Probate Court, to enable rightful heirs to obtain the real property, to which they are justly entitled, without needless expense, delay, or necessity of resort to other courts. (2 *Barb., Ch.*, 93-4; 1 *Metc.*, 207; *Code*, sections 1088, 1161-2, 1047, *sub.* 5, 869, *sub.* 3, 4.)

*Mitchell, Dolph & Smith*, for respondents:

The jurisdiction of the Probate Court is special and limited and is derived by fair and reasonable construction of the language of the Constitution and statutes. (*Dayton on Surrogates*, 7, 8.) That the Probate Court may sell real estate to pay debts, and to partition real estate among heirs as provided in sections 1088, 1161-2, of the *Code*. That the provisions of section 1088 are limited to cases mentioned in 1161-2, and that appellants have not brought themselves within the cases there, because petition fails to state the filing of first semi-annual account; fails to state that deceased had property subject to distribution; and to state that the estate was indebted.

That when the administration is complete, all that the Probate Court can do is to discharge the administrator, and the real property remaining is discharged from his possession, without order or decree. (*Section 1160, Code.*) The question of *heirships* does not belong to the County Court.

*PRIM, J.* The petition does not show what progress has been made in the administration; whether any or what property, either personal or real, is comprised in the estate; whether any account has been rendered; whether debts exist, and whether any have been paid. The main question to be determined in this case is whether, under our statute, it is the duty of the County Court to determine what persons are

entitled to the realty; and to make partition of the realty of the decedent. This question has been fully argued, as it affects the whole merits, the decision of this question is conclusive of the case.

The Constitution provides that "the County Courts have the jurisdiction pertaining to Probate Courts, Boards of County Commissioners, and such other powers, duties, and such civil jurisdiction, not exceeding the amount in value of \$500, &c., as may be prescribed by law." The appellant contends that the Constitution confers on the County Court the power here contended for, as a part of the jurisdiction pertaining to Probate Courts. In inquiring whether such jurisdiction, at the time of the adoption of the Constitution, we find in this connection that lands and tenements were deemed and treated as something distinct from the personalty which might go into the hands of the administrator; and the distribution of real estate did not formerly pertain to the jurisdiction of Probate Courts (2 *Black. Com.*, 189; *ward*, 551; *Griffith v. Buchan*, 10 *Barb.*, 432.)

At common law real estate descended to the heir, not subject to the control of the administrator; and such was the general rule in most of the States at the time our Constitution was adopted. Hence its distribution was not a matter pertaining to probate jurisdiction. In this State the power of the administrator to take possession of real property was derived solely and directly from the Constitution. It was conferred by section 1088 of the Code, which authorized the administrator to hold the temporary possession of real estate, and we think this power is not justified under the clause relating to "other powers and duties." It cannot be maintained that if all that is provided in the statute concerning the possession and distribution of real estate is repealed, such repeal would be an encroachment upon the diminution of "the jurisdiction pertaining to Probate Courts;" neither would that court then have any power to distribute real estate.

Whatever power that court has in this respect being created by statute, the whole act should be examined together to ascertain the true intent and meaning of the legislature. Section 1088 gives the administrator possession and control of the real estate "until the administration is completed, or the same is surrendered to the heirs, or divided by the order of the court or judge thereof." Sections 1161, and 1162 provide that the court may, under certain circumstances, order that an heir, devisee, or legatee, may in the discretion of the court have the possession of the real property to which he may be entitled, or a part thereof before the administration is completed. Section 1160 declared that the real property "is the property of those to whom it descended by law, or is devised by will, and upon the termination of the administration, the unsold real property is discharged from such possession and liability without any order or decree therefor." Yet if there is any *surplus of proceeds of sale*, the court or judge thereof should order a distribution of such surplus. We think the power conferred by the provision contained in *section 1088 of the Code* is qualified and limited to cases specified in sections 1161 and 2. Then, when under the Code the administration is completed, the court discharges the administrator, and the real property descends and goes directly to the heirs-at-law, if there be any, "without any order or decree therefor." To hold that the Code has conferred upon the County Court, sitting in probate, power to make partition of real estate, would be by implication to clothe that court with a very important branch of jurisdiction, not usually pertaining to such courts; and would be in contravention of the generally admitted doctrine, that jurisdictions deriving their powers from statutes are held strictly to the exercise of the powers expressly given. (*Bloom v. Burdick*, 1 Hill, 130; *Dakin v. Hudson*, 6 Cow., 221.)

This Code has provided a mode of proceeding for the partition of real estate, and evidently contemplated a proceeding by complaint in the Circuit Court, in which not only must

the property be designated, but the interest of all persons in that property must be specifically and particularly set out. We are satisfied it was not the intention of the legislature in framing the Code that jurisdiction in partition should be exercised by Probate Courts.

Judgment affirmed.

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**JAMES FIELDS, Appellant, v. JOHN R. and EMMA LAMB, Respondents.**

*Appeal from Marion County.*

1. An order, partially removing a case into the U. S. District Court from a Circuit Court, on the ground that a part of the defendants are citizens of another State, is not reviewable in this court.
2. It does not affect a substantial right, or prevent a judgment or decree, within the meaning of section 525 of the Code.
3. The act of Congress of March 2, 1867, does not repeal the act of July 27th, 1866, so as to deprive the Circuit Court of the power to make such order upon petition.

APPELLANT commenced suit in the Circuit Court for Marion county, against James P. O. Lownsdale and Emma Lamb, including respondents, as heirs of Daniel H. Lownsdale deceased, for the purpose of quieting his title to the half of block "G" in the city of Portland. Emma Lamb was the granddaughter of said deceased, and, with her husband, John R., resided in Kentucky. The respondents, under the laws of the United States, petitioned the Circuit Court to have the case, as to them, transferred to the District Court of the United States for the district of Oregon, claiming this right as non-residents in Oregon. The Circuit Court, for Marion county, to which this case had been transferred, for cause, granted the petition, and ordered, that as to them, the case was transferred into that District Court. From that order, appellant appealed to this court; and here, respondents moved to dismiss such appeal for want of jurisdiction.

the subject of appeal. Several cases stand on the same footing, and the arguments are all submitted in this.

*Logan & Chapman and William Strong*, for appellants, submit:

That this order affected a substantial right of appellants, and in effect determined the case so as to prevent a judgment by the State courts; that it is a suit to quiet title to a single tract of property, derived from a single source, from which the rights of defendants claim their rights, and that the suit could not be divided.

That the act of March 2d, 1867, repeals that of July 27, 1866; and here, the affidavit, necessary for the inception of a writ of prohibition in the Circuit Court for such order, is wanting.

*Page & Hill*, for respondents, cite:

*Code of Oregon*, section 525, and article 7, section 8 of the Oregon Constitution, and, as a parallel and leading case, 13 N. H. 597.

That no order this court could now make would be binding upon U. S. District Court, which had assumed jurisdiction of the case.

*WILSON, J.* Both parties rely upon the same provisions of constitutional and statute law, for their case; and of course it devolves on this court mainly to construe those. *Section 7 of the Constitution* is in these words: "The Supreme Court shall have jurisdiction only to revise the final decisions of the Circuit Courts;" and *section 525 of the Code* is: "A judgment or decree may be reviewed as provided in this title, and not otherwise; an order affecting a substantial right, and which in effect determines the action thereon, so as to prevent a judgment or decree therein, &c., shall be deemed a judgment or decree." The Constitution declares that only final decisions of the Circuit Courts can be reviewed in this Supreme Court; and since, in the nature of practice in our courts, other decisions than formal judg-

ments and decrees operate as final dispositions of litigation, the legislature undertook to declare what that word in the Constitution might contain.

In section 525, it was provided that certain actions of the courts should be equivalent to judgments or decrees. That, when the Circuit Courts made an order affecting a substantial right, and which in effect determined the issue or suit, so as to prevent a judgment or decree thereon, an aggrieved party might appeal therefrom. The order in question decided only that, as to certain defendants, the case might be transferred to another court, in order that a judgment or decree might be rendered in that court. It affected only the right of a party to bring his case, if he thought it advantageous, in the State Courts; it affected no right to go to the merits of the case, or to a denial of the obtaining of a decision by the courts, but only interfered with a party in the choice of a place where redress might be had. The order did not prevent a decree; for it must be presumed that the court to which the case was transferred was competent to proceed to final decree. The order did not determine the action, for it proceeded without any interruption, except the mere delay in copying and filing certain pleadings and papers. In no view of the case can we see that the order came within that class which would entitle the appellant to a hearing here. This point has been incidentally passed upon at this term of the court in the case of *The Oregon Central Railroad Co. v. The Oregon Central Railroad Co.* The case of *The N. Y. & N. H. R. R. Co.*, 13 N. Y., 597, is a case directly in point on this part of the case.

Appellant claims that the court below had no authority to make such order at that stage in the proceedings, and that the order when made was illegal and void. That the act of Congress of July, 27th, 1866, under which the order was made, was repealed by the act of 1867, of March 2d. The former act provided for cases in which that portion



defendants residing in another State, might have the case removed into the District of the United States, as to them, the case were of such character that it might be determined as to them, without the presence of others; or was for the purpose of restraining or enjoining them, and exceeded in value the sum of five hundred dollars. This was done in this case upon mere petition. Appellants claim, if such a practice is sanctioned, yet by a subsequent United States statute of March 2d, 1867, it was necessary that the moving party should have filed an affidavit of prejudice; that from local influence or prejudice, justice could not be obtained in the State courts. Appellants aver that this act repealed the one of July 27th, 1866, and that respondents have filed no such preliminary affidavit.

We find those statutes are not so inconsistent but that both may stand undiminished.

The former act provides only for cases where a part of the *defendants* are non-residents. The latter act provides for cases where the proceeding was between a citizen of one State as plaintiff, and one of another State as defendant; and ~~the~~ the right to *either* party, plaintiff or defendant, to ~~move~~ *have* the case if certain influences or prejudices were ~~to~~ *existed* to exist.

The plaintiff having a choice of tribunals in which he ~~may~~ *can* pursue defendant, ordinarily has no right, having ~~in~~ *the* former, to allege that such is hostile to him. That ~~provides~~ *provides* for his relief, and for a case which might well ~~be~~ *have* been brought in the United States Courts at once. The ~~of~~ *act* of 1866 provides for cases, where a part of the defendants ~~are~~ *are* residents in the same State with plaintiff, and could ~~be~~ *be* equally with him, that the State courts should determine their differences.

We do not think any repeal was effected which made it ~~necessary~~ *necessary* for respondents to file such preliminary affidavit. ~~The~~ *The* court below had jurisdiction, then the matter is not ~~viewable~~ *viewable* here; and we see nothing which would deprive ~~that~~ *that* court of such control, and the appeal must be dismissed.

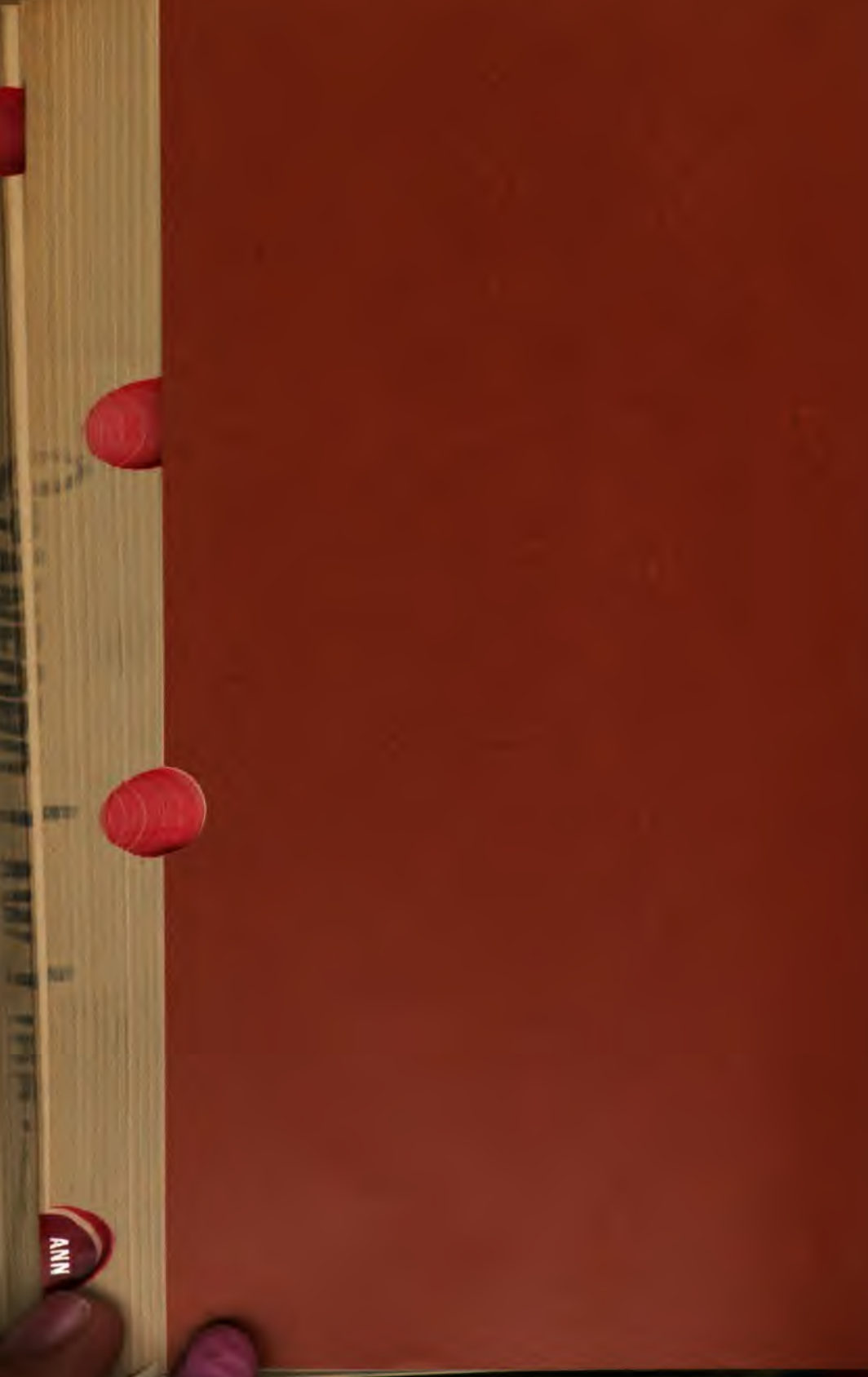




EXTRA ANNOTATION  
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# NOTES

## ON THE

# OREGON REPORTS.

### CASES IN 2 OREGON.

17-19, **SCHLUSSEL v. WARREN.**

case has not been cited.

19-22, **WREN v. FARGO.**

Evidence.—Parol Evidence is Admissible to explain alterations in  
deed, p. 21.

Seal.—Seal in Burnette v. Young, 107 Va. 188, 57 S. E. 642, admitting  
evidence to show addition of seal to deed.

County Commissioners.—The Power of County Commissioners is limited by statute  
any act not authorized by statute is void, p. 22.

Idaho.—First Nat. Bank of Idaho v. Malheur County, 80 Or. 426,  
p. 783, 85 L. E. A. 88, applying the rule to county courts.

County Commissioners.—After Accepting Bond of Officer county commissioners  
no power, on their own motion, to disapprove it, p. 22.

Idaho.—State v. Toole, 26 Mont. 30, 91 Am. St. Rep. 386, 66 Pac.  
5 L. E. A. 644, holding that state furnishing board cannot re-  
accepted bid.

23-29, 80 Am. Dec. 401, **FAHIE v. PRESSLY.**

Ignorance or Mistake of Fact is not ground for relief  
due to party's negligence, p. 26.

Idaho.—Thornton v. Krimbel, 28 Or. 274, 42 Pac. 995, holding that  
must be mutual or superinduced by fraud or some inequitable  
act; Clark v. Hindman, 46 Or. 75, 79 Pac. 59, barring persons'  
by things said or done under a misapprehension of legal rights.  
Idaho notes to 41 Am. St. Rep. 33; 55 Am. St. Rep. 505, 506, 519,  
Ignorance of one's rights as a ground of relief.

29-34, **FARNUM v. LOOMIS.**

Equitable Interest in land is not subject to dower, p. 34.

Idaho.—Whiteaker v. Vanschoelack, 5 Or. 118, Snider v. Lehnherr,  
88, and The Holladay Case (Hickox v. Holladay), 29 Fed. 236,



**Highways.**—Want of Notice is Fatal to proceedings of county board lay out a road, p. 41.

Cited in *Parker v. Ft. Worth etc. Ry. Co.*, 84 Tex. 336, 19 S. W. reaffirming the rule.

**Highways.**—Petitioners for a Road are not disinterested and cannot be appointed as viewers, p. 41.

Cited in *Locke v. Highway Commrs.*, 107 Mich. 633, 65 N. W. 558, holding that members of the board who decided the necessity of the highway were disqualified to sit at a subsequent proceeding to establish the same highway.

**Courts.**—Once Having Acquired Jurisdiction, and that appearing, no interment is in favor of jurisdiction of inferior court, p. 41.

Cited in *Becker v. Malheur County*, 24 Or. 218, 33 Pac. 544, applying the rule to the proceedings of a board of equalization. Cited in 51 L. R. A. 111, on liability of officer for making arrest.

#### Or. 43-45, SMITH v. INGLES.

**Execution.**—Equitable Estate of Debtor is not subject to lien of execution and cannot be sold under execution, p. 45.

Cited in *Bloomfield v. Humason*, 11 Or. 232, 4 Pac. 334, *Phoenix & Mill Co. v. Scott*, 20 Wash. 52, 54 Pac. 779, *Silver v. Lee*, 32 Or. 511, 63 Pac. 883, *In re Estes*, 3 Fed. 136, 140, 6 Saw. 459, *The Laday Case* (*Hickox v. Elliott*), 28 Fed. 118, *Holmes v. Wolfard*, 47 Or. 100, 81 Pac. 822, and *Budd v. Galter*, 50 Or. 44, 99 Pac. 639, all affirming and applying the rule.

Distinguished in *Pogue v. Simon*, 47 Or. 7, 114 Am. St. Rep. 908, 33 Pac. 567, holding right of purchaser at execution sale subject to redemption after expiration of period of redemption. Cited in notes to 88 Or. Dec. 348, on estates and interests affected by judgment lien; 100 L. R. A. 347, on priority as to proceeds of creditors' bills; 67 L. R. A. 888, 889, on effect on legal title of conveyance of land in fraud of creditors.

#### Or. 46-49, LELAND v. PORTLAND.

**Dedication.**—Streets by Map, p. 48.

Cited in *Oregon City v. Oregon etc. R. Co.*, 44 Or. 176, 74 Pac. 926, holding deeds made with reference to map showing streets sufficient; *Byron v. Knipe*, 2 Wash. 402, 27 Pac. 229, 13 L. R. A. 142, dissenting opinion, majority holding not in point. Cited in note in 27 Am. L. R. A. 560, on dedication to public use.

#### Or. 49-52, HOPWOOD v. PATTERSON.

**Abatement and Revival.**—Plea in Abatement must be Separate from Plea in bar and disposed of before latter is interposed, p. 51.

Cited in *Oregon etc. R. R. Co. v. Wait*, 3 Or. 95, 96, *Oregon etc. R. Co. v. Scoggin*, 3 Or. 162, *Derkeny v. Belfile*, 4 Or. 259, *Chamberlain v. Hibbard*, 26 Or. 433, 38 Pac. 438, *In re Morgan's Estate*, 46 Or. 78, 79, 78 Pac. 1030, *Curtze v. Iron Dyke etc. Min. Co.*, 46 Or. 607, 81

Pac. 817, *McClung v. McPherson*, 47 Or. 86, 82 Pac. 13, *La McCarty*, 47 Or. 477, 84 Pac. 78, *Elliott v. Kuzek*, 2 Alaska, 50 Wythe v. Myers, Fed. Cas. No. 18,119, 3 Saw. 595, 600, all upholding and illustrating the rule; *Oregonian Ry. Co. v. Oregon Ry. Co.*, 22 Fed. 248, 10 Saw. 464, 469, reaffirming the rule but holding that the denial of corporate existence is a plea in bar unless specifically pleaded in abatement.

Distinguished in *Bridal Veil Lum. Co. v. Johnson*, 25 Or. 1027, under condemnation statute.

## 2 Or. 52-53, **ROBBINS v. BAKER.**

**Pleading.**—**Sufficiency of Denial on Information and belief.**

Cited in *Sherman v. Osborn*, 8 Or. 87, *Wilson v. Allen*, 11 Or. 2 Pac. 92, and *Law Guarantee etc. Soc. of London v. Hogue*, 560, 63 Pac. 690, all upholding similar answers. Cited in note 1 Am. Dec. 631, as to where defendant may deny on information and belief.

## 2 Or. 53-55, **GIRD v. MOREHOUSE.**

This case has not been cited.

## 2 Or. 57-59, **INGLAND v. COSTELLO.**

This case has not been cited.

## 2 Or. 59-61, **KAMM v. HOLLAND.**

**Bills and Notes.**—**Party Indorsing Paper Before Delivery is not as indorser, not as maker, p. 60.**

Cited in *Deering v. Creighton*, 19 Or. 120, 20 Am. St. Rep. 199, and *Kealing v. Vansickle*, 74 Ind. 544, 39 Am. Rep. 199, approving the rule; *Kerr's Estate*, 4 Pa. Dist. Rep. 699, distinguishing indorser from surety.

Distinguished in *Barr v. Mitchell*, 7 Or. 354, holding rule inapplicable to non-negotiable paper; *Wade v. Creighton*, 25 Or. 460, 290, holding that where it appears that note is negotiated by indorser strength of the indorser he is liable as a comaker. Cited in note 1 72 Am. St. Rep. 682, on effect of indorsement by stranger before delivery; 29 Am. Dec. 298, on blank indorsement of note by stranger.

## 2 Or. 61-66, 84 Am. Dec. 409, **GRISWOLD v. STOUGHTON.**

**Execution.**—**Law Requiring That Separate Parcels of land be sold separately is directory, p. 64.**

Cited in *Dolphy v. Barney*, 5 Or. 211, *Bank of British Columbia v. Page*, 7 Or. 455, *Bays v. Trulson*, 25 Or. 116, 35 Pac. 28, and *v. Burnett*, 28 Or. 76, 41 Pac. 8, all holding the matter discretionary with the sheriff.

**Execution.**—**Debtor cannot Attack Sale After Expiration of time for redemption in the absence of oppression, fraud or injury, p. 65.**

Cited in *Power v. Larabee*, 3 N. D. 510, 44 Am. St. Rep. 577, and *W. 791*, reaffirming the rule; *Gregory v. Bovier*, 77 Cal. 123,

232, holding that failure to sell separately could not be raised after expiration of redemption.

**2 Or. 66-69, PALMER v. STATE.**

**Intoxicating Liquor.—Keeping Saloon Open on Sunday, p. 67.**

Cited in *Beauvoir Club v. State*, 148 Ala. 649, 121 Am. St. Rep. 82, 42 South. 1042, holding offense complete though no sales are made.

**2 Or. 69-74, PORTLAND v. STOCK.**

**Statutes.—Revised or Amended Section of Statute need not be set out in the amending act, p. 73.**

Cited in *Draper v. Falley*, 33 Ind. 474, and *The Borrowdale*, 39 Fed. 381, both approving the rule; *State v. Parsons*, 40 N. J. L. 127, 29 Am. Rep. 210, holding it unnecessary to embody the old section in the new statute, provided the section, as it stands amended, be inserted at length; *Mayer v. Cahalin*, Fed. Cas. No. 9340, 5 Saw. 355, disapproving the rule so far as it applies to implied repeals but following it. Cited in note in 55 L. R. A. 849, on power of legislature to enact or amend a code or compilation of laws by a single statute.

**Statutes.—The Section Revised or Amended must be set forth and published in full as revised or amended, incorporating all changes made, pp. 73, 74.**

Cited in *Dolan v. Barnard*, 5 Or. 393, and *State v. Wright*, 14 Or. 369, 379, 12 Pac. 710, reaffirming the rule; *Grant County v. Sels*, 5 Or. 252, 253, dissenting opinion, majority holding rule inapplicable to repeal by implication.

Distinguished in *Bird v. County of Wasco*, 3 Or. 285, holding rule inapplicable to repeals; *Grant County v. Sels*, 5 Or. 247, holding rule inapplicable to implied repeals; *Fleischner v. Chadwick*, 5 Or. 155, where the new act contained no reference to any prior act.

**2 Or. 75-78, CARLAND v. HEINEBERG.**

This case has not been cited.

**2 Or. 78-81, BURCHARD v. STATE.**

**Intoxicating Liquors.—Grant to City of Right to regulate saloons does not repeal state laws governing them, p. 80.**

Cited in *State v. Baker*, 50 Or. 384, 92 Pac. 1078, 13 L. R. A., N. S., 1040, to same effect; *City of East Portland v. County of Multnomah*, 6 Or. 64, holding that state may transfer its control of streets to cities. Cited in note in 13 L. R. A., N. S., 1042, on drunkenness as defense to homicide.

**Indictment.—Where One Offense is Sufficiently Charged and another is not, the allegations as to the latter may be regarded as surplusage, p. 81.**

Cited in *State v. Humphreys*, 43 Or. 48, 70 Pac. 825, and *Territory v. Gatliff*, 2 Okl. 532, 37 Pac. 811, approving and applying the rule; *United States v. Clark*, 46 Fed. 638, holding that the caption forms no part of the indictment and may be regarded as surplusage.

**2 Or. 81-88, OREGON STEAM NAV. CO. v. PORTLAND.**

**Taxation.**—After Assessment has Been Made and returned, could not make a reassessment, p. 84.

Cited in Oregon Steam Nav. Co. v. Wasco County, 2 Or. 81, affirming the rule. Cited in note to 56 Am. Dec. 533, on pl. taxation of property.

**2 Or. 85-87, HURD v. MOORE.**

**Slander.**—Complaint must Show That Words were spoken in presence or hearing of some person, p. 86.

Cited in Burnham v. State, 37 Fla. 329, 20 South. 549, applying rule to allegations in indictment for slander.

**2 Or. 87-89, WALDRON v. HARRISON.**

This case has not been cited.

**2 Or. 89-91, HARKER v. FAHIE.**

**Appearance.**—Voluntary Appearance Does not Waive Time to Plead, p. 90.

Cited in White v. Northwest Stage Co., 5 Or. 102, to point out that appearance waives want of service of process.

Distinguished in Kinkade v. Myers, 17 Or. 471, 21 Pac. 558, where the appearance was special.

**2 Or. 91-92, HAMLIN v. KINNEY.**

**Executors.**—Sureties on Executor's Bond cannot be Sued if Executor has made default in the probate court, pp. 91, 92.

Cited in Territory v. Bramble, 2 Dak. 202, 5 N. W. 950, applying and applying the rule. Cited in note to 51 Am. Dec. 531, on liability of personal representative before action on bond.

**2 Or. 93-95, CARTER v. CHAPMAN.**

**Public Lands.**—Variation of Boundaries as Abandonment of Claim, p. 94.

Cited in Shockley v. Brown, 1 Wash. Ter. 466, holding that boundary herein not substantial.

**Husband and Wife.**—Title cannot be Taken from Married Man except by her deed properly executed, p. 95.

Cited in Frarey v. Wheeler, 4 Or. 197, refusing to give specific force married woman's contract to convey; Fields v. Squire, 100 Cal. No. 4776, 1 Deady, 366, 378, holding that conveyance by husband with notice to wife cannot divest her of her half of donation.

**2 Or. 97-100, 88 Am. Dec. 463, SWIFT v. STARK.**

**Judgment.**—Full Faith and Credit to Judgment of sister state.

Cited in Miller Brewing Co. v. Capital Ins. Co., 111 Iowa, 111, 41 Am. St. Rep. 529, 82 N. W. 1027, holding foreign judgment conclusive. Cited in notes to 44 Am. Dec. 573, on effect of judgment against partnership or joint debtors on service on one; 50 L. R. A. 101, on service of process sufficient to constitute due process of law.



**2 Or. 101-103, 89 Am. Dec. 465, LOWNSDALE v. HUNSAKER.**

Cited in note in 26 L. R. A., N. S., 14, on sufficiency of selection or designation of goods sold out of larger lot.

**2 Or. 103-107, KETOYUM v. STATE.**

Pleading.—Demurrer to Whole Complaint fails if one cause of action be good, p. 105.

Cited in Waggy v. Scott, 29 Or. 388, 45 Pac. 775, approving and following the rule.

**2 Or. 107-112, HUNSAKER v. COFFIN.**

Process.—Summons Requiring Defendant to Appear and answer "forthwith" does not confer jurisdiction, p. 110.

Cited in Northcut v. Lemery, 8 Or. 322, holding divorce decree void where publication of summons was insufficient.

Distinguished in Ladd v. Higley, 5 Or. 298, on the facts; Strong v. Barnhart, 6 Or. 103, 104, where the record showed proper summons, but the service was defective; Woodward v. Baker, 10 Or. 494, where the attack upon the judgment was collateral.

Courts.—When the Steps by Which a Court obtains jurisdiction are prescribed by statute, they must be clearly followed, p. 110.

Cited in Munroe v. Thomas, 35 Or. 175, 57 Pac. 420, approving and applying the rule.

**2 Or. 113-115, MOSSEAU v. VEEDER.**

This case has not been cited.

**2 Or. 115-116, STATE v. JOHNSON.**

Larceny.—When Property Stolen in Another State is brought here, the offense follows the goods, p. 116.

Cited in Rex v. Briscoe & Scott, 8 Eng. Rul. Cas. 149, not accessible; Werthington v. State, 58 Md. 410, reviewing authorities from other states sustaining the rule.

Modified in Stanley v. State, 24 Ohio St. 168, 15 Am. Rep. 604, holding that the rule does not apply where the property was stolen in a foreign and independent sovereignty.

**2 Or. 117, HEATHERLY v. HADLEY.**

Appeal.—Affirmance for Want of Prosecution, p. 117.

Cited in United States Trust Co. v. Marquam, 41 Or. 372, 64 Pac. 644, and Henricksen v. Smith, 29 Or. 477, 42 Pac. 486, explaining procedure in case of abandoned appeal.

**2 Or. 118-122, STARR v. STARK.**

Reversed in 6 Wall. 402, 18 L. ed. 925.

This case has not been cited.

**2 Or. 123-125, GARRISON v. PORTLAND.**

Jury.—Right to Allow Withdrawal of challenge, pp. 123, 124.

did not apply to improvement assessments; City of Raleigh 110 N. C. 43, 14 S. E. 524, 17 L. R. A. 330, upholding as taking into account entire line of way improved and assessment according to frontage; State v. Dodge County, 8 Neb. Am. Rep. 819, upholding Nebraska law making local improvement by special assessment on property benefited. Cited in note Am. Dec. 522, on local improvement assessments as exercise of taxing power; 35 L. R. A. 58, on personal liability to pay assessment for local improvement.

**Constitutional Law.**—Legislative Determination of Mode of Assessment for local improvements is not reviewable, pp. 160, 161.

Cited in King v. City of Portland, 38 Or. 416, 63 Pac. 5, A. 812, approving and applying the rule; Martin v. Tyler, 302, 60 N. W. 401, 25 L. R. A. 838, holding that it is a local function to designate localities that would be benefited by and that should bear the burdens thereof.

**2 Or. 163-168, CRAWFORD v. ABRAHAM.**

**Costs.**—Taxation and Allowance of Costs and Disbursement.

Cited in Wilson v. City of Salem, 3 Or. 483, 484, holding that each item of disbursements should be particularly set forth.

**Witness Fees are Allowable, Though Witness attends without poena,** p. 166.

Cited in Perham v. Portland etc. Electric Co., 33 Or. 433, 24, Duree v. Chicago etc. Ry. Co., 118 Iowa, 644, 92 N. W. Christensen v. Union Trunk Line, 6 Wash. 83, 32 Pac. following the rule; Linforth v. San Francisco Gas etc. Co. App. 439, 99 Pac. 718, holding that fees of witnesses "required" to attend may be taxed, under statute providing fees for "required" to attend; Meagher v. Van Zandt, 18 Nev. 286, 59, dissenting opinion, majority limiting fees to witnesses who have been subpoenaed.

**Costs.**—Mileage must be for Number of Miles actually traveled, p. 166.

Cited in Coleman v. Ross, 14 Or. 351, 12 Pac. 648, and Sullivan Door etc. Co. v. Garrett, 28 Or. 172, 42 Pac. 130, approving Howe v. Douglass County, 3 Or. 490, 492, construing code relating to mileage.

**Costs.**—Objections to Cost Bill must be Specific to require verification, p. 167.

Cited in Wilson v. Salem, 3 Or. 483, and Cross v. Chichester 116, both following the rule.

**Costs.**—Verification to Bill and Its Amendments are required by proofs, p. 167.

Cited in Young v. Hughes, 39 Or. 586, 595, 66 Pac. 273, to consider additional affidavits.

**Costs.—Mileage to Witness Residing Beyond Reach of subpoena.** 167.

Cited in *Burrows v. Balfour*, 39 Or. 494, 65 Pac. 1063, allowing double mileage under section 795 of the code; *Spencer v. Peterson*, 1 Or. 262, 68 Pac. 1108, holding that objection that witness voluntarily attended does not raise question that his examination was unnecessary; *Luckey v. Lincoln County*, 42 Or. 332, 334, 70 Pac. 509, 10; *State v. Seibert*, 130 Mo. 214, 32 S. W. 673, reviewing other decisions; *Fish v. Farwell*, 33 Ill. App. 244, holding that mileage for travel outside of state cannot be taxed as costs.

#### Or. 168-174, **BRUMMET v. WEAVER.**

**Husband and Wife.—Separate Property of Wife**, pp. 173, 174.

Cited in *Vetten v. Carmack*, 23 Or. 287, 31 Pac. 660, 20 L. R. A. 91, construing constitution and statute relating to separate property; *Carr v. Hamilton*, Fed. Cas. No. 13,314, 1 Deady, 268, holding that constitutional exemption made exempt property separate property. Questioned in *Lemon v. Waterman*, 2 Wash. Ter. 491, 7 Pac. 900, distinguished in holding that exemption was mere exemption and did not create separate estate.

#### Or. 175-179, **RYAN v. HARRIS.**

**Justices of the Peace.—Power of Legislature to Give Officers power of justices affirmed**, p. 177.

Cited in *State v. Wiley*, 4 Or. 186, and *Multnomah County v. Adams*, 6 Or. 115, both approving the rule; *Craig v. Mosier*, 2 Or. 324, applying the rule to the recorder of Salem; *State v. Wiley*, 4 Or. 187, holding that jurisdiction of police judge when acting as justice could not be limited to criminal matters; *Clemmensen v. Peterson*, 35 Or. 50, 56 Pac. 1016, reluctantly reaffirming the rule on the ground of stare decisis.

#### 179-182, **RICHARDSON v. FULLER.**

**Confession.—One Partner cannot Confess Judgment for the firm except an action pending**, p. 180.

Cited in *Bank of Shelton v. Willey*, 7 Wash. 540, 35 Pac. 412, applying and applying the rule.

Distinguished in *George W. McAlpin Co. v. Finsterwald*, 57 Ohio 545, 49 N. E. 788, holding that the rule does not give firm the right to question a judgment so confessed. Cited in note 5 Am. Dec. 570, on effect of judgment against partnership or debtors on service on one.

**Confession.—In Confession of Judgment the Sworn Statement must set out the facts out of which the indebtedness arose**, p. 181.

Cited in *Puget Sound Nat. Bank v. Levy*, 10 Wash. 604, 45 Am. Rep. 803, 39 Pac. 144, applying the rule in a similar case. Cited in notes to 99 Am. Dec. 277, judgment by confession; 28 L. R. A. 100, on rights of partners inter se in partnership realty.

**2 Or. 182-189, CHAVENER v. WOOD.**

**Execution.**—Sale Extinguishes Creditor's Lien, p. 187.

Cited in *Lauriat v. Stratton*, 11 Fed. 109, 6 Saw. 339, approving and applying the rule.

**2 Or. 189-190, MURCH v. MOORE.**

**Judgment.**—Extending Lien Under the Statute, p. 190.

Cited in *Dearborn v. Patton*, 3 Or. 423, following the rule; *Man v. Holman*, 53 Or. 459, 99 Pac. 425, construing similar statute; *Burns v. Connors*, 1 Wash. 8, 23 Pac. 837, holding that a proceeding to revive a judgment is not an action on a judgment.

Distinguished in *Browne etc. Co. v. Chares*, 9 N. M. 320, 50 235, holding that a judgment barred by limitation statute could be revived by *scire facias*.

**Judgment.**—Domestic Judgments are not Barred by section of the code, p. 190.

Cited in *Strong v. Barnhart*, 5 Or. 499, approving the rule.

Distinguished in *Citizens' Nat. Bank v. Lucas*, 26 Wash. 40, 41 Am. St. Rep. 748, 67 Pac. 254, 56 L. R. A. 812, holding domestic judgments barred by limitation statute.

**2 Or. 190-192, SMITH v. CASE.**

**Contracts.**—Contract Void Because Made on Sunday may be ratified by ratification on a week day, p. 191.

Cited in *Tucker v. West*, 29 Ark. 398, 405, approving and applying the rule; *Melchoir v. McCarty*, 31 Wis. 257, 11 Am. Rep. 600, approving the rule, but holding it inapplicable to void contracts other than those made on Sunday.

Distinguished in *Oregon etc. R. R. Co. v. Potter*, 5 Or. 232, holding the original contract had no valid consideration to support it and could not be aided by ratification. Cited in notes in 12 Am. St. Rep. 293, on validity of Sunday contracts; 59 Am. St. Rep. 642, on contracts incapable of ratification.

**2 Or. 200-201, BEQUETTE v. PEOPLE'S TRANSP. CO.**

**Negligence.**—The Least Negligence of Plaintiff will not excuse gross carelessness of defendant, p. 201.

Cited in *Holstine v. Oregon etc. R. Co.*, 8 Or. 169, and *Farmington Umatilla Co.*, 15 Or. 319, 16 Pac. 36, both approving and applying the rule. Cited in note to 55 Am. Dec. 671, on contributory negligence.

**2 Or. 202-203, DOLPH v. NIOKUM.**

**Appeal.**—Return of Service of Notice of Appeal may be amended, p. 202.

Cited in *Seeley v. Sebastian*, 8 Or. 563, and *Barbre v. Good*, 3 Or. 468, 38 Pac. 67, both approving and adhering to the rule.

**Appeal.**—Notice and Certificate are not Amendable, p. 203.

Cited in *Shirley v. Burch*, 16 Or. 10, 18 Pac. 348, reaffirming the rule.

**Appeal.—Notice of Appeal must Set Forth Full Specification of errors, p. 203.**

Cited in *Carver v. Jackson County*, 22 Or. 63, 29 Pac. 78, following the rule; *Boy v. Horsley*, 6 Or. 388, 25 Am. Rep. 537, refusing to consider errors not set forth in notice of appeal; *State v. McKinnon*, 8 Or. 490, disregarding assignment which did not specify the ground of error relied on.

Qualified in *McRay v. Freeman*, 6 Or. 453, holding rule inapplicable to objection to jurisdiction or sufficiency of complaint.

## **2 Or. 203-205, LINDLEY v. WALLIS.**

**Appeal.—When Appeal is Perfected in the Court Below** prior to the first day of term of supreme court, transcript must be filed before close of second day of term or be deemed abandoned, p. 204.

Cited in *Estate of Bennett*, 1 Alaska, 162, reaffirming and applying the rule.

**Appeal.—Application for Extension of Time to File Transcript** must be made within the time prescribed for filing it, p. 204.

Cited in *Seeley v. Sebastian*, 3 Or. 565, approving and following the rule.

**Appeal.—Service of Notice may be Either on Party or attorney** residing in county; outside of county service can be made on party only, p. 204.

Cited in *Carr v. Hurd*, 3 Or. 160, 161, *Rees v. Rees*, 7 Or. 80, *Poppleton v. Nelson*, 10 Or. 439, and *Bennett v. Minott*, 28 Or. 343, 39 Pac. 997, approving and following the rule; *Butler v. Smith*, 20 Or. 129, 130, 25 Pac. 381, 382, upholding the rule and criticising *Shirley v. Burch*, 16 Or. 5, 6; *Lewis & Dryden Co. v. Reeves*, 26 Or. 448, 38 Pac. 623, following the rule in spite of statute directing service on attorney only.

Questioned in *Shirley v. Burch*, 16 Or. 5, 6, 18 Pac. 346, holding that service cannot be made on party having an attorney of record residing in the county.

## **2 Or. 205-206, COFFIN v. COULSON.**

This case has not been cited.

## **2 Or. 206-213, OREGON STEAM NAV. CO. v. WASCO COUNTY.**

**Taxation.—Powers of Assessor and County Court over assessment-roll, pp. 207-213.**

Cited in *Darragh v. Bird*, 3 Or. 248, and *Portland University v. Multnomah County*, 31 Or. 500, 50 Pac. 533, approving the rules; *Gray v. Stiles*, 6 Okl. 492, 49 Pac. 1094, following the rule in construing a similar statute; *Wallace v. Bullen*, 9 Okl. 7, 58 Pac. 950, stating powers of boards of equalization; *Leicester Waterworks Co. v. Nuttall*, 16 Eng. Rul. Cas. 690, not accessible.

## **2 Or. 214-215, TRAINOR v. MULTNOMAH COUNTY.**

**Intoxicating Liquor.—Money Advanced as Liquor License** cannot be recovered from the county on refusal to grant the license, p. 215.

Cited in *McLeod v. Scott*, 21 Or. 106, 26 Pac. 1064, and *Hag*  
City of Ashland, 91 Wis. 631, 65 N. W. 509, applying the rule  
similar cases. Cited in notes in 21 L. R. A. 582, 589, on discretion  
granting liquor licenses; 16 L. R. A., N. S., 512, on recovery of  
earned liquor license fee.

2 Or. 215-220, **MILLS v. LEARN.**

**Ferries.—Riparian Owner has not Exclusive Right to,** p. 217.  
Cited in *Bickley v. Learn*, 3 Or. 545, 546, reluctantly following  
rule.

**Ferries are Part of the Road for public use,** p. 217.

Cited in *Price v. Knott*, 8 Or. 443, denying right to change  
ings at will.

2 Or. 221-225, **STATE v. BROWN.**

**Counterfeiting.—Federal and State Power to Define and pu**  
p. 223.

Cited in *Young v. Frazier*, 36 Or. 250, 78 Am. St. Rep. 772, 59  
708, 48 L. R. A. 153, holding that each may prohibit and punish  
same offense; *Stroube v. State*, 40 Tex. Cr. 583, 51 S. W. 358, re  
nizing jurisdiction of state courts over counterfeiting.

2 Or. 225-226, **STOLL v. HOBACK.**

This case has not been cited.

2 Or. 227-236, **STATE v. FITZHUGH.**

**Jury.—Challenge to Panel is Abolished,** p. 231.

Cited in *State v. Dale*, 8 Or. 233, and *State v. Ju Nun*, 53 O  
97 Pac. 97, both recognizing the abolition.

**Grand Jury.—Irregularities in Impaneling are not Ground**  
objection to indictment, p. 231.

Cited in *Posey v. State*, 86 Miss. 152, 38 South. 328, holding  
irregularities in formation of grand jury do not vitiate the in  
ment; *People v. Lauder*, 82 Mich. 138, 46 N. W. 964, stating  
of objecting to mode of selecting jury; *United States v. Mit*  
136 Fed. 911, holding that disqualifications of grand jurors are  
ited to those set forth in the Oregon statute. Cited in note in  
B. A. 779, on organization of grand jury.

**Criminal Law.—Acts and Declarations of Co-conspirators as**  
dence, p. 234.

Cited in *State v. Steeves*, 29 Or. 92, 43 Pac. 949, holding th  
person who is present aiding and abetting crime is a prime  
Cited in note in 68 L. R. A. 220, on homicide in carrying out unl  
conspiracy.

**Criminal Law.—Inconsistent Statements Made at Other Times**  
admissible to impeach but not to prove facts, p. 234.

Cited in *State v. Jarvis*, 18 Or. 366, 23 Pac. 253, and *Josep*  
*Furnish*, 27 Or. 266, 41 Pac. 426, both approving the rule; *Sta*  
*Steeves*, 29 Or. 104, 43 Pac. 952, stating rule as to impeaching

witness; *Dillard v. Olalla Min. Co.*, 52 Or. 134, 94 Pac. 968, admitting inconsistent statements to impeach witness.

**Appeal.**—Questions of Fact are not Subject to review, p. 236.

Cited in *State v. Wilson*, 6 Or. 429, *Hallock v. City of Portland*, 8 Or. 30, *State v. McDonald*, 8 Or. 118, *State v. Mackey*, 12 Or. 156, 6 Pac. 648, *Kearney v. Snodgrass*, 12 Or. 315, 7 Pac. 312, *McBride v. Northern Pac. etc. Co.*, 19 Or. 71, 23 Pac. 816, and *State v. Gardner*, 33 Or. 152, 54 Pac. 810, all refusing to review verdicts based on conflicting evidence; *State v. Olds*, 19 Or. 442, 24 Pac. 406, dissenting opinion, majority reversing conviction for insufficiency of proof; *State v. Foot You*, 24 Or. 70, 32 Pac. 1034, holding that question of insufficiency of evidence to convict should be raised on motion for discharge in lower court.

Qualified in *State v. Hill*, 39 Or. 96, 65 Pac. 520, holding that, whenever anything occurs after submission of cause tending to subvert justice, the facts will be reviewed. Cited in notes to 86 Am. St. Rep. 666, on admissibility of dying declarations; 56 L. E. A. 358, on dying declarations as evidence.

## 2 Or. 237-238, *KNOTT v. FRUSH*.

**Ferries.**—Nature of Ferry License, pp. 237, 238.

Cited in *Beckley v. Learn*, 3 Or. 546, holding that holder of ferry license cannot obtain a renewal unless land owner fail to apply; *Hackett v. Wilson*, 12 Or. 37, 39, 6 Pac. 657, 658, and *Montgomery v. Multnomah Ry. Co.*, 11 Or. 353, 355, 3 Pac. 440, 441, holding that court cannot, after issuing license to one person, grant another to a different person; *Evans v. Krountinger*, 9 Idaho, 158, 72 Pac. 884, holding ferry franchise assignable. Cited in note in 59 L. E. A. 544, on establishment, regulation, and protection of ferries.

## 2 Or. 238-241, *STATE v. MANN*.

**Gambling.**—Device Defined, p. 241.

Cited in *State v. Gilt Lee*, 6 Or. 428, approving the definition. Cited in notes to 121 Am. St. Rep. 701, on gambling games and devices; 17 L. E. A., N. S., 1211, on card-game paraphernalia as "gaming device."

**Gambling.**—Statute Which Does not Describe Devices intended to be prohibited is void for uncertainty, p. 241.

Cited in *Dekelt v. People*, 44 Colo. 528, 99 Pac. 331, holding that uncertainty in describing offense renders statute void; *Czarra v. Board of Medical Supervisors*, 25 App. (D. C.) 461, holding reasonable certainty sufficient in describing offenses.

Distinguished in *State v. Carr*, 6 Or. 135, where statute described the game by name; *People v. Carroll*, 80 Cal. 156, 22 Pac. 130, holding the statute sufficiently definite.

Criticised in *Re Lee Tong*, 18 Fed. 256, 9 Saw. 333, denominating the opinion narrow and purblind and holding that gambling laws should be construed so as to make them effective.



**2 Or. 242-260      NOTES ON OREGON REPORTS.**

**2 Or. 242-246, DELAY v. CHAPMAN.**

This case has not been cited.

**2 Or. 246-249, STATE EX REL. ROSENHEIM v. HOYT.**

**Officers.—Officer cannot Use His Position** to place himself in p. 249.

Cited in *Hornung v. State*, 116 Ind. 462, 19 N. E. 153, 2 L. 510, holding vote by school trustee for himself as superintendant illegal. Cited in note in 18 L. R. A. 367, on validity of vote of common council or similar body as affected by personal interest of members.

**Officer.—Incompatible Offices cannot be Held by the same** p. 249.

Cited in *Lattime v. Hunt*, 196 Mass. 265, 81 N. E. 1001, noting the question. Cited in notes to 86 Am. St. Rep. 582, on one office by accepting another; 47 L. R. A. 553, on decision vote at election.

**2 Or. 251-255, RICKEY v. FORD.**

**Appeal.—Object of Statement is to Make a matter of record** which is not such, p. 252.

Cited in *State v. McKinnon*, 8 Or. 490, to point that statute providing for specific assignments of error must be followed.

**2 Or. 255-257, STATE v. OREGON C. R. CO.**

**Appeal.—Acts Resting in the Discretion of Law Officers are** reviewable, p. 257.

Cited in *Fields v. Lamb*, 2 Or. 342, refusing to review order moving cause to federal court; *Everding v. McGinn*, 23 Or. Pac. 179, refusing mandamus to control discretion of district attorney to try title to office.

**2 Or. 258, McDONALD v. CRUSEN.**

**Courts.—What Constitutes Filing a Paper**, p. 258.

Cited in *Bade v. Hibberd*, 50 Or. 504, 93 Pac. 365, and *Conant's Estate*, 48 Or. 535, 73 Pac. 1020, holding filing not sufficient by clerk's failure to indorse paper; *Hilts v. Hilts*, 43 Or. Pac. 698, holding the deposit of the filing fee a prerequisite to

**2 Or. 259-260, McDONALD v. CRUSEN.**

**Appeal.—Rule on Affirmance on Appeal from judgment on** error, p. 260.

Cited in *Powell v. Willamette etc. Co.*, 14 Or. 23, 12 Pac. 8, holding that when court remands case, after sustaining demurrer, court determines whether defendant may answer; *Aiken v. Columbus*, 167 Ind. 152, 78 N. E. 661, 12 L. R. A., N. S., 416, same effect.



2 Or. 260-269, **LEE v. SUMMERS.**

**Evidence.**—Writing cannot be Varied by Oral Evidence, p. 265.

Cited in Portland Nat. Bank v. Scott, 20 Or. 424, 26 Pac. 277, reaffirming the rule; Hilgar v. Miller, 42 Or. 556, 72 Pac. 320, holding that evidence of what parties said prior to making contract is inadmissible to vary its terms.

**Public Lands.**—Congressional Grant in Words of present grant passes title to grantee, p. 267.

Cited in Blakesly v. Caywood, 4 Or. 288, and Dolph v. Barney, 5 Or. 201, both approving the rule.

**Overruled** in Quinn v. Ladd, 37 Or. 268, 59 Pac. 459, following decision of federal supreme court to effect that grant passes only **possessory** right until completion of residence.

2 Or. 269-277, **HEATHERLY v. HADLEY.**

**Judgment.**—In Pleading Former Judgment, It is Necessary to state what matter was determined in the former suit, p. 274.

Cited in Heatherly v. Hadley, 4 Or. 2, being another appeal of the same case; Wythe v. Salem, Fed. Cas. No. 18,121, 4 Saw. 88, holding that in pleading former adjudication at law it is sufficient to say that the facts were identical with those pleaded in the complaint.

**Pleading.**—Each Matter Should be Stated in a Direct Manner so that issue may be taken by direct denial, p. 272.

Cited in Springer v. Jenkins, 47 Or. 506, 84 Pac. 481, to point out that matters in avoidance or justification must be pleaded; Da Costa v. Dibble, 40 Fla. 423, 24 South. 913, holding denial herein mere statement of legal conclusion.

**Qualified** and explained in Oregonian Ry. Co. v. Oregon Ry. & Nav. Co., 22 Fed. 247, 10 Saw. 464, holding the rule not to preclude denial on information and belief when facts are not such as must be within his personal knowledge. Cited in note to 27 Am. St. Rep. 249, on necessity of pleading estoppel.

2 Or. 277-288, **EAGLE WOOLEN MILLS CO. v. MONTHITH.**

**Estoppel.**—One cannot Dispute Title Which He Sets Up, p. 282.

Cited in Mickey v. Stratton, Fed. Cas. No. 9530, 5 Saw. 475, holding that where both parties claim title through the same person neither can deny his title. Cited in note to 47 Am. St. Rep. 76, on claimants under common source of title.

**Corporations.**—Deed of Corporation must be Sealed with the corporate seal, p. 285.

Cited in Brown v. Farmers' Supply Depot Co., 23 Or. 543, 32 Pac. 548, Thayer v. Nehalem Mill Co., 31 Or. 443, 51 Pac. 204, and In re St. Helena Mill Co., Fed. Cas. No. 12,222, 3 Saw. 88, all approving and following the rule.

2 Or. 288-291, **SHIVELY v. WELCH.**

**Reformation of Instruments.**—Equity will not Reform for mistake unless established by evidence so clear as to preclude all question, p. 290.

Cited in *Newsom v. Greenwood*, 4 Or. 123, *Lewis v. Lewis*, 4 Or. 179, *Epstein v. State Ins. Co.*, 21 Or. 181, 27 Pac. 1045, and *Thornton v. Krimbel*, 28 Or. 274, 42 Pac. 996, all reaffirming the rule.

**2 Or. 291-295, MILLER v. BANK OF BRITISH COLUMBIA.**

**Corporations.—President has Power to Confess Judgment, p. 294.**

Cited in *Shute v. Keyser*, 3 Ariz. 342, 29 Pac. 389, holding that the right of a corporation to confess judgment is an incident to its power to be sued.

Denied in *Fogg v. Ellis*, 61 Neb. 832, 86 N. W. 494, holding rule inapplicable in Nebraska.

**2 Or. 295-297, BYBEE v. BURBANK.**

This case has not been cited.

**2 Or. 298-301, REBEA v. UMATILLA COUNTY.**

**Taxation.—Board of Equalization is the Only Tribunal having original jurisdiction to correct assessment, p. 300.**

Cited in *Darragh v. Bird*, 3 Or. 249, holding that failure to appeal to the equalization board to correct errors in assessment bars remedy.

**Taxation.—Parties Aggrieved by Decision of Board of Equalization may sue out a writ of review, p. 300.**

Cited in *Darragh v. Bird*, 3 Or. 250, *Poppleton v. Yamhill County*, 8 Or. 339, *Oregon etc. Bank v. Jordan*, 16 Or. 117, 17 Pac. 624, *Paulson v. City of Portland*, 16 Or. 464, 19 Pac. 458, 1 L. R. A. 573, concurring opinion, *Northern Pac. Ry. Co. v. Patterson*, 10 Mont. 105, 24 Pac. 705, *Southern Oregon Co. v. Coos County*, 39 Or. 192, 64 Pac. 648, and *Dundas Mtg. etc. Co. v. Charlton*, 32 Fed. 195, 13 Saw. 25, all reaffirming and applying the rule.

**Taxation.—Power of Board of Equalization, p. 300.**

Cited in *Portland University v. Multnomah County*, 31 Or. 500, 50 Pac. 533, holding that county court has no power to strike property from the roll as exempt from taxation.

**Certiorari.—Writ is Barred if not Sued Out within six months, pp. 300, 301.**

Cited in *Southern Oregon Co. v. Coos County*, 30 Or. 254, 255, 47 Pac. 854, approving and applying the rule.

**2 Or. 302-304, HOGAN v. WYMAN.**

**Executors and Administrators.—Executors With Power of sale need not report their proceedings to the court, p. 304.**

Cited in *Brown v. Brown*, 7 Or. 299, holding that the court can neither confirm nor disapprove such sale.

**2 Or. 304-306, STEPHENS v. KNOTT.**

**Ferries.—Reservation in Grant of Ferry Franchise construed, p. 306.**

Cited in *Stephens v. Knott*, 3 Or. 50, construing same grant. Cited in note in 59 L. R. A. 546, on establishment, regulation and protection of ferries.

**2 Or. 306-307, STATE SCHOOL DIST. NO. 29 v. HULIN.**

**Schools.**—**School Districts** are Public Corporations whose existence can be questioned only by the state, p. 307.

Cited in *School Dist. No. 115 v. School Dist. No. 54*, 34 Or. 99, 55 Pac. 98, holding that the legality of the organization of a district can only be attacked by the state. Cited in note in 13 Am. Dec. 523, on quasi corporations.

**2 Or. 307-310, PARTLOW v. SINGH.**

**Limitation of Actions.**—**Payment by One Joint Debtor** revives debt as to all, p. 310.

Cited in *Re Smith's Will*, 43 Or. 609, 75 Pac. 187, and *Scott v. Christenson*, 49 Or. 225, 124 Am. St. Rep. 1041, 89 Pac. 377, reaffirming and applying the rule; *Sheak v. Wilbur*, 49 Or. 878, 86 Pac. 376, holding that part payment by trustee in bankruptcy of one maker tolls the statute as to all; *Sutherlin v. Roberts*, 4 Or. 387, holding that any person who could be compelled to pay is competent to make a part payment; *Oleson v. Wilson*, 20 Mont. 563, 63 Am. St. Rep. 639, 52 Pac. 375, dissenting opinion, majority holding joint maker not bound by payment made by comaker.

Distinguished in *Dundee Mortgage etc. Co. v. Horner*, 30 Or. 562, 48 Pac. 177, where the payment was made by a person who was not liable; *Oewhisk v. Shingle*, 5 Wyo. 101, 63 Am. St. Rep. 17, 37 Pac. 394, 25 L. R. A. 608, holding that a payment by one party jointly and severally liable, without the knowledge or consent of the other, does not suspend the statute as to such other; *Stubblefield v. McAuliff*, 20 Wash. 445, 55 Pac. 638, holding wife not bound by payments made on a mortgage by her husband who was a joint maker.

**Limitation of Actions.**—**Statute Begins to Run from Date of last payment**, p. 310.

Cited in *Creighton v. Vincent*, 10 Or. 57, approving and following the rule.

**2 Or. 311-313, OREGON IRON CO. v. TRULLINGER.**

Affirmed in 3 Or. 1.

Cited in note in 67 L. R. A. 384, on grant of water power.

**2 Or. 314-320, STATE v. HAYES.**

**Bail.**—**Statutory Undertaking** is not a Common-law Recognizance but a mere simple contract, pp. 316, 317.

Cited in *Malheur County v. Carter*, 52 Or. 626, 98 Pac. 493, holding that it is simply a statutory contract to pay money on condition; *Whitney v. Darrow*, 5 Or. 444, supplying an omitted word in a bail bond otherwise perfect.

**2 Or. 320-321, FLANDERS v. ISH.**

This case has not been cited.



Cited in *Riddle v. Miller*, 19 Or. 470, 23 Pac. 808, and *Laurent v. Lanning*, 32 Or. 18, 51 Pac. 81, both applying the rule; *May v. Emerson*, 52 Or. 267, 96 Pac. 455, holding that judgment creditor obtains no better title than debtor had. Cited in note in 38 L. R. A. 249, on priority of judgment over conveyance made after beginning of term.

2 Or. 336-340, **HANNER v. SILVER.**

**Executors and Administrators.**—County Court has No Authority to determine heirship or partition land, p. 338.

Cited in *State v. O'Day*, 41 Or. 500, 69 Pac. 544, approving the rule.

Distinguished in *Webster v. Seattle Trust Co.*, 7 Wash. 650, 35 Pac. 1084, under different provision in Washington code.

**Executors and Administrators.**—Right of Administrator to Possess Realty is conferred by statute, not by constitution, p. 338.

Cited in *Clark v. Bundy*, 29 Or. 194, 44 Pac. 224, holding possessory rights of administrator wholly statutory.

1 Or. 340-343, **FIELDS v. LAMB.**

This case has not been cited.

REV. J. J. LEWIS, D.D.

*Clark v. Bandy*, 19 Or. 191, 48 Pac. 125, holding possession of land by state.

JAMES V. BOLEY, JR.

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# JUSTICES

OF THE

## SUPREME COURT OF THE STATE OF OREGON.

IN 1868 AND 1869.

REUBEN P. BOISE, Third District.....	CHIEF JUSTICE.
PAINE P. PRIM, First District.....	} JUSTICES.
JOHN KELSAY, Second District.....	
WILLIAM W. UPTON, Fourth District.....	
JOSEPH G. WILSON, Fifth District.....	

IN 1870.

PAINE P. PRIM, First District.....	CHIEF JUSTICE.
ANDREW J. THAYER, Second District.....	} JUSTICES.
R. P. BOISE, Third District.....	
WILLIAM W. UPTON, Fourth District.....	
B. WHITTEN, Fifth District, from June to Sept. 1870.....	
L. L. McARTHUR, Fifth District, from Sept. 1870.....	

IN 1871.

PAINE P. PRIM, First District.....	CHIEF JUSTICE.
ANDREW J. THAYER, Second District.....	} JUSTICES.
BENJAMIN F. BONHAM, Third District.....	
WILLIAM W. UPTON, Fourth District.....	
L. L. McARTHUR, Fifth District.....	

IN 1872.

WILLIAM W. UPTON, Fourth District.....	CHIEF JUSTICE.
PAINE P. PRIM, First District.....	} JUSTICES.
ANDREW J. THAYER, Second District.....	
B. F. BONHAM, Third District.....	
L. L. McARTHUR, Fifth District.....	

RICHARD WILLIAMS, from 1864 to 1870....	} CLERKS.
C. G. CURL, from 1870.....	

## JUDICIAL DISTRICTS AND THE JUSTICES PRESIDING.

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PRIM, C. J.

**SECOND DISTRICT**—The counties of Benton, Lane, Douglas,  
Curry.

KELSAY, J. to 1869.

THAYER, J. from 1869.

**THIRD DISTRICT**—The counties of Marion, Linn, Polk, Tillamook,  
Yamhill.

BOISE, C. J. to 1871.

BONHAM, J. from 1871.

**FOURTH DISTRICT**—The counties of Multnomah, Clackamas,  
Clatsop, Columbia and Clatsop.

UPTON, J.

**FIFTH DISTRICT**—The counties of Umatilla, Union, Baker, Grant,  
Wasco.

WILSON, J. to 1870.

WHITTEN, J. to September, 1870.

McARTHUR, J. from September, 1870.



# CASES HEARD AND DETERMINED

IN THE

## CIRCUIT COURTS

OF THE

STATE OF OREGON.

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Circuit Court for Multnomah County, November Term, 1897.

THE OREGON IRON CO. v. JOHN C. TRULLENGER.

**INSTRUCTION.**—A grant by the words, "To flow back the water to the foot of the present wheel" \* \* \* \* \* "and the right at all times to use all the water which naturally flows below said mill;" *Held*, to mean the water as it flows from the mill-wheel, the mill being in operation.

**NOTE.**—It is necessary to give consideration to all parts of a deed in order to ascertain what was the intention of the parties; and for this purpose, surrounding circumstances within the knowledge of the parties at the time should be considered.

**SERVITUDES.**—The purchaser of part of an estate takes it with the servitudes that are visibly attached at the time of the sale.

**RIGHT TO POND WATER.**—The right to use water necessarily implies a right to dam and to retain it. One exercising this right can only *detain* it. He cannot divert it. He must not detain it unreasonably, or let it off in unreasonable quantities.

**NOTE.**—What is unreasonable detention is, in general, a question of fact.

It appears by the pleadings, that on the twenty-sixth of January, 1864, the defendant was owner of the land over which Sucker Creek flows, from Sucker Lake to the Willamet river, and had then a mill and dam in use on said stream, a short distance below Sucker Lake.

It was admitted on the argument, that defendant's mill was propelled by a large breast-wheel, upon which water

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for the twentieth of January 1864

ing on the creek near its mouth and be

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construct and maintain a dam of any length and height, and to flow back the water to the foot of the present overshot-wheel of the mill, and the right at all times to use all the water which naturally flows below said mill in said stream, unobstructed by the parties of the first part, their heirs and assigns."

It appears from the proofs and admissions, that the creek is, in the dry season, but a small stream, which in its natural condition is for a short portion of the year insufficient to drive either the mill of the defendant or the machinery of the plaintiff. And that by means of using the lake as a reservoir, and retaining water during the wet season which would be of no use at that time in propelling the machinery of either party, the value and usefulness of the stream to both parties is greatly enhanced. But that the quantity thus saved was not sufficient to fully supply either party during the last dry season. That the natural flow of the stream is liable to become too small for either, by the heat and drouth of summer, and also by hard freezing in the winter.

The plaintiff complains that during the dry weather of the past summer, the defendant has ponded the water back so as to render it impossible for the plaintiff to operate his machinery, and that the defendant has let the water down his gates at irregular intervals, and in irregular and improper quantities, causing unnecessary waste of the water, interruption to the plaintiff's business of smelting

The plaintiff also claims, that by the construction of the dam, the defendant had no right to pond the water of Sucker Creek; but that the plaintiff has a right that it should flow all times, as in a state of nature, to the plaintiff's reservoir, without being stopped or ponded by the defendant. The plaintiff also claims that the defendant is threatening to build his dam higher than it was at the time of executing the deed to Green, and thus to further obstruct the flow of the water.

The evidence showed that the value of the water power to each of the parties was greatly enhanced by ponding

Sucker Lake, and would be nearly worthless without that in dry weather the stream afforded but three to inches of water under pressure of thirty feet; that at the date of the deed the defendant's mill required and from thirty to sixty inches of water under thirty feet pressure; that the water required to run the defendant's ten hours will run the plaintiff's machinery twenty hours; that the defendant's mill used at that time two and a half cubic feet per second; that running the defendant's mill twelve hours, in times of low water, will draw from the lake three fourths of an inch; that the lake, when ponded, is of capacity, together with the natural flow of water into it, to run the defendant's mill twelve hours a day for ten months, and that the water can be drawn down in a dry season several feet without serious loss to the defendant; that during the years in which the mill has operated, working the mill has never required the water to be drawn down more than two feet.

*Logan & Shattuck*, for the plaintiff.

*Mitchell & Dolph*, for the defendant.

UPTON, J. The principal question in this case is upon the construction of the deed from the defendant to Green, in determining what right and privileges were conveyed.

If no reference had been made to the mill or dam in the language of the deed might be construed to convey a right to all the power afforded by the natural flow at all times. But reference in the deed to the defendant's mill-dam and water wheel, confines the right to flow back the water to particular limits. And I think, upon the same principle and with equal certainty, the reference to defendant's mill and dam limits the purchase, and reserves to the plaintiff rights which otherwise would have passed. The instrument, taken as a whole, shows the intention of the parties to have been, that the defendant should retain such right in the water as was necessary to a reasonable use of his mill. It is a pertinent matter, that the deed discloses on its face the intended

of the water by each party. What might or might not be a reasonable use of the water by the defendant may depend very much upon the purposes to which it is to be applied by those occupying below him, especially since that purpose is expressed in the deed. Thus, if the contemplated business below required that the plaintiff be constantly supplied with a small stream, and there was no possibility of constructing reservoirs by the plaintiff to equalize the flow coming from the mill, the defendant might, in a time of scarcity be obliged to desist from interrupting the flow, on the principle that one may not so use even his own property as to unreasonably discommode others.

The words, "The right at all times to use all the water which naturally flows below said mill," if they stood alone, might be of doubtful construction, and the whole sentence in which they occur, taken independently of the rest of the instrument, might, without much violence or strictness, be construed to convey an absolute right to have the water flow at all seasons of the year and at all hours of the day, in the precise quantity it would have flowed in a state of nature.

But it is necessary to give consideration to all parts of the instrument, in order to ascertain what was really the intent of the parties. (*Marvin v. Stone*, 2 Cow. 781.) For this purpose, the surrounding circumstances within the knowledge of the parties at the time should be considered. (*Blossom v. Griffin*, 3 Kernan, 569.)

It will be presumed that the parties were contracting with knowledge of the situation of the property; and it is evident that they did not intend to abandon the advantages derived from using the lake as a reservoir. The terms of the contract exclude the idea that the defendant was expected to abandon the use of his mill; but it seems to have been contemplated that the defendant could and would so use his mill that the flow of water below it would supply the requirements of the purchaser's business, whenever there was sufficient water. It is admitted that the plaintiff has a reservoir of sufficient capacity; that if, during each day, the defendant lets down sufficient water for the twenty-

four hours, the plaintiff can retain and use it without injured because of temporary interruption of the flow of the stream. Accordingly, if the defendant lets down the gates at regular intervals in quantities such as the plaintiff is entitled to, no harm can be done by the daily closing and opening of the gates. But the plaintiff claims that by the "water which naturally flows," the plaintiff became entitled to all the water that would have flowed there in a state of nature; that the defendant's ponding up the water would increase the evaporation and diminish the stream. It is said that construction is not a necessary import of the words "the water which naturally flows." There is something other than a state of nature contemplated and expressed when we add to the words, "the water which naturally flows," the words, "*below the mill.*" There is no difference between a grant of the "quantity of water that would flow in a state of nature" and "the quantity which naturally flows below a mill."

Had the defendant sold all the land he owned "the foot of the wheel" down to the Willamet River, with all its hereditaments and appurtenances, I think the purchaser would have acquired all the rights that are conveyed by this deed. But in that case the purchaser would have taken subject to all the burdens and servitudes connected with the use of the grantor's mill. "The purchaser of an estate takes it with the servitudes that are visible and attached at the time of the sale." (*Lampman v. Miller*, 507.)

But it seems too evident, from the terms of the contract, that the parties intended a continuation of the use of the defendant's mill to admit of argument. The purchaser evidently took the property subject to a right in the defendant to make such use of the lake as had been theretofore made, if not seriously detrimental to the purchaser.

And if there had been no relation of grantor and grantee, the owner of the lands above would have a right to construct a dam, and to make use of surplus water to fill the lake when the detention would not work actual injury or damage to his neighbor. "The right to use necessarily implies the right to dam and to detain the water." (*Van Hoesen*

ventry, 10 Barb. 520.) "While each proprietor has a right to detain the water as it passes through his land long enough for the proper and profitable enjoyment of it; he can only *detain* it; he cannot *divert* it. (*Platt v. Johnson*, 10 John. 213, 218.)

He must not detain it "unreasonably, or let it off in unusual quantities to the annoyance of his neighbor." (3 Kent's Com. 440; *Webb v. The Portland M. Co.*, 3 Sumner, 9.)

What is an unreasonable detention is, in general, a question of fact. I think it is not an unreasonable detention to detain the defendant's pond in the wet season with surplus water, that could not then be available to the plaintiff, and discharge it in the dry season, in proper quantities, when the flow must necessarily be advantageous to the plaintiff. By unavoidable construction of the contract, the defendant has a right to use his mill, and the rule is that he must so use his property as not to injure others. He has a right at proper times to detain the surplus water by ponding the same. I think he has by his deed limited himself to such uses; and that he has no right to accumulate and retain water at times when it is needed for the use of plaintiff's works. I think he may at all times retain the water at the height at which it had been constantly retained, as indicated by the dam and flume up to the time of Green's purchase; namely, at the height of one foot above the surface of the stream; both because that was the condition of things at the time the purchase was made, and because it does not appear that such detention would make the flow of the stream, at any time of scarcity of water, materially less than it would have been had no dam been built. The plaintiff is entitled to have sufficient water to drive the machinery, as mentioned in the deed, if the natural flow of the stream, together with surplus water used in running the mill, would produce so much, and if it would not, then so much as the natural flow of the stream would produce, and the defendant has no right to so use his dam or gates as to prevent this. This amount of water should be supplied at such intervals or with such constancy as to enable the



plaintiff, by means of his reservoir, to have the reg  
of it.

(a.) The following decree was entered: It is ordered, ad  
decreed that said John C. Trullenger is owner in fee of all  
power created, or that can be created, by the flow and fa  
Sucker Creek above said point designated as "the foot of the  
water-wheel," and has the right to pond and raise the  
Sucker Lake at and above his said saw-mill at all times when  
be done by means of surplus water; and that all water flowin  
creek over and above twenty-five cubic feet per second, is su  
ter. And the said plaintiff is owner in fee of all the water  
ated, or that can be created, by the flow and fall of the said c  
said point.

It is further ordered, adjudged and decreed, that the said  
Trullenger be and is hereby required, at all seasons of the ye  
mit, at the least, as much water, to flow over or through  
or the gates thereof, at his said saw-mill, at regular intervals  
ceeding twenty-four hours, as shall be equal to all the water t  
naturally flow during the same time in said creek if no pondin  
ruption existed. And whenever the water is raised or ponded  
Lake so as to be more than four feet above the natural surf  
lake, said John C. Trullenger is hereby required to permit  
water so to flow in the course of each twenty-four hours  
equal to twenty-four cubic feet per second for ten hours;  
say, nine hundred thousand cubic feet of water during each t  
hours.

And it is further ordered, adjudged and decreed, that whe  
John C. Trullenger, his heirs or assigns, shall during the v  
cause the said pond, including the said Sucker Lake, to be  
raised to its full capacity, and shall husband and use said  
a prudent manner conducive to the mutual benefit of said Tru  
said plaintiff, said Trullenger, his heirs or assigns, shall not d  
year be required to draw down said pond or lake lower than  
four feet above the natural surface of said lake.

And it is further adjudged and decreed that the said plainti  
said J. C. Trullenger each pay one-half the costs of this suit.

Pending this suit, an injunction was granted restraining the  
from making certain alterations in his gates and dam, and  
defendant's motion, the injunction was so modified "as to all  
defendant to use his saw-mill and gates as he shall desire; pr  
regular intervals, not exceeding twenty-four hours, he discha  
sufficient to supply the plaintiff's works."

The defendant was required to show cause, upon an alleg  
of the temporary injunction, and the hearing was had subsequ  
rendition of the decree, and after the close of the term.

On this hearing, it was disclosed that there were no defin  
ments to indicate the point of "the natural surface of the lake,  
there was much difference of opinion among persons acquai  
the premises, as to how much of the present depth of water



Circuit Court for Multnomah County, November Term, 1867.

F. OPITZ et al. v. WM. WINN.

**ENISHEE.**—Where a person who is served with garnishee process voluntarily pays money to the constable, it is not error for the justice of the peace to refuse to enter an order directing the constable to pay the money to the judgment debtor, although the money may be earnings for which the justice could not lawfully enter judgment.

The facts are stated in the opinion of the court.

**UPTON, J.** The defendant, Wm. Winn, obtained a writ of review, directed to Israel Graden, justice of the peace.

The justice had rendered a judgment for \$88.69 in favor of the plaintiff, against this petitioner, on October 11, 1867, and between that date and October 23, garnishee process was served on Carson and Porter. The latter answered that they had \$27, belonging to the said Winn, petitioner; which sum they delivered to the constable, to hold the execution. On the 23d, the defendant Winn filed an affidavit, stating that the \$27 was earnings of the judgment debtor, earned within thirty days next preceding *date of the affidavit*, and demanded that the same "be exempted from execution, and that the same shall not be included in any judgment against Carson and Porter." The defendant asked the justice to make an order directing the constable to pay the \$27 to him, and the justice declined to make any order in that respect. Thereupon the defendant petitioned for this writ.

The statute does not, in direct terms, affirmatively exempt "earnings;" but section 310 provides that "the earnings of a judgment debtor for personal services, at any

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illegally created. The cause was pending on appeal to the supreme court when this source of uncertainty was made known, and to avoid the uncertainty, the supreme court so modified the decree as to fix the point to which the water should be drawn down each year, "Three and one-half feet below the highest point to which the water shall have stood when the pond was so filled for such year." In other respects, the decree was affirmed.

time within thirty days next preceding a judgment against a garnishee, shall not be included in said judgment,' necessary for the support of the family, etc.

It is not claimed that the justice has rendered a judgment against the garnishees, Carson and Porter; but he has erred in refusing to control the process of his Court, and that he should direct the constable to deliver to the petitioner the money voluntarily paid over by Carson and Porter.

I am not prepared to say the justice has power to make such order; if the constable had made an unlawful use of the power that a court should have to control its own process would probably be exercised by directing a discharge. But this money is voluntarily paid, its payment was not enforced by process, and it is a question yet to be decided whether its payment discharged Carson and Porter from their liability to the petitioner Winn.

A justice of the peace derives his power from the statute. The statute does not by any express words authorize him to make the order, and I think it was not error for him to decline to make it.

The petition does not show affirmatively that an error had been committed, and the writ must be dismissed.

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Circuit Court for Multnomah County, February Term,

## STATE OF OREGON v. JOSEPH TAYLOR

**EVIDENCE.**—Where the conversations of the defendants are admitted in evidence, the whole conversation relating to the subject admitted.

**PRIVILEGE OF WITNESS.**—A witness on a former examination had made statements which were then reduced to writing; she was asked whether on that occasion she mentioned the name of one "Morris." It was not error for the court to direct that the witness be allowed to inspect the writing before answering, although it appeared on inspection that the name "Morris" was not contained in the writing.

**DEGREE OF CRIME.**—A defendant charged with stealing from the State may be convicted either of larceny, or of larceny from the State.

if the facts charged in the indictment are sufficient to include both degrees of crime.

*M. F. Mulley*, District Attorney.

*Mitchell & Dolph*, for the defendant.

The defendant, having been convicted of the crime of larceny from the person, moved for a new trial.

The following opinion was filed, overruling the motion.

UPTON, J. It is assigned as error that the witness, Mrs. Rolff, was allowed to state a conversation between herself and the defendant, in which she told what was said between herself and one Roberts. In detailing the latter conversation, she declared that she told the defendant that she offered said Roberts a watch, \$100, and a ticket to San Francisco, if Roberts would leave the State before this trial; and that Roberts refused to accept the offer. The defendant objected that the transaction was criminal, and that there can be no agency in the commission of crime, and Mrs. Rolff could not make the offer as the defendant's agent. We think the conversation was properly admitted, without reference to the question of agency. It was a conversation between the witness and the defendant; and the defendant's answers to the witness could not be fully understood, without giving what the witness had said to him. The evidence was material, for the purpose of showing whether or not the defendant had attempted to suppress evidence.

It is also assigned as error that the court refused to permit the defendant to cross-examine Mrs. Rolff as to her testimony on a former occasion, without permitting her to examine the written deposition taken on that occasion. The defendant admits the general rule, that a witness cannot be examined as to the contents of a written instrument, without submitting the writing for inspection, but claims that the point here made is not within the rule. He asked whether she spoke of one "Morris" on that occasion, and he now claims that the name Morris does not occur in the deposition, and claims that he was deprived of his right to test the strength of her recollection.

If this constitutes an exception to the general rule, it would follow that a witness could be asked, in regard to any supposed statement and the admissibility of the statement, without an inspection, would depend on whether or not the language referred to was contained in the statement or writing. I cannot see that the proposed question is an exception to the general rule. The foundation of the rule is, that the writing is the best evidence; and a sufficient reason for applying it to cross-examinations is, that no persons have memory sufficient to endure such a cross-examination as is here proposed. Besides this, it very seldom occurs that a witness reducing conversation or testimony to writing, that a witness is said orally is placed on paper in the order in which it was uttered, and the writer does not always use the identical words uttered by the witness. It would therefore give the cross-examiner an unfair and unreasonable advantage over the witness, to permit him to examine with the writing in his hand, without permitting the witness to inspect it—afterwards to read it to the jury as a higher class of evidence than what was said on the former occasion.

It is also assigned as error that the jury was instructed that the facts stated in this indictment were sufficient to constitute larceny from the person; and also that the facts set forth in this indictment are sufficient to include the crime of simple larceny.

There is a form given in the Code, for larceny in a indictment, that omits to state the value of the property stolen. I think under that form of indictment a conviction of larceny could not be sustained; but if the value of the property be also alleged, the indictment will charge all the facts that constitute the latter crime. Larceny from the person is a higher degree of crime than simple larceny. This indictment charges larceny from the person, and in doing so, it charges all the facts that constitute simple larceny, and I think the latter crime is in this case necessarily included in that with which the defendant is charged.

The motion for a new trial must be overruled.

Circuit Court for Clackamas County, March Term, 1868.

W. C. JOHNSON et al. v. THE CITY COUNCIL OF  
OREGON CITY.

Intangible property, not growing out of real estate, must be held to follow the person of the owner.

The locality does not depend upon the face of the written evidence of the ownership. Where one of two co-executors resides in this State, and transacts the business pertaining to the estate, and the other resides abroad, the residence of the former will determine the situs of the choses in action belonging to the estate.

Notes and other choses in action belonging to citizens resident in Oregon City, are liable to taxation under the charter of Oregon City.

*Johnson & McCown*, for the plaintiff.

*S. Huelat & B. Killin*, for the defendant.

The plaintiffs are executors of the last will of W. C. Dement, deceased. J. D. Dement, one of the executors, being a resident of San Francisco, Cal., and the other, W. C. Johnson, residing in Oregon City, in this state; the latter had the personal care and management of the estate.

Some months before the time of the annual city assessment of Oregon City for 1867, the executor Johnson caused notes, mortgages, etc., payable to the executors, theretofore kept by him in Oregon City, to be placed in the hands of an agent residing outside of Oregon City; said Johnson continuing a citizen of, and to reside in, Oregon City and still retaining power over and control of the notes, and collecting interest on them at Oregon City. The notes, notwithstanding their removal, were assessed by the assessor of Oregon City to the value of \$30,000.

W. C. Johnson, as executor, paid the tax under protest, and this action is brought to recover back the amount paid.

UPTON, J., delivered the following opinion:

The charter of Oregon City contains the following provisions: The City Council has power "to levy and collect taxes for general corporation purposes, not to exceed one



half of one per cent per annum upon all real and personal property *actually* within the corporate limits of said city, made taxable by the law for county and territorial purposes.

The assessor shall make "a correct list of all the real estate within said city, and the *personal estate of all citizens thereof*;" and upon such property is to be levied the taxes spoken of in the charter.

The mode of conducting the assessment and collection of taxes the charter directs "shall be the same as in assessing and collecting county and territorial taxes."

The State law (Code, p. 898, s. 19,) provides that "if any person is assessed as executor, a designation of his representative character shall be added to his name, and he shall be assessed for all personal property held by him in such representative character."

Section 3 (Code, p. 894) provides the terms "personal estate" shall be construed to include "all debts due, or to become due, from solvent debtors, whether on account of contract, note, mortgage or otherwise."

I think the plaintiff Johnson must for the purposes of this case, be considered as sole executor, or as fully representing and by permission acting for his co-executor in all matters pertaining to the management, control and custody of the property in question. Mr. Dément, while in a foreign State, and making no objection to that control and custody, can no more disclaim the acts of Johnson, or set up a claim of distinct ownership and custody, than if he were sole executor. Co-executors are considered in law as one individual person. The acts of any one of them are deemed the acts of all. (Bacon, Ab. "Executor," D. Com. Dig. "Administration," B. 12.)

I shall, therefore, dismiss all further consideration of that feature of the case, and deal with the questions as if Mr. Johnson was sole executor, or as if both of them, or of one of the executors were resident citizens of Oregon.

The legal title of the personal property of an estate passes to the executor or administrator when reduced to his possession or control, notwithstanding he holds it in trust. If the State law had been silent on the subject, it would

properly assessable to such trustee. Beyond what has been added to, this case presents no question that would not arise if the property in question had been the individual property of the plaintiff, W. C. Johnson.

It was admitted on the trial that the notes were taken out within the limits of Oregon City for the sole purpose of avoiding the assessment and taxation by that corporation, and the suit was brought for the purpose of testing the question whether the absence of the notes and mortgages, was sufficient to relieve them from liability to the tax.

Debts due to a person are taxable to such person, as a general rule, at the place where he resides, and debts of which there is no written evidence are evidently, by the city charter, made taxable to the citizens resident in Oregon City.

Is a promissory note identical with the debt which is secured by it?

Promissory notes are spoken of in the books as *choses in action*. A debt, the evidence of which is not in writing, is not a *chose in action*. If the paper on which the promise is written, or the written words, are what is meant, when it is said that a promissory note is a *chose in action*, or that a promissory note is personal property, there is reason for the position that removing the paper and the written words from the limits of a city removes the property from the city. And it is said, in support of the position, that the characteristics of a promissory note so indicate. Promissory notes are good in the hands of an innocent purchaser. A delivery of the paper passes the title of the *chose in action*; and for these purposes the paper may be said, at least, to represent and stand for the debt, if it is not in fact identical with it. What does it follow because delivery of the paper transfers the right of action from one person to another, that the paper and the right of action are one and the same thing, or that the place where the note may be, is the place of the indebtedness, or of the property.

The two are not always in the same place or in the control of the same person, for negotiable paper may be fraudulently taken from the owner and yet the debt—the right of

action—may remain in and with the owner. Again, it is not uncommon that duplicate or triplicate papers are made to represent, or to be evidence of, the same indebtedness, and the respective original copies may be in the hands of different persons, each claiming to be the holder of the note and of the property the note represents, and that property may be in the original payee, and the holder of the note not in his possession or control.

The paper alone is not sufficient to constitute evidence of the existence of property. The paper may be of itself, and is, *prima facie* evidence of the existence of property. But if the paper is even perfect as a writing, it may have been made or obtained under such circumstances that there is no property in the property it purports to represent. If the facts exist which the law declares, a cause of action exists—the property exists.

If the promise for a valuable consideration has been made, the property called the debt or indebtedness exists, whether the promise is reduced to writing or not. Making a promissory note creates evidence, but the indebtedness may exist either with or without that kind of evidence.

The making of the note renders certain rules of law applicable to the transaction, that would not otherwise apply to the contract, and casts upon each of the original parties to the note new rights or liabilities under certain contingencies that may or may not happen. But nothing in the subject thus abstractly considered thus justly lead us to the conclusion, that the owner of the property, indebtedness, evidenced by a promissory note, can change the location of his property by changing the location of the evidence of that indebtedness, any more than the owner of a demand resting upon the evidence of a single witness can change the place of his property by changing the place of the witness. In the case of contracts not negotiable by delivery, it will hardly be contended, that to carry the contract across the state line would remove the *choses* from one State to the other.

Intangible property not growing out of real estate may be held to follow the person of the owner. Instead of depending on the whereabouts of the evidence of the



ip, the locality of this class of property must, in general, depend upon the locality of him whose personal property is.

Had the plaintiffs delivered these notes upon a sale thereof, of course the plaintiffs' property therein would have been divested, and if removed to another town or state with the buyer, of course the location of the property would have been changed.

Or had the plaintiffs taken them out of Oregon City and pledged them in security for money, the plaintiffs would thereby have ceased to have the absolute property, and possibly the place of the property might thus be changed, but there no such question arises.

The framers of the charter seem to have understood the law of this subject in the light above set forth.

The charter makes no provision for assessing notes or other evidences of indebtedness, not the property of citizens of Oregon City, that might be actually in the city. It uses the words, "and the personal estate of all citizens thereof."

An assessment so made could not include such notes or other evidences of indebtedness not the property of the citizens. The indebtedness represented by notes so held would not be *actually* in the city, and, as a consequence, would not be embraced in the provision first quoted. There are reasons for excluding the tangible property of the citizens held and used elsewhere, as is done by the words "actually within the corporate limits," that do not apply to *choses in action*; 1st, because the use and advantages of such property are not likely to be enhanced or benefited by the municipal expenditures, and 2d, because the same property may be subject to similar taxes elsewhere.

I think it clear that the property in question was, because of its nature and the place of its ownership, actually in Oregon City and liable to be taxed there.

If it were doubtful, there is a reason, applicable to doubtful cases, that would be of much force in favor of this position—that is, the contrary rule would be in the highest degree impolitic. It would hold out strong inducements

to citizens to send their evidence of indebtedness out of the city and thereby avoid their due share of the public taxes. By doing this secretly, they might avoid loss at the place of deposit and thus escape entirely, while the citizens would have increased taxes. Possibly a still greater evil would arise under that state of the law, by rendering it impossible to ascertain the whereabouts of this kind of property, or to determine for what property citizens were to be assessed.

If the citizen, under this temptation, was induced to undertake to avoid taxation, it would be next to impossible to ascertain whether or not he had such papers deposited within the city; and if they were absent, it would be difficult for assessors of other municipalities to learn where they were deposited, either for their assessment or for the purpose of punishing illegal evasion of the laws relating to such county taxes.

The complaint should be dismissed.<sup>1</sup>

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Circuit Court for Clackamas County, March Term, 1903.

**A. F. HEDGES v. WM. STRONG, Administrator of the Estate of Amory Holbrook, Deceased.**

**STATUTE OF FRAUDS.**—To bring a contract within the Statute of Frauds relating to parol agreements not to be performed within a year must appear to be necessarily incapable of performance within a year of the time.

**PLEADING.**—Where the statute declares a promise void unless in writing, it is not necessary to allege in the complaint that the promise was in writing.

**NEW CONSIDERATION.**—It is not necessary that the promise be in writing, where the promise to pay the debt arises out of a new and original consideration of benefit moving between the contracting parties.

**PRESUMPTION.**—If a note is found in the possession of the maker, it raises a presumption that the note has been paid.

**IDEM.**—The presumption is disputable.

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<sup>1</sup> Affirmed on appeal.

THE case is presented on demurrer to the complaint. The complaint charges that in 1860 the plaintiff held a promissory note of \$16,000 and interest, made by one David McLaughlin; that said McLaughlin at that time sold a valuable tract of land to one Daniel Harvey, receiving as part of the consideration said Harvey's notes to the amount of \$16,000, which latter notes Harvey deposited with said Henry Holbrook, giving to the latter power to act as said Harvey's agent; that the plaintiff, Hedges, commenced an action against said McLaughlin on the first mentioned note, and caused garnishee process to be served on both said Harvey and said Holbrook. Whereupon, said Holbrook, in open court, in order to procure a discharge of the garnishee process, promised to Hedges that he would pay Hedges the amount due to Hedges on the note as soon as money should be made out of the notes left with him by Harvey, over and above money sufficient to pay certain designated claims and the attorney's fees owing by McLaughlin to Holbrook; and thereupon the garnishee process was discharged. The complaint charges that Holbrook received the requisite amount of money, but, although requested, did not pay, etc.

The ground of demurrer is that the complaint does not state facts constituting a case of action.

*S. Huelat*, for the plaintiff.

*Wm. Strong*, for the defendant.

UPON, J. Two distinct grounds of defense, under the statute of fraud, are presented in the argument: 1st, That the contract was not to be performed within one year; 2d, That this is a promise to pay the debt of another, and is not in writing.

The first position is not sustained. The authorities are conclusive that the statute embraces only such promises as, on their terms, are *not to be performed* within the time. It does not embrace cases in which it may happen that performance will be required within the time, in pursuance of the terms of the contract. (1 Smith's Leading Cases, 3.)

"To bring a contract within the statute of frauds to parol agreements not to be performed within must appear to be *necessarily incapable* of performance in that time." (*Artcher v. Zeh.*, 5 Hill 200.)

Before disposing of the second point, it may be referred to a position taken by the plaintiff; that the promise would otherwise be within the statute, though it was made by an attorney, while acting in that capacity, and in the presence of the court, and that the predicate of an order discharging the attachment is binding.

The cases cited from 41 Barb. 648, and 4 Sandf. 211, refer to promises and representations made in the progress of the same cause, where enforcement was not. It seems reasonable and necessary that the court, under such circumstances, should have power to compel a party, especially, an attorney of the court. But this is not to take judicial notice of what transpired in open court, and a resort to parol evidence, to show that the promise was made in open court, is as objectionable as a resort to parol to show that it was made at all. To make the promise the foundation of a new action, would be to ignore those objections of uncertainty, which caused the promise to be void of the statute.

This question might be disposed of, upon the ground that although on the trial of an issue written evidence of the promise would be required, yet it is not necessary to allege in the complaint that there is a writing. In this case has been argued upon the assumption that the promise rests in parol, and it is evident that the same result would arise on the trial, if not passed upon at the trial. It is as well to treat the case as if it appeared on the face of the complaint that the promise was not made in writing.

The sufficiency of the complaint, then, must turn upon the question, whether within the meaning of the statute it is only a promise to pay the debt of another.

The plaintiff claims that it is a new and original contract, founded on a consideration moving, not between the parties to the first contract, but between Hr. Hol-

plaintiff, and that the consideration was both a benefit to Mr. Holbrook, and a harm to the plaintiff.

For the purpose of illustration, law writers have pointed out three classes of cases, and drawn the lines of demarkation as follows:

1st. Where the promise is collateral, but is made at the same time, and is a ground of the original credit.

2d. Where the collateral promise is subsequent, and not an inducement to the creation of the debt.

3d. Where the promise to pay the debt of another, arises out of some new and original consideration of benefit, moving between the newly contracting parties."

The first two classes are within the statute of frauds, but the last is not. (*Leonard v. Vreden*, 8 Johns. 29.)

The distinction thus drawn by Chief Justice Kent is the recognized law, and is sustained by modern cases. The only inquiry necessary to make is whether the complaint shows benefit to Mr. Holbrook to have been a consideration for the promise.

It seems that there was a garnishee process served upon Holbrook, which, if followed up as the plaintiff had a right to follow it, might have put Holbrook to trouble and expense, and might have resulted in a judgment against him. It can hardly be said that the discharge of the garnishee process, and dismissing the proceeding, was no benefit to Holbrook. There was a possibility that the act would not ultimately be an advantage to him, but the material point is whether he made the promise because of an expected benefit moving to himself, and whether, because of that expected benefit, he made a promise which caused the plaintiff to discontinue the proceeding under the attachment.

Had the garnishment been retained, it might have interfered with Holbrook's business of collecting and disbursing money due from Harvey, and might have delayed the time of obtaining, if it did not diminish the amount of, the notes then being earned by Holbrook. And it might have diverted the business of making those collections from Holbrook and given control of the notes to the plaintiff.

I think the complaint shows a promise founded upon a

new consideration beneficial to Mr. Holbrook, and demurrer should be overruled.

The defendant filed his answer, denying the of the complaint, and the cause being tried, the instructed as follows:

The plaintiff founds his demand upon an alleged made by Amory Holbrook in his lifetime, that he, would pay the plaintiff the amount of money mentioned in the complaint. Under our statute, a contract, whose terms is not to be performed within a year from the date thereof, is void; that is—if the terms of a contract are such that it cannot be performed within a year, it is void. If such is not the case, and if, according to the terms of the contract, circumstances may arise that will make its performance due before the expiration of a year, it is not void by our statute, although not in writing. If you find that Mr. Harvey had paid his notes before the expiration of the year, the terms of the agreement would have obliged Holbrook to perform its conditions in less than a year. It is not a case requiring the promise to be in writing at the time of the time in which it is to be performed.

If this was a bare promise to pay the debt of another, it is void, because not in writing; for an unwritten promise to pay the debt of another, when there is no new consideration moving to the person who makes the promise, is void.

It is not binding unless there is in substance a new contract made. If a person, for the sake of an advantage to himself, promises to pay the debt of another, and the promise induces the person, to whom the promise is made, to forego some right or privilege because of the promise, the law treats such new promise as a new contract and not as a collateral promise, founded upon sufficient consideration between the maker of the new promise and the person to whom it is made.

The debt thus incurred is not simply the debt of the original party, but the law treats the transaction as a new and independent undertaking, entered into by the new party, upon

cient consideration of benefit to the party making the promise. It is not material how great or how small is the advantage to be derived or expected on the part of the new promissor. It is sufficient if he deemed of it some advantage, and made the new promise in order to gain that advantage.

You will determine from the evidence what promise, if any, was made by Mr. Holbrook. What were its terms, and what considerations induced him to make it, and what are the facts in regard to the time it was to be performed. And if, under the law, as already stated, it was valid and binding, you will determine from the evidence whether the contingencies have happened under which performance could be required.

If you find that Mr. Holbrook has made a binding promise, you will determine from the evidence in the case what claims or notes against Mr. McLaughlin had been paid or accepted by Mr. Holbrook before his promise was made to the plaintiff, and whether he has received from Harvey more money than was necessary to cover the claims and notes so paid or accepted, together with Mr. Holbrook's individual claims against McLaughlin, and if more, how much more he has received. For Mr. Holbrook or his administrator could not, under any circumstances, be liable to the plaintiff for money that was necessary to satisfy his own demands, or those that he had accepted before the agreement was made.

The notes of Mr. McLaughlin, found among the papers of Mr. Holbrook, are offered by the defendant as evidence to show, or tending to show, that they had been paid or accepted by Mr. Holbrook.

If a note is found in the possession of the maker of the note, it raises the presumption that the note has been paid.

Whether these notes were held by Mr. Holbrook as agent for Mr. McLaughlin, is a question of fact for the jury. If Mr. Holbrook held them as agent for Mr. McLaughlin, his having possession of them raises the same presumption as if McLaughlin had held them. That is that they had been paid. Such a presumption is disputable by other evidence.



As to the *time when* these notes or any of them were  
and the question whether the accepted demands were  
or accepted before or after the alleged promise, the jury  
to determine from all the evidence in the case. (a)

Circuit Court for Clackamas County, March Term, 1868

GEORGE AND THOMAS MILLER v. OREGON  
PAPER MANUFACTURING COMPANY.

**CONFESSION OF JUDGMENT.**—Where a confession of judgment is  
“in an action pending,” the statement mentioned in sec. 25  
Code is not requisite.

**CORPORATION.**—The president of a private corporation is comp  
confess judgment.

**JUDGMENT, HOW SET ASIDE.**—A charge of actual fraud, in proc  
judgment by confession, should not be finally determined on  
and affidavits.

**PARTIES.**—A corporator may sue his corporation.

**DIRECTOR.**—A director is not bound by the vote of a majority, v  
claims on a contract in which he is one party and the cor  
another. The court refused to set aside a judgment in  
a director and against his corporation, obtained by confes

**CONFIRMATION OF SALE.**—A mere judgment creditor, who is not  
to the action, cannot appear to oppose the confirmation of

*Mitchell, Dolph and Smith* for George and Thomas

*W. W. Page, contra.*

THREE different parties had each commenced an  
against this defendant, a private corporation, and ea  
obtained a judgment by confession, the president  
defendant having confessed judgment in each case  
3d day of July, 1867. The names of the plaintiffs a  
amount recovered by them, respectively, are as f

(a) The jury having been discharged without a verdict, a  
mise was effected, and judgment entered by consent.

\* This case was, by consent, argued in Multnomah Cou  
chambers. The decision was affirmed on appeal, under the name  
*ler Brothers v. Bank of British Columbia.*



Charles S. Miller recovered \$6,873.80, A. J. Block recovered \$378.67, and the Bank of British Columbia recovered 10,040.

Execution was issued in each case, and real estate, namely, the defendant's factory, having been sold, each of the said plaintiffs moved for confirmation of the sale. These plaintiffs, George and Thomas Miller, commenced an action against the same defendant about the same time, and on the 19th day of July, 1867, obtained a judgment by default for \$1,147.12. They have filed a motion, supported by affidavits, to set aside each of the three judgments so obtained by confession. And they also appear in each one of those cases, and oppose the motions for confirmation of the sale.

By consent of all parties, all these motions are taken under consideration at one time and submitted upon the same argument.

It is claimed that the judgments by confession should be set aside, for these reasons:

1. There is no statement of the facts out of which the indebtedness arose.
2. The president of the corporation was not authorized to confess judgment.
3. Fraudulent acts of the defendant and of the plaintiff Block, stated by affidavit.
4. The plaintiffs Charles Miller and Block are directors.

UPPON, J., filed the following opinion.

It is claimed that the confessions in these cases are irregular, for want of a statement of facts in compliance with section 252 of the code. The code recognizes two modes of confessing judgment, namely, "without action" and "in action pending." In the former, "the confession shall be made, assented to and acknowledged, and judgment given in the same manner as a confession in an action pending;" and it "shall state plainly the facts out of which the indebtedness arose." I cannot think that the statute requires the same statement of facts to be contained in the judgment where the confession is made "in an action pending." It seems that such statement is to stand in the place

of a complaint in a case where judgment is confessed out action.

When an action is commenced, and a complaint which would be good on demurrer; and the defendant confesses its truth, and otherwise complies with the statement is not required to make the statement mentioned in section 252.

In regard to the authority of the president of a corporation to confess a judgment, section 248 designates the officer as one competent to make the confession; and there is no rule of law that will require him to place or to exhibit evidence of his being specially directed or authorized in the particular case by the directors, or other officers of the corporation. If he should act wholly without authority, and even against the interest of the corporation, it is doubtful whether anyone except the corporation can raise the objection, unless by a bill in chancery. The question is, whether fraud in the confession of the judgment not appearing on the record, can be set up by motion tried upon affidavits.

I am satisfied upon examination of authorities, that a junior judgment creditor is entitled to obtain relief by motion, where the record shows that a judgment confessed has been irregularly entered. But it is not sufficient that a charge of actual fraud in procuring the confession not supported by the record, ought to be tried upon motion and affidavits; none of the authorities cited go to that.

The trial of a disputed question of fact upon affidavits, with the exclusion of all benefit of cross-examination, is at least, a most unsatisfactory mode, and if ever permitted as a means of establishing fraud in fact, it should only be resorted to in plain and undisputable cases.

A charge of actual fraud in procuring a judgment confessed, not supported by the record, should not be determined upon motion and affidavits.

Whether one who is a director can sue the corporation in which he holds that position, is a question raised in this case, but no authorities are cited in opposition to the proposition.

It is well established that a corporator may contract with his corporation, and sue or be sued on his contract. (*Calbertson v. Wabash Nav. Co.*, 4 *McLean*, 544; 3 *Mass.* 385.) And I know of no sound reason for a distinction in this particular between a director and any other corporator.

Although he is bound by a vote of a majority, even when he dissents, this is not the case when he claims on a contract, in which he is one party and the corporation another. (*Revere v. Boston Copper Co.*, 15 *Pick.*, 363.)

It does not appear affirmatively but that the president acted by the direction of the directors.

I think the proceedings are not shown by the record to be irregular, and that the matters set up by affidavit do not warrant the court in determining, upon motion, that the judgments are fraudulent in fact. These motions must, therefore, be denied.

According to section 293 of the code, objection to confirmation of the sale can only be made by "the judgment debtor, or, in case of his death, his representative." As mere judgment creditors, not parties to the action, George and Charles Miller cannot appear in this motion.

As no competent party has filed objections, the sale must be confirmed.

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Circuit Court for Multnomah County, June Term, 1868.

ISAAC S. TOBY v. FERGUSON et al.

**JUDGMENT, HOW PLEAD.**—In pleading the judgment of a Court of special jurisdiction, it is not necessary to state the facts that confer jurisdiction.

**DEMURRER.**—If a demurrer strikes at the whole of an answer, as not constituting a defense, and there is a part of the answer that amounts to a defense, the demurrer will be overruled.

THIS case was heard on demurrer to the answer; the facts appear in the opinion filed in the cause.

*Caples & Moreland*, for the plaintiff.

*Page & Stevens*, for the defendant.

UPRON, J. This is an action for false imprisonment. The defendant, after denying some of the allegations of the complaint, makes a "further answer," to which the plaintiff demurs.

Omitting formal words, the further answer states that "the writ of arrest was duly issued out of the county court of said county," for the said Toby, "for causes allowed by law and specified in section 106 of the code of civil procedure," and the arrest was thereon made. "And thereafter, on the 28th of April, 1868, in the said action in the said county court, judgment was duly rendered and given in favor of said" Ferguson et al., "against the said Toby, for the sum of \$317.80, and that in default of the payment of the said judgment, that he, the said Toby, be kept in custody until discharged according to law." That execution thereupon issued, upon which the said Toby was thereafter imprisoned until discharged.

The grounds of the demurrer are that art. 1, sec. 19 of the state constitution provides that, "there shall be no imprisonment for debt, except in cases of fraud or absconding debtors." And that the answer does not show that this arrest was made in such a case, inasmuch as section 106 includes other declared causes for arrest.

This point involves indirectly the question of the constitutionality of section 106 of the code. But I do not feel called upon to pass upon the question, as I think the answer should be sustained on grounds aside from the constitutionality of that section.

It appears from the answer that a cause was pending between the parties in the county court; that the court had jurisdiction of the *action*, and that that court "duly rendered" a judgment of imprisonment against this plaintiff, and that a portion of the imprisonment complained of was under that judgment. Under section 85 of the code this judgment is well plead, and is a defense to that extent. "In pleading the judgment of a court or officer of special jurisdiction, it shall not be necessary to state the facts that confer jurisdiction."

The demurrer strikes at the whole of this "further answer," and as there is a part of it that amounts to a defense, the demurrer must be overruled.

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Circuit Court for Multnomah County, June Term, 1868.

**E. H. BURTON v. WALTER MOFFITT and J. A. STROWBRIDGE.**

**PARTY WALL.**—The owners of a party wall, built at joint expense, are not tenants in common, but each owns his own land, with a right to use the wall, which he may enforce by action.

**ENCROACHMENT.**—Where one party contracted to build a wall sixteen inches or two bricks thick, on the division line, and to permit the other party to use the wall upon his paying one-half the cost; and in constructing the wall he erected an iron pilaster of his building, which was ten inches wide, so that one-half of it stood on each side of the division line; *Held*, that the pilaster was not part of the wall contracted for, and that it was improperly extended beyond the division line.

**DISCRETION.**—Although the removal of the pilaster was deemed the only adequate remedy, a temporary injunction before final hearing was refused, on the grounds that the plaintiff showed no indications of presently occupying the premises, and the building had so far progressed that a removal would be nearly or quite as expensive at the present time as at the completion of the building. Granting or refusing the order in such case deemed the exercise of the discretion of the court.

**COMPENSATION.**—Where, by not conforming to the terms of the contract, the width of the plaintiff's premises above the upper floor was improperly diminished by two inches, the injunction was denied, on the ground that the injury is not beyond pecuniary compensation.

THIS case was heard on a motion for an injunction.

The complaint presents the following facts: The plaintiff's grantor being the owner of lot 4, in block 4, in the city of Portland, bargained in writing, not under seal, with Moffit and Strowbridge, owners of the adjoining lot, (being lot 3 in the same block,) that M. and S. should build a wall on the line between the two lots for the mutual use of the owners, of dimensions as follows: The "foundation twenty inches thick; first story sixteen inches or two bricks thick;

second story twelve inches or one and one half to extend on the land of both parties equally." The grantor and his assigns were by the contract "the privilege of owning and using one half of said parcel by paying to M. and S. one half the cost thereof. They should use the same for building purposes, at the cost of building a similar wall at the time of using it." The plaintiff and the defendants each had a lot on Front street of twenty-five feet; the defendants' lot north twenty-five feet.

The defendants commenced the proposed wall. They constructed the brick work up to the second floor and finished the same in accordance with the terms of the contract. But the south face of the wall they carried up perpendicularly, as well above as below the second floor, making an offset of four inches on each side at the second floor, instead of an offset of two inches on each side. Thus two thirds of the twelve-inch wall was built on the plaintiff's premises. The defendants also constructed an ornamental *iron front* of their own design, so that the south pilaster thereof projected about four inches south of the line between the lots 3 and 4, and the cornice projected eight and three fourths inches south of the division line.

At the time of the filing the complaint and setting aside of this motion, the iron front was set, and the walling brick above it had commenced, but not many courses were laid above it, or above the second floor.

By consent, witnesses were examined orally and written to show cause.

Experts testified that the workmanlike mode of constructing ornamental fronts of contiguous buildings, of different styles of architecture, was, "to return the cornice into the angle of the building and not around the [angle of, the] building." The iron front of the side wall, which is common to the buildings, there should be two pilasters, one appertaining to each building, conforming to the style of, each building.

*Logan & Shattuck*, for the plaintiff, claim that the mode of making the off-set in the brick wall is an error that deprives the plaintiff of two inches of space.

second floor and totally unfits the premises for the purposes of the plaintiff.

And that if the defendants are allowed to finish and maintain their ornamental front, it will be in the way of the front which the plaintiff designs to use, and will destroy the symmetry of his proposed building. And that each of the injuries is such that money is not an adequate compensation.

*Stout, Reed and Strong*, for the defendants, claim that if there is a fault in making the off-set, the plaintiff has shown special or irreparable injury. That he has no present use of the ground, and it is uncertain when he will use it, if ever. And that it would be an injury to the wall to leave off-set for years on the side, having no roof. That the iron pilaster is a part of the wall which they contracted to build. That the materials are not specified by the contract, and that they have the right to build such portion of it as they choose of iron.

The following opinion was filed in the case, by UPTON, J.:

This is an application for a preliminary injunction, but I presume nearly all the facts are presented that will be adduced on the trial; and in the argument, attention has been given to the subject of the ultimate rights of the parties as well as to the propriety of granting or refusing the present injunction. The defendants claim that their iron pilaster, which is ten inches wide, with a base and capital twelve inches wide, is a part of the wall contracted for.

I think this cannot be maintained. If it is part of the wall, they were bound to build it of certain thickness; this part of the wall was to be sixteen inches thick. By departing from the specified thickness of the wall, they show that they did not consider the iron pilaster a part of the "wall" contemplated by the terms of the contract. The wall is spoken of as "*two bricks thick*." If they had a right to build the wall of iron, they had a right to charge half the cost of the wall to the plaintiff; and if of iron, they could build it of still more costly material, and charge the plaintiff with half the cost of a similar wall, at a future time.

The iron front must be considered distinct from what was contracted for, both because it is a reasonable addition to the terms of the contract when examined in connection with the circumstances under which the contract was made and because both parties have so treated it.

By the terms of the contract the wall was to be for the use of each party. The plaintiff was to have the "privilege of owning and using one half" of the wall. Half of it stands upon the land of each, and each will be the separate property of each, subject only to a right in the other to a reasonable use of the whole.

"The owners of a party wall built at joint expense are not tenants in common, but each owns his own land and has a right to use the wall, which he may enforce by action." (*Matts v. Hawkins*, 5 Taun. 20; *Cubitt v. Porter*, 11 Cr. 257.)

So the plaintiff and defendants in this case will have a right to the use of their respective lots, and each will have the use, saving only, and subject only, in each case to the other will have to the use of the party wall. It will be important to consider what rights one of the parties will have to or in this wall, aside from the right he has in half of it by virtue of owning the ground on which it stands. Each part of the wall gives strength and support to the other part; the owner has a right to that support; he has a qualified right in the whole wall, but still he has no right to use it as not to interfere with the right of his neighbor to a similar use of it.

It is by the contract evidently in contemplation of the parties will construct a building; probably in many respects similar. In each case symmetry of front will be an element going to make up the availability of the proposed building. There is no question of the nature of the right which one of these parties has in the property of the other, that will justify extending a pilaster or cornice beyond the original boundary. If a proceeding is a violation of the rule, that he has no right to use his own as not to injure others; and it even goes to show that by an actual encroachment upon the premises



"Each is owner in severalty of the portion of wall situated on his own land, with no qualification except that neither has a right to pull it down without the other's consent." (*Harred v. Cisco*, 4 Sandf. Sup. C. 480.)

I cannot now see any grounds that justify the defendants in projecting their iron front upon the premises of the plaintiff. Nor can I say that any remedy but its removal will be adequate under the facts as they are presented on this motion.

But it is not shown that the plaintiff is now engaged in building, or that he intends to build on his lot, at so early a day as to make the removal of this obstacle necessary before the final hearing in this suit. It is shown by the evidence of experts that the removal would be attended by nearly or quite the same expense at the present time that it will be if required after the completion of the building; and the completion of the building will not tend to render the decree ineffectual so far as relates to the iron front. I think, therefore, in regard to this branch of the case, it will be a proper exercise of the discretion of the court to refrain from making an order until after final hearing.

As to the location of the wall of the second story, it is not shown that the plaintiff will be irreparably injured; but, on the contrary, the plaintiff admitted, when on the stand as a witness, that the injury, which is a mere diminution of the width of his premises above the second floor, might be fully compensated by a sufficient payment of money.

I am not inclined to place the refusal of this motion on the ground asserted in argument; that literally the wall, considered as a whole, extends equally on the lands of each party. The spirit and intent of the contract does not seem to me to be complied with in this respect; a fair construction is, that no more of the plaintiff's premises should be encumbered than of the defendant's. But I think the circumstances, that it was uncertain how long the wall would stand before the plaintiff would build and protect it by a fence, and that the contract leaves that matter to the party's option for an indefinite period, may well be considered in determining whether the defendants shall now be restrained,

and compelled to rebuild that part that is already covered above the second floor.

Under the circumstances of the case I shall decline making an injunction order before the final hearing. The present motion will be denied.

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Circuit Court for Multnomah County, June Term, 1886.

J. G. CHAPMAN v. PATRICK RALEIGH.

**TRANSCRIPT OF DOCKET.**—Where a transcript on appeal from the circuit court was filed, and was treated as a transcript filed with the county clerk to authorize the judgment to be docketed in the circuit court, and an execution was issued out of the circuit court, the execution was set aside on motion.

THE plaintiff recovered a judgment in justice's court for \$75, on the 12th of June, 1858. On the 7th of July following, the defendant appealed to the circuit court. On the same day the plaintiff filed a counter undertaking in pursuance of section 71 of the act relating to justice's courts.

On the 16th of July the defendant filed with the circuit court this court a transcript of the docket and the papers in the cause, in pursuance of section 72 of the act. Thereupon the plaintiff caused an execution to issue out of the circuit court to enforce the judgment set forth in the transcript.

The defendant now appears and moves this court to set aside the execution.

*J. G. Chapman, in person.*

*Shattuck & Killin, for the defendant.*

**BY THE COURT; UPTON, J.** The plaintiff claims that in filing a transcript in pursuance of the statute that requires appeals, he has also literally complied with section 72, which provides for docketing judgments rendered in the justices of the peace in the judgment docket of the

court; and that therefore he is entitled to execution issuing out of this court. He, as respondent, claims, that having given a counter undertaking, he is, according to the spirit and intent of the law, entitled to an execution as if no appeal had been taken; and that if he was entitled to an execution issued out of the justice's court before the transcript was filed, upon filing it he becomes entitled to one issuing out of this court.

I do not think it is necessary to pass upon the various questions raised and argued; as to the sufficiency of the counter undertaking. I do not think it was the intent of the legislature that the transcript on appeal should serve the sole purpose of bringing the case here for a trial *de novo* of standing as the record of a final judgment, to be enforced in pursuance of section 50.

Nor is the proceeding already taken a literal compliance with section 50. This transcript is required to be filed with the clerk of this court, while section 50 requires the transcript that shall serve as a basis of a judgment lien, and of an execution, to be filed with the *county clerk*.

It is true that both these officers are united in the same person; and there is but a technical difference in this respect in the modes of proceeding. But this is sufficient to prevent a course of proceeding that claims no greater merit than that of being a compliance with the letter of the statute, while it evidently disregards its spirit and intent.

The motion should be granted.

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Circuit Court for Multnomah County, June Term, 1868.

A. O. LANDER v. SAMUEL A. MILES and JOHN COLLINS.

**VENUE.**—On a motion for change of venue for convenience of witnesses, counter affidavits of inconvenience to witnesses of the adverse party were heard.

**HEIST.**—The crime of assault with a dangerous weapon is a felony, and a person guilty of that offense may be arrested by a private person, although the latter did not see the offense committed.

**PREPONDERANCE OF EVIDENCE.**—In justification of an arrest, a preponderance of evidence is sufficient, on the point whether the arrested party had committed a felony.

**JUSTIFICATION.**—Firing a gun upon a person, in order to secure his arrest, is justifiable only where it is necessary. It is not justifiable where the arrest can be secured by less dangerous means.

In this action the plaintiff claims \$20,000 damages, for alleged unlawful arrest, wounding and imprisonment of the plaintiff. The defendants justify, claiming that at the time of the arrest the plaintiff had recently committed a felonious assault with intent to kill, and was fleeing from justice, and that the wounding was necessary in order to secure his arrest.

On the trial, it appeared in evidence, that a few days previous to the arrest, the plaintiff and two others, Wilkins and Card, had a personal rencounter in Washington County, in which the plaintiff fought against the two; that the plaintiff struck one of them with a gun-barrel, injuring him severely, and also struck one of them with a pitchfork-handle. All the parties had been drinking to excess. The evidence is conflicting as to who made the first assault, and as to the degree of violence used against the plaintiff. After the rencounter the plaintiff fled, a warrant was issued for his arrest, and placed in the hands of the sheriff of Washington County, and the sheriff offered, and published notice of, a reward for the plaintiff's apprehension. The defendants, at or near St. Helens in Columbia County, discovered the plaintiff, passing down the Columbia River alone in a skiff. They procured a skiff, pursued, overtook and hailed the plaintiff, who reached the bank of the river, and was in the act of stepping out of his skiff on to land, to elude their pursuit, when the defendant Collins fired with a rifle upon the plaintiff, from the pursuing boat (which was twenty or thirty feet from the plaintiff). The rifle-ball broke the plaintiff's leg; and the limb was afterwards amputated near the body, in consequence of the wound.

The defendant, in justification, had answered that at the time of the wounding the plaintiff was fleeing from justice, stating facts to show that the plaintiff had recently committed

a felonious assault with a dangerous weapon, and with intent to kill, and that the shooting was necessary in securing his arrest. There is also in the answer a statement that the plaintiff was charged with that offense, that a warrant had been issued, and that the plaintiff was fleeing on that account, and that the defendants were acting in good faith, the purpose of making the arrest, and without mal-

- F. Caples, Esq., for the plaintiff.

Judge E. D. Shattuck, for the defendants.

The defendants moved for a change of venue, on the ground of convenience to witnesses; showing the names of their witnesses, residing at St. Helena, the place of holding the circuit court for Columbia County. The plaintiff filed counter affidavits, showing the residences of an equal number of his witnesses to be in Washington County; and in such direction, as to compel them to pass the place of holding this court, to reach St. Helena.

The defendants claimed that counter affidavits cannot be heard on a motion for a change of venue.

The court refused to strike out the counter affidavits, and after argument, overruled the motion to change the place of trial.

A jury being impaneled, and the evidence and arguments of counsel submitted, Upton, J. instructed the jury as follows:

The plaintiff sues to recover for an alleged assault and battery, and for alleged false imprisonment.

The defendants, among other grounds of defense, seek to justify their acts on the ground that those acts were done in the lawful arrest of the plaintiff. The defendants have also offered proof in mitigation of damages.

If the plaintiff has made out a *prima facie* case, that is, if he has proved such facts as show in him a right to recover damages, the burden of proof is thrown on the defendants. And in that case, it becomes material to consider, whether the defendants have established a justification.

And if a justification is not shown, it will be proper to consider whether the circumstances should operate in mitigation of damages, and if at all, to what extent.

The jury should carefully distinguish between what is a justification, and what are only circumstances in mitigation.

A justification is where the act is shown to have been fully done.

Circumstances are in mitigation of damages only if they do not tend to show that the act was lawful, but only tend to show that it was done without bad motives.

For instance, the warrant issued to the sheriff of Livingston county, or the notice of a reward offered for the plaintiff's arrest, are neither of them evidence tending to a justification; for neither of them added anything to the force or power of the defendants in making the arrest; but they are evidence in mitigation of damages, tending to show that the defendants acted with good motives.

A private person may arrest another:

"For a crime committed or attempted in his presence."

"When the person arrested has committed a *felony*, though not in his presence;" and

"When a *felony* has in fact been committed, and *he has a reasonable cause* for believing the person arrested to have committed it."

If the plaintiff committed a *felony*, on occasion of that encounter with Wilkins and Card, the defendants had a right to arrest him.

"A *felony* is a crime punishable with death, or which *or may be* punishable by imprisonment in the penitentiary of this State."

A simple assault is not a *felony*. But an assault with intent to kill, or an assault with a dangerous weapon, is punished in the state penitentiary, and is, consequently, a *felony*.

In determining whether the plaintiff committed a *felony* at the time of that encounter, is involved what is called the law of self-defense. Because the plaintiff claims that the violence he used on that occasion was in the defense of his own person. Where one, who has not

quarrel and is otherwise without fault, is assaulted, he has a right to use all proper and necessary means to defend and protect his person. But if in the rencounter, he uses more force and violence than is necessary for his protection and safety, he becomes himself the aggressor, and becomes also guilty of an assault. And when a rencounter has been brought on by his adversary, if after all danger to his person has ceased, he unnecessarily, wantonly and dangerously, beats his adversary with a dangerous weapon with which he is armed, he is guilty of a felony.

It is for you to determine, as a question of fact, whether the plaintiff committed a felony on occasion of that rencounter. The burden of proof is on the defendant to establish that fact, but it is to be decided according to the preponderance of evidence; this being a civil case; and he is not required to satisfy you beyond a reasonable doubt.

If you find that the plaintiff did commit a felony on that occasion, it will be your duty to determine whether or not the mode of making the arrest is such as can be justified.

Firing a gun upon a person in order to secure his arrest, is justifiable only when it is necessary. It is not justifiable when the arrest can be secured by less dangerous means. It is a question of fact for you to determine whether the shooting was necessary, in order to arrest the plaintiff.

If you find the plaintiff had committed a felony on the occasion of the rencounter, and that the shooting was necessary in order to make the arrest, you will find for the defendant.

If you do not find both of these matters in the affirmative, the plaintiff will be entitled to damages; and it will be for you to determine from the facts established by the proofs what will be a just compensation to be recovered by the plaintiff under all the circumstances of the case.

If you find for the plaintiff, the amount recovered by him should be as compensation. Punishment should not in this case be treated as an object of the action, and it is not a case calling for exemplary or vindictive damages.

The jury returned a verdict for the plaintiff of \$4,800.

Circuit Court for Multnomah County, June Term, 1868.

S. O. LANDER v. SAMUEL A. MILES and JOSEPH COLLINS.

MOTION FOR A NEW TRIAL.

**NEW TRIAL.**—The court is not at liberty to grant a new trial on doubtful and disputed questions of fact.

**NEWLY-DISCOVERED EVIDENCE.**—Motions for new trial on the ground of newly-discovered evidence are regarded with distrust, and the most exact showing of diligence, and of all other facts necessary, is required. The testimony must have been discovered since the trial; it must be shown that it could not have been obtained by reasonable diligence on the former trial; and it must not be cumulative.

**AFFIDAVIT OF WITNESS.**—It is a practice that seems to be generally approved to require the affidavit of the moving party to be accompanied by the affidavit of the witness, or the omission to do so is counted for.

**CUMULATIVE.**—Evidence of material facts which the moving party cannot prove nor attempt to prove, may be regarded as not cumulative.

**DILIGENCE.**—A party who moves for a new trial should be free from laches in not having moved for a continuance. It is not sufficient that the affiant depose in terms "that he has made diligent inquiry;" the affidavit should state facts. The question of diligence must be determined by a consideration of specific facts deposited.

The jury having rendered a verdict for \$4,800 in favor of the plaintiff, the defendants filed a motion for a new trial, the motion being argued and submitted by the same counsel who conducted the trial.

The court filed the following opinion, overruling the motion:

Only three of the specified grounds were urged on the argument of the defendant's motion for a new trial. They were:

1. Newly-discovered evidence;
2. Excessive damages;
3. And insufficiency of the evidence to justify the verdict.

Upon the two points last named, as the evidence is already made part of the record, the mover relies upon the knowledge and recollection of the court. I cannot say that the evidence was not sufficient to justify the verdict.

When the plaintiff had proved the wounding and injury



ment, and the disastrous effect of the wound, it became incumbent on the defendants to justify or excuse the acts proved. For this purpose they offered evidence tending to show that a felony had been committed by the plaintiff, and that the means used to arrest the plaintiff were necessary and proper. If the defendant established both these propositions, the verdict was against evidence; but if he failed in regard to either proposition, the plaintiff should prevail.

In the opinion of the court, neither proposition was conclusively established; nor can I say the weight of evidence is with the defendant on each of them. The court is not at liberty to grant a new trial upon doubtful and disputed questions of fact, and thus usurp indirectly the province of the jury.

Nor can the court, from any *data* before it, say that the damages were excessive or given under the influence of passion or prejudice. The jury were instructed, I think, correctly as to the measure of damages; or, at least, if there was error in that particular, I think it was in favor of the defendant; the jury having been told that exemplary or vindictive damages could not be given in the case. Jurors are necessarily the judges of the weight of evidence adduced in mitigation of damages, and in this case the evidence was conflicting.

The injury is of a most grave and serious character; and if the plaintiff was entitled to recover, it is impossible to say with certainty that a less sum would be adequate compensation for the loss of a limb, disregarding the minor considerations, such as bodily pain, loss of time and expenses incurred.

There are no facts or circumstances in the case that lead the Court to infer or suspect that the jurors were influenced by passion or prejudice. It would be unreasonable to draw such inference from the amount of the verdict in this case. From the very nature of the injury, which includes the loss of a limb, it is difficult, if not impossible for one man to tell what would be the honest conviction of another as to the amount required to compensate for the loss.

A judge is no more authorized to set aside a verdict because he differs from the jury as to weight of evidence where it is conflicting and where there is ground for a difference of opinion, than a jury would be to decide contrary to the instructions given, but in accordance with its wishes or preferences.

To sustain the ground of *newly-discovered evidence* the affidavit of the defendant Miles states that the affiant expects and believes that Job Card will swear that he is one of the persons beaten and assaulted by the plaintiff; that Card was sober at the time, and recollects distinctly all that occurred; that there was no assault whatever committed on the plaintiff by Wilkins or Card;" but that in some words between the parties, "the plaintiff assaulted said Card, and that the plaintiff's shirt was cut in attempts to resist the assaults made by the plaintiff and that the plaintiff, without any just cause or provocation, used the gun-barrel and the pitchfork, referring to the evidence, wantonly and maliciously; and severely and cruelly beat, bruised and disabled said Card and said Wilkins." "And that the plaintiff had repeatedly made use of violence against said Card." The affiant says he made diligent inquiry in Washington County and elsewhere and caused others to do so for said Card but could not ascertain where he was until Wilkins (on the trial) testified to his whereabouts. That he heard a variety of reports as to his whereabouts, but could get no definite information sooner.

On the trial, both the plaintiff and Wilkins testified to the rencounter. They both testified that both Wilkins and Card were intoxicated at the time of the rencounter. Wilkins said he was too much intoxicated at the time of the rencounter to tell what occurred at the commencement of the fight.

The affidavit of Miles is objected to, as not showing diligence; that the evidence is cumulative; and that it is shown that the evidence has been discovered since the trial. And the plaintiff claims that evidence given on the trial to the effect that the defendant Miles was well ac-

th both Wilkins and Card before the difficulty, and that the two were near neighbors, should be considered.

The necessity and propriety of granting new trials in proper cases, and the necessity of strict practice to prevent abuse and unfair advantage being obtained by granting, are equally important. Caution is particularly necessary when the motion is founded on newly-discovered evidence, both because it opens a temptation to perjury, and because its abuse would give an unfair advantage, by allowing a party to take the chance of success with a part of his witnesses, and if not successful, to avoid the consequences of his venture, by a new trial, while his adversary could be remediless if unsuccessful at either trial.

Hence "motions for a new trial on the ground of newly discovered evidence are regarded with distrust and disfavor, and the strictest showing of diligence and all other facts necessary is required." (*Baker v. Joseph*, 16 Cal. 180.)

It is considered settled—First: That the testimony must have been discovered since the former trial.

Second: That it could not have been obtained with reasonable diligence on the former trial. (*Moore v. Philadelphia Bank*, 5 Serg. and Rawle, 41; 13 Mass, 302; 7 Mass. 55.)

Third: That it must not be cumulative. (*Bartlett v. Hodgson*, 3 Cal. 57; and *Ib.* 114, 399; *Gavan v. Dopman*, 5 Cal. 2; *Live Yankee Co. v. Oregon Co.* 7 Cal. 42; *Duryee v. Pennison*, 5 *Ib.* 248; *People v. Superior Court*, N. Y. 10 *end.* 292.)

"Cumulative evidence means additional evidence to support the same point, and which is of the same character as evidence already produced." (10 Wend. 292.)

It is the practice in some jurisdictions, and one that seems to be generally approved, to require the affidavit of the moving party to be accompanied by the affidavit of the witness himself, or the absence of such affidavit to be accounted for. (*Pilot Rock Co. v. Chapman*, 11 Cal. 162; *Ib.* 199.)

If Card will testify to material facts which the defendant cannot prove or attempt to prove on the trial, his evidence may be regarded as not cumulative.

My recollection of the evidence is that the defendant attempted to prove by Wilkins, that the plaintiff assaulted Card, without cause or provocation, bruised, and disabled Card and Wilkins. The matters, which the affiant says he expects to prove by either conclusions, or facts that are admitted by the defendant, except the allegation that, "There had before that been a difficulty between the plaintiff and said Card, and the plaintiff had repeatedly made threats of violence against said Card."

The threats are referred to *only on the belief of* the affiant without alleging any knowledge or even information of Card or any one else. This detracts from the force of the statement. (11 Cal. 162, 199.)

A party should be set free from *lashes* in not having a continuance.

It is a general rule that the existence of the evidence should have been unknown to the party at the time of the trial, and the circumstances should not leave an inference that by reasonable diligence would have discovered it. (11 Cal. 162, 199.) *Tyler*, 18 John. 489; *Jackson v. Molin*, 15 John. 100.

The trial has disclosed that the affiant, before the trial, was acquainted with both Wilkins and Card; knew that they were both engaged in the difficulty; that they were both of acquaintance, and all that is disclosed indicates that the affiant probably knew as much as he does now of the existence of the evidence to be obtained from Card. He says that he was in Washington County, and elsewhere, for Card and Wilkins does not show that he inquired of Wilkins; nor does he show any other acquaintance of Card's. He says he heard of reports as to Card's whereabouts; but he does not show that he followed them up, or that they were not correct.

The use of the word diligent, in his statement of facts, adds but little, if anything, to the force of his statement, for it is not admissible that he should judge what extent of inquiry amounts to diligence. It is sufficient that he depose in terms "that he has made inquiry;" the affidavit should state facts. It is not sufficient to say that he has made inquiry to such extent

anks that he should be regarded as diligent. The question must be determined by a consideration of specific acts deemed to

I think it should be shown that he applied to parties most likely to be informed about Card and his affairs; and if he obtained "reports" or information from them, it should be shown with what results he followed up the information.

It does not appear from this affidavit but that ordinary efforts would have enabled the defendant to learn the residence of Card, and to have procured his deposition before trial. A new trial must be denied.

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Circuit Court for Multnomah County, June Term, 1868.

### F. BROWN v. EDWARD CAHALIN.

**PROOF OF CONSIDERATION.**—An acknowledgment of payment of purchase money contained in a deed or bill of sale may be explained by parol. Parol evidence is admissible to show that the consideration expressed in a deed was not the actual consideration.

**CIRCUMSTANTIAL EVIDENCE.**—When the action was for an agreed price, and the evidence was conflicting as to whether that price was agreed to, the actual value of the property sold was admitted as a circumstance tending to disprove the alleged agreement. Proof of the state of accounts was admitted as circumstantial evidence tending to contradict a claim of payment by a release of prior indebtedness.

**NEW TRIAL.**—Where it is evident that the jury have disregarded instructions, to the detriment of a party, it is ground for a new trial.

THE plaintiff alleges that he and the defendant were partners, owning a building and a stock of goods; that the parties dissolved the partnership, and that he sold his interest in the building, the goods and the business to the defendant for the sum of fifteen hundred dollars, which the defendant promised to pay him upon request, but only paid \$35, and, although requested, refused to pay the balance, \$1,465.

The answer admits the purchase of the building and goods, but denies that the defendant promised to pay

therefor \$1,500, or any sum; but says that at the time of the dissolution the plaintiff was indebted to the defendant in a large sum, and that the two, as partners, were indebted to divers other persons; and that the building and goods were sold to the defendant solely upon the consideration that the defendant would release his claims for money owing to him from the plaintiff and would assume the debts owing by the firm; that the defendant did so release plaintiff and assume said firm debts, and thus fully paid the plaintiff for all his interest in the building, goods and business.

The replication denies the allegations of the answer.

*W. W. Page*, for the plaintiff.

*Stout & Reed*, for the defendant.

A jury being called and sworn, the plaintiff introduced a deed and bill of sale executed by him to the defendant. The deed recites that the consideration for the building is one thousand dollars, and admits its receipt by the plaintiff, and the bill of sale recites a consideration of \$500 for the goods, and admits that the amount was received by the plaintiff.

The plaintiff introduced as a witness an attorney, who drafted the deed and bill of sale; and after proving that he was the person who drew them, asked: "What can you state as to the amount of money paid at the time of the transaction?"

The defendant objected that the plaintiff having introduced the instruments could not dispute them.

The objection was overruled, and the witness testified: "No money was paid at the time. The parties came together to my office, and said they wanted a deed and bill of sale. When writing the deed I said—'What consideration shall I insert?' and one of them said, you may as well put in \$1,000; the other assented. When I was drawing up the bill of sale, a similar question was asked by me, and one of them mentioned \$500, and the other assented, or made no objection. I supposed the amount to be a mere

matter of form. Nothing else was said about money or the consideration."

The plaintiff testified that the defendant agreed to pay \$1,500 for his interest in the property.

The plaintiff rested his case; and the defendant testified on his own behalf, that he never agreed to give any sum for property, but that the business had been unsuccessful, and that the plaintiff had become indebted to him, and had consented and agreed to transfer the property to him, if he (the defendant) would release that indebtedness, and assume the debts owed by the firm. That the transfer was made in pursuance of that agreement and at the plaintiff's solicitation; that after the transfer was made and all their business settled up, he made the plaintiff a present of the \$35 mentioned in the pleadings.

The defendant's counsel asked what was the building, stock of goods and business worth?

The plaintiff objected to the evidence as incompetent and irrelevant. The defendant claimed that he could show that an undivided half of the whole was not worth \$300; and that it was a circumstance tending to show that \$1,500 was not an agreed price.

The evidence was admitted as a circumstance tending to show whether or not the \$1,500 was an agreed price.

Under similar objection and ruling, the plaintiff testified to the condition of the firm business and the state of the accounts between the parties.

The jury was instructed, among other things, that the evidence of the value of the property, and of the state of accounts between the parties, was admitted solely for the purpose of enabling the jury the better to determine whether the defendant had promised to pay the plaintiff \$1,500 for the property transferred to him; and that unless the defendant had promised to pay that sum for the property and business, the plaintiff could not recover.

The plaintiff recovered a verdict for \$800.

The defendant moved for a new trial, assigning the following grounds:

1st. The plaintiff should not have been permitted to dis-

puts by parol evidence the admission of payment contained in the deed and bill of sale.

2d. It was error to allow the plaintiff to go into evidence of the condition of the accounts prior to the dissolution and sale.

3d. Insufficiency of the evidence to justify the verdict.

4th. The verdict is against law.

5th. That the jury disregarded the instructions of the Court.

The motion submitted, and taken under advisement, the following opinion was filed granting a new trial.

UPRON, J. The first objection is not well taken; it is a general rule that a written receipt may be explained by parol. And the general rule that a party is not permitted to dispute his own deed, is subject to the exception that a party may show that the consideration expressed in the deed is not the actual consideration, whenever that becomes a material point.

There is equal reason for permitting a party to show that the acknowledged payment has not been made. It is an every day practice to state a nominal consideration in deeds; and it is equally common to allow the deed to contain a formal acknowledgment of payment when none has been made. Where one takes a deed and gives his promissory note, or a note and mortgage, to secure the price, nothing is more common than for the deed to recite that full payment has been made, and the acknowledgment of payment contained in the deed is considered open to explanation.

The second ground of this application is the admission of evidence of the state of the accounts between the parties up to the time of the dissolution.

It would have been clearly error to permit the jury to understand that they were to find by their verdict what would have been a fair settlement; this action being for money due upon an express promise to pay a specified sum. But the jury were instructed that the plaintiff could not recover unless fifteen hundred dollars had been agreed



On by the parties. It appears to me that the actual value of the property, and the question whether or not the plaintiff was then indebted to the defendant, are each distinct matters of fact, tending to show which of the parties told the truth, in narrating what occurred at the time of the dissolution. And I think this was properly permitted to go to the jury as circumstantial evidence tending to ascertain the truth in regard to the principal question in issue.

Upon the fourth and fifth grounds, I think the verdict should be set aside. There was no evidence tending to show that more than \$35 was paid by the defendant at or after the sale of the property. And if the plaintiff established the fact alleged in the complaint, that the defendant promised to pay \$1,500 for the property and business assigned, he was entitled to recover at least \$1,465. The jury returned a verdict for \$800; and the conclusion is irresistible that the jury disregarded the instructions given, and attempted to determine a matter that was not in issue, but instead of passing upon the question of fact, whether the defendant made the purchase at an agreed price of \$1,500, the verdict was rendered with a view to determine thereby what was the probable value of the property, or what would have been equitable terms of settlement at the time. The instructions were explicit, that the plaintiff could only recover upon proof of the alleged settlement. But if a settlement was in fact made, all previous demands were canceled by, or merged in, the contract of settlement. Where it is evident that the jury, whether intentionally or inadvertently, have disregarded instructions to the detriment of a party, it is ground for a new trial. The verdict should be set aside.\*

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\*The cause was subsequently retried; and the plaintiff had a verdict for \$1,465.

Circuit Court for Multnomah County, June Term, 1868.

JAMES B. STEPHENS v. JOSEPH KNOTT.

Where S. has a contract with K., the owner of a ferry, that S. and his family shall have their ferryage free; and S. owns land on which there is a saw-mill and growing timber, and contracts with N. that N. shall use the saw-mill and saw the growing timber at N.'s expense and cost; and S. shall convey the lumber from the mill across the ferry and sell it, and the two shall divide the gross proceeds equally; and S. hires G. to haul the lumber across the river at the ferry for \$3 per thousand—the ferryage of the lumber across the river is not the ferryage of S., and K. is not obliged to ferry the lumber free of charge.

*Logan & Shattuck*, for the plaintiff.

*D. Fredenrich*, for the defendant.

In March, 1861, the plaintiff sold to the defendant the ferry across the Willamet river at Portland. As a part of the consideration of the sale and transfer, the defendant stipulated "that the said James B. Stephens, party of the first part, and his family shall have their ferryage free from all charges and demands forever."

Stephens was then a farmer, having a family, and having teams and some employees at work on his farm. In 1867 he purchased a saw-mill, and contracted with a Mr. New that New should cut and haul the logs from timber growing on Stephens' land and saw them at the mill at his own expense. Stephens, at his expense, should take the lumber at the mill, convey it to Portland and sell it, and after sales, New should have one half of the gross proceeds and Stephens the other half. Lumber was cut in pursuance of the contract, and Stephens sold to a Mr. Guild, teams, upon consideration that the teams should become the property of Guild when Guild should pay the agreed price thereof to Stephens, by hauling said lumber from the mill to Portland at an agreed price of \$3 per thousand, Stephens engaging to Guild that the ferryage was paid for and should cost Guild nothing. Guild commenced hauling the lumber, and the defendant refused to permit Guild to cross with

lumber on the ferry, without payment. Stephens paid, under protest, the usual rates of ferryage, and he brings this action to recover back the money so paid and damage for detention and delays thus caused.

*Logan & Shattuck*, for defendant, claim:

1. That this is not the business of Stephens, or of Stephens and his family.
2. That it is not the ferryage of Stephens, but of the party who engaged to haul the lumber.
3. That it is not the ferryage of Stephens, but that of Stephens and Mr. New.
4. That the true meaning of the contract is, that Stephens was to have the amount, or at least the kind of ferrying that was consistent with the business in which he was engaged at the time of taking the contract.

The cause was tried without a jury and the following decision was rendered:

UPRON, J. Whether Guild, while hauling lumber by the thousand, shall be considered as a principal in the business of hauling the lumber, that is, as doing business for himself; or as the agent of the plaintiff Stephens and doing the business as an agent, is one of the questions to be determined. For some purposes he would necessarily be considered an agent, and for other purposes it is equally certain he is a principal. He was a bailee of the lumber, and therefore an agent; for the idea of agency is necessarily involved in every bailment.

But in the business of hauling lumber and the profits to be made from it, when considered abstractly from any consideration of ownership of the lumber, he was acting as a principal.

Then how is the owner of a ferry authorized to look upon and treat such a business? What would be the respective rights and liabilities of Stephens and Guild if dealing with a ferryman who had no contract with either of them? Would the ferryman upon demand being made by Guild, be bound to take notice of the relations existing between Stephens

and Guild? If Guild used the ferry and refused payment, could the ferryman recover the toll in an action? And could Guild defend by pleading against the ferryman, that Stephens was the party demanding the use of the ferry?

It was said in argument that because Stephens and Guild had expressly agreed that Guild should pay no toll, the business of hauling still continued the business of Stephens. That Guild could not be under any obligations to pay on Stephens' lumber, when by the very terms of his employment it had been agreed that Stephens should discharge that duty.

This position is not well founded. Knott was not a party to the contract between Stephens and Guild, and a mere agreement between the latter two, that the ferrying should be done on Stephens' account, would not increase or change Knott's liabilities or obligations. As between them, or either of them and Knott, that agreement did not give or take away any rights. Knott's right to charge ferryage depended upon the question, whose business was the transportation of the lumber. If Guild became principal in the business of hauling, then it was no longer Stephens' business; and Stephens could not bind defendant Knott, except in regard to Stephens' business; or, in other words, Stephens' ferrying.

On the next ground of defense urged, we are to inquire whether conveying lumber to Portland (if it had been done without the intervention of Guild) would be considered the business of Stephens, or the business of Stephens and another. If the latter, it must be conceded that it is not within the contract. "Where two or more persons place their money, effects, labor and skill, or some or all of them, in business, with an understanding that each is to share in the profits; one may contribute labor or skill, another property, and another money, according as they shall agree." The business is a partnership.

In this case the parties were each to have half the gross proceeds of the lumber. Stephens contributed the growing timber, the use of the mill for the term of the partnership, and the labor and expense of hauling the lumber to town. Mr. New contributed the labor and expense of cutting and

cutting the timber, manufacturing the lumber, and keeping the mill in repair. The business of converting the standing trees into money by the process agreed upon, was a business interesting to, and enlisting the energies and efforts of each of these parties, one as well as the other, from which both were to derive profit. If it was the business of Stephens it was also the business of Mr. New. Independent of any strict definitions, it was a business in which they were jointly interested, and they jointly shared the profits, and consequently it was a partnership business.

But it is claimed that Mr. New's labors upon, and his position and control of the lumber ceased at the mill, and that by their contract the matter of carrying it to Portland was the sole business of Stephens.

If it were true that Stephens' agreement that he would carry the lumber across the river, made that the sole and individual business of Stephens, it is difficult to see why his contract with Mr. Guild, that Guild would carry it by a steamer, did not again change the matter, and make its carrying to Portland the sole business of Mr. Guild.

If the plaintiff's position can be sustained, Mr. Stephens could contract with one set of men to chop and deliver on the east side of the river all the cordwood that could be used in Portland, and with another set to haul it all across the river, and thus appropriate the cost of ferrying; or, he could contract to carry all the freight of the country across the river for a percentage on the value.

It will hardly be contended that the plaintiff Stephens could enter into the business of forwarding freight, and contract with the railway company to receive its freight at the east side of the river and convey it to the west side, and there collect all the charges, and return to the company the specified share thereof; and thus, having contracted with other parties to do the wagoning at a certain rate per ton, compel the defendants to pass the wagons over the river free of charge.

Yet the difference between that proposition and the one now before the court is, that in that case Stephens and the railway company would not have the general property in the goods car-

ried, while in this case he and New have a general partnership in the lumber.

The lumber is no more the separate property of New when it is crossing the river, than it is the separate property of New when it is passing through the saw-mill. In the course of this business the trees are severed from the realty, and the logs are being brought to the mill become the personal property of Stephens and New, and they so remain until, being converted into lumber, they are sold.

I can not doubt but that New is a partner in the business of manufacturing the lumber, conveying it to market and selling it. If logs are lost before they are hauled, and the quantity of lumber to be made is thereby diminished, or if lumber is lost while being transported, or sales are made at reduced price, or the lumber is lost to irresponsible parties, both Stephens and New suffer from the loss of profits by the circumstance.

The fact that it is a special partnership does not raise the main question. If Stephens could make the hauling an individual and sole business, by agreeing that he would personally do the hauling for the whole business, or that he would, on his own expense, he can make the carrying of the lumber at freight his ferrying by agreeing to do it at his own expense. But this point is conclusively disposed of so far as the partnership is concerned, by the circumstance that Stephens has agreed to haul the lumber across the river at a certain price per thousand. (1)

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(1) The decision in this case was reversed on appeal to the Supreme Court. No written opinion has been filed in that court; but it seems that a reason was found for holding that Stephens was to furnish the mill and the standing trees, and to transport the lumber for half the gross receipts, made the work Stephens' individual business, while Guild's agreement to transport, for a specified sum per thousand, did not make the transportation Guild's individual business.

remit Court for Multnomah County, August 26, 1868. At Chambers.

CHANCY BALL v. J. H. LAPPIUS, City Marshal.

MANDAMUS.—Mandamus lies to compel an officer to perform an act which the law specially enjoins as a duty resulting from his office.

EM.—An ordinance passed in 1862, directing the city marshal of the city of Portland "to procure at the cost of the city" \* \* \* "a smallpox hospital, the selection to be subject to the approval of the committee on health and police," does not impose such an official duty on the present city marshal as will be enforced by mandamus.

EM.—Mandamus is proper only where a party has a legal right, and there is no other appropriate legal remedy.

EM.—The right must be certain, and clearly made out by the facts of the case.

DISCRETION.—The granting or refusal of the writ is discretionary.

PETITION for writ of mandamus.

The petition alleges that one Adam, "a small-pox patient," is, and for six days has been, lying and being in a tenement building immediately adjoining the place of business of the petitioner in the city of Portland; that the locality is thickly populated with men, women and children, and there is great danger of said disease spreading among the people. That the business of the petitioner, and business generally in the vicinity has been suspended by reason of the presence of said disease.

The petition cites a city ordinance passed in 1862, which enacts: 1st. "That the city marshal be, and he is hereby, required to procure, at the cost of the city, a suitable building at or near the outskirts of the city, for the purpose of a small-pox hospital, the selection to be *subject to the approval* of the committee on health and police."

2d. "That the said marshal be, and he is hereby, further required to have removed, without delay, to said hospital any and all small-pox patients that may hereafter occur in this city."

A third section requires the marshal to procure medical and other attendance. The petition charges that the defendant is marshal of the city, and that, being requested, he refused to remove the patient.

UPTON, J. filed the following opinion:

The writ of mandamus lies to compel an officer to perform an act which the law specially enjoins as a duty resulting from an office, trust or station.

It may require the officer to proceed to the discharge of any of his functions, although such discharge involves the exercise of discretion and judgment, and a choice between different modes of proceeding; yet "it shall not control judicial discretion." And it is safe to go further, and say that it shall not control discretion, judicial or otherwise, where the law assigns to an officer. (*Judges of Oneida v. People*, 18 Wend. 97.) In such case the office of the writ is to compel the officer to act. The mode of acting is still to be determined by him in whom the law has lodged the discretionary power.

In determining on the necessity and propriety of the writ it must be observed:

1st. Mandamus is proper only where a party has a legal right, and there is no other legal remedy. (*Ex parte Nelson*, 1 Cow. 428; 2 Hill, 45.)

2d. The right must be certain, and clearly made out by the facts of the case. (*People v. Supervisors Chenango*, Kern. 563.)

3d. The granting or refusing of the writ is discretionary. (*Van Rensselaer v. Sheriff of Albany*, 1 Cow. 512.)

If it were established clearly that the law enjoined upon the defendant a positive duty to remove every smallpox patient to some known hospital now in existence, the writ would present no difficulty. A writ would necessarily be issued upon refusal to perform the act enjoined. And it was certain that the law enjoined upon him the duty to provide a hospital; gave him the power, to provide a hospital; upon refusal he might be compelled by mandamus.

It is not alleged in the petition that there is a hospital, and, consequently, it must be assumed that there is no hospital. This leads us to consider whether the marshal has a duty to provide a hospital, and whether it is by law enjoined on him as a duty, to provide a hospital.



The construction of the ordinance is open to doubt. It is not clear from its language, whether it intended more than to require of the marshal in office in 1862, to procure a building. And I think it not a fair interpretation of the language to hold that that marshal from time to time, and his successive marshal, is empowered by it to provide a new hospital, as often as the one provided shall be destroyed, or as often as from any cause the city shall lack one.

Aside from this question, the marshal's selection is made subject to the approval of the committee on health and police." The marshal, then, is not empowered, on his own initiative and according to his own judgment, to procure a hospital. His selection is subject to the approval or disapproval of another power. The city charter clothes the city council with power "to make regulations to prevent the introduction of contagious diseases into the city, and to remove persons infected with such diseases therefrom to suitable hospitals."

The ordinance shows that it was not the intention of the council to divest themselves of control of this subject; but, on the contrary, the selection is subject to the approval of one of their committees, which is, in reality, holding it still under the control of the council, the committee being a constituent part of that body. It is true the council can not delegate their power to a committee, but if the committee approve, and so report to the council, the express or tacit assent of the council to the approval being had, it will be treated as the action of the council.

If, then, the marshal should make all possible effort, he has no power even to procure a hospital independently of the council.

I think it extremely doubtful whether the petition shows whether that the marshal has the power, or that it is a duty enjoined on him by law to procure a hospital.

Generally a court does not take judicial notice of facts not shown by the record. But, as this class of applications has never been considered addressed to the discretion of the court, and as it is in the first instance *ex parte*, I think it not unreasonable to revert to facts that are within the knowl-

edge of the court, and may be ascertained by examining its records and files in other cases. It is shown by those records, that shortly after the passage of this ordinance, a former marshal procured a hospital building, in pursuance of the provisions of the ordinance, which was used for hospital purposes by the city, and which has since been destroyed; and that the council refused to approve certain of the marshal's proceedings in that matter.

It is not certain, if the marshal should attempt to select another building, that the council would approve his act; and yet the petition asks that the marshal be compelled to select a building and remove the patient to it, on his own responsibility. The petition does not propose that he should simply select a building and report the selection to the council. In fact, that course would evidently be too dilatory to meet the wants of the petitioner. A mandamus should not be granted where it would be unavailable. (*People v. Supervisors of Green*, 12 Barb. 217; 13 How. Pr. 305; 11 Id. 89.)

The subject of contagious diseases has by law been confided to the discretion and judgment of the city council, and a mandamus should not be granted to control that discretion. It should not be resorted to in this connection, unless it is clearly shown that there is an evident neglect of duty or violation of law.

The writ must be denied.

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Circuit Court for Multnomah County, November Term, 1868.

**F. DUFERNOY v. JACOB STITZEL, Sheriff of  
Multnomah County, et al.**

**GARNISHEE.**—A. recovered judgment in this court against D. in a civil action for a sum of money, and thereupon, in a proceeding in which V. was served with garnishee process, A. recovered a judgment against V. for an indebtedness alleged to be due from V. to D. In pursuance of the judgment against D. the latter was imprisoned for want of payment. An execution was issued against V., and V. paid to the sheriff the amount adjudged against him, under protest, and then appealed his case to the supreme court. *It was held*, that the money paid by V. must be applied on the execution against D., notwithstanding the protest and appeal.

J. B. MAYERAN obtained a judgment for something over \$2,900 against the petitioner, F. Dufernoy, in a civil action in this court, and it was adjudged that in default of payment the defendant be imprisoned. Process in the nature of garnishee having been served on Leon Vial, the said Mayeran obtained a judgment against the said Vial, to the amount of \$2,600, on account of money alleged to be due from said Vial to said Dufernoy. Execution was issued on each of these judgments, and placed in the hands of the defendant, Jacob Stitzel, sheriff of Multnomah County, in whose custody said Dufernoy is now detained by the execution in the first named case. The other execution being levied on the property of said Leon Vial; Vial paid the said sheriff the full amount of the judgment against him, protesting that said judgment was erroneous; and he immediately appealed that case to the supreme court; and notified the sheriff thereof. The defendant, Dufernoy, demanded that the money paid by Leon Vial should be credited on the execution upon which he was in custody, and he paid to the sheriff a sum equal to the difference between the two judgments. The sheriff returned the execution that had been issued against Vial and paid the money into the hands of the clerk, without making any endorsement on the other execution. Dufernoy, by his attorney, demanded, both of the clerk and of the sheriff, that the payment should be endorsed and applied on the latter execution, and that Dufernoy be released from custody. Both the sheriff and the clerk failed to comply with the demand, and Dufernoy now files this petition, praying for such application to be ordered, and for a writ of *habeas corpus*.

The cause was submitted for final judgment on the pleadings.

*Wm. F. Trimble, Esq.*, for the petitioner.

*Mitchell, Dolph & Smith*, for the defendants.

UPTON, J. Sections 155 and 281 of the code, are applicable to cases where an attachment has been served; and these sections of statute make it the duty of the sheriff, in

ordinary cases, to apply money received by him "due the defendant" on the judgment against the

It does not appear with certainty whether the money had been attached so as to bring the case (if treated as a payment) literally within the provisions 155 and 281. But if the money is made over, without an attachment, the reason for the rule is the same.

The fact that Leon Vial paid the money under protest to avoid a forced sale of his property, and took the appeal, shows that he is disposed to test the question whether the money is paid or received "on a debt due the defendant." I confess that I have felt great doubt whether it was proper of the sheriff to apply the money, notwithstanding the appeal, and appeal, as he would be bound to do if the judgment against Vial had become final.

Had the pleadings shown affirmatively what the grounds of the appeal were, and that there was a probability of the judgment being reversed, and that Vial has a good case, the case would have presented still greater difficulties.

It does not affirmatively appear that the judgment against Vial is likely to be reversed, nor that the plaintiff's original suit is in great danger of being left without remedy if the judgment should be reversed and he be compelled to refund this money.

It does not seem just to hold the defendant liable upon a mere supposition or possibility that the judgment against his alleged debtor is erroneous, and especially because the plaintiff has prosecuted his demand against Vial to judgment, and has, to a certain extent, taken the responsibility of declaring there is no error, by applying the money to judgment and issuing execution upon it. It will not do that the money be applied on the original judgment without prejudice to the right of the plaintiff to move for a new credit aside, in case he is compelled to refund the money by Leon Vial.

[ \* \* ] Upon the residue of the judgment on the original action, being satisfied, an order for the discharge should be made.

Circuit Court for Multnomah County, November Term, 1868.

STATE OF OREGON v. JOSEPH BERTRAND.

**EVIDENCE.**—Where the proof shows that the killing was done voluntarily or intentionally, with a weapon which was intended for taking life, the use of that kind of a weapon raises a presumption that the killing was done maliciously.

**BURDEN OF PROOF.**—When such proof is made, unless the circumstances of the killing show that it was justifiable or excusable, the burden of proof devolves on the defendant to show an excuse or justification for the killing.

A killing with such weapon is positively proved, or proved beyond a reasonable doubt, it is not a ground of acquittal that the evidence fails to show whether or not the killing was justifiable.

The burden of proof, in such a case, rests on the defendant to show by a preponderance of evidence that the killing was justifiable or excusable.

The defendant, Joseph Bertrand, was indicted for murder in the second degree, by shooting and killing Julius A. [Name] with a pistol. The evidence disclosed that the homicide was committed in the store-room of the deceased, who was a grain merchant.

The room was filled with sacks of grain to a height of ten or eight feet, except that several walks or narrow alley-ways, were left between the piles of sacks, and there was a small open space about the desk, at which the deceased stood at the time of the homicide.

The evidence tended to show that the defendant at that time stood in one of the alleys, which was about two feet wide, and that he was about twelve feet from the deceased when the time the revolver was fired. The ball struck the deceased at the throat, and struck about the centre of the vertebral column, breaking the neck and causing instant death. No other persons were in the store-room at the time, but several persons came in immediately, and before the defendant went out. The position of the body of the deceased indicated that at the time of the shooting he had his hands in his coat pockets; that he had no weapon in his hand or in his coat pockets, but had a revolver in the pockets of his trousers. There was evidence that the deceased and the

defendant had been acquainted for several years, and formerly had business relations in California, about which the defendant was greatly dissatisfied, and that the defendant was here for the purpose of inducing or compelling the deceased to accede to some proposition about their business affairs; and that a few days before the homicide the defendant threatened personal violence against the deceased.

The only exculpatory evidence adduced on behalf of the defendant, was, that he came from the scene of the crime toward the jail, with an avowed intention to surrender himself into custody, and that about thirty minutes after he was placed in the jail, he complained of pain at his breast to the jail officer, whose attention he then called, examined the spot, and a spot on his breast looked more red at that time than was natural.

*M.F. Mulkey*, District Attorney.

*David Logan*, for the defendant.

UPRON, J., among other instructions, gave the following:

If you are satisfied beyond a reasonable doubt that the defendant intentionally killed the deceased with a pistol, the burden of proof devolves on the defendant. When the proof shows that the killing was done by the defendant voluntarily or intentionally, with a weapon which was designed and intended for taking life, the law creates a presumption from the use of that kind of weapon that the party using the weapon intended to kill, and that the killing was malicious.

When such proof is made, unless the circumstances of the killing show that it was justifiable or excusable, the burden of proof devolves on the defendant to show a justifiable excuse for the killing.

In such case it devolves on the defendant to show that the killing was necessary, or to show such circumstances as would render the act excusable.

The burden is on the state, in the first instance, to rebut the presumption of innocence, and to show that the defendant did the acts that constitute the crime. But

te shows beyond a reasonable doubt, that a defendant purposely did the killing charged in the indictment, with a weapon that was designed for the very purpose of taking life, soon as that point is established, the burden of proof changes, and the burden then rests upon the defendant. And there is not proof to show that the act was justifiable, or to show that it was excusable, the defendant is not entitled to be acquitted for the lack of evidence on the subject of justification or of excuse. Where voluntary killing with a gun is fully proved, and some evidence is offered tending to show a justification or an excuse, if there is not a preponderance of evidence in favor of justification or excuse, the defense is not made out.

In this case the killing cannot be justified upon any other ground except that the killing was necessary, in order to prevent Meire, the deceased, from killing the defendant, or from doing him great bodily harm.

The killing is not excusable, unless on the grounds that it was done by accident in doing a lawful act, or "by accident or misfortune in the heat of passion upon a sudden and efficient provocation, or upon a sudden combat without premeditation and without undue advantage being taken, and without any dangerous weapon being used, and not done in a cruel or unusual manner."

"If a person without malice, either express or implied, and without deliberation, upon a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible, voluntarily kill another," the act is manslaughter. If a person purposely and maliciously kill another, the act is murder.

The defendant was convicted of manslaughter.

Circuit Court for Multnomah County, February Term

H. W. HEATH v. R. GLISAN and R. B. W.

**LIABILITY OF A SURGEON.** A physician or surgeon is only for ordinary care and skill, and for the exercise of his best judgment in the matters of doubt. The words ordinary care and skill are used in their common acceptation.

**ORDINARY SKILL.**—By ordinary skill is meant such skill as is possessed by men engaged in the same profession.

**SURGEON NOT LIABLE FOR ERROR IN JUDGMENT.**—If the defendant possessed ordinary skill and used ordinary care, they are not liable for an error in judgment committed in a case presenting doubt or uncertainty.

**EXPERTS.**—Opinions of men skilled in a particular art or science are admitted to aid the judgment of the jurors.

**MEASURE OF DAMAGES.**—Either the plaintiff is entitled to compensation for the injury, or the defendants are entirely and wholly exonerated.

The plaintiff, having received a severe injury at his right joint, was treated for the injury by the defendants, who are physicians and surgeons, and he brings this action to recover for want of proper treatment for the injury, claiming damages to the amount of \$50,000.

The defendants (although not partners) answer in denial, denying the allegations of the complaint, averring that they treated the case with care, skill and diligence, and that there was no negligence on the part of the plaintiff. These allegations were met and denied by a replication.

On the trial the injured arm was exhibited, and the condition of permanent dislocation at the elbow was shown. The principal matters of fact controverted on the trial were the following: Was there a fracture? If a fracture, was it to what extent? Was the dislocation ever reduced? Were the parts in apposition at the time the plaintiff resumed labor? If the injured limb was reduced, did re-dislocation occur before or after the defendants had ceased to treat the case? Could re-dislocation have been produced by voluntary muscular contraction? Was the plaintiff's negligence contributing to the want of successful result?



The proof showed that the plaintiff was a young man who engaged successfully in a lucrative business, requiring personal labor and the use of his hand that was now maimed. And that the defendants were physicians and surgeons of high standing in their profession. Many surgeons were examined as experts, and the evidence is too voluminous to be inserted.

*Messrs. Copes and Cronin*, for the plaintiff.

*Messrs. Strong, Mitchell and Page*, for the defendants.

UPTON, J. The court gave the following instructions to the jury:

Inasmuch as it devolves on you to decide all disputed questions of fact involved in the case, it is important that you clearly understand, and constantly keep in mind, what questions of fact are in dispute between the parties. It will assist you in your deliberations if you carefully observe what facts are established, to determine the liabilities of physicians and surgeons in cases of this kind. The rules of law applicable to the subject are settled and established with a high degree of certainty, for this is not a new subject and the rules are not new. It is charged by the plaintiff, "that the defendants failed to treat the plaintiff's injury in a skillful and proper manner." That "through ignorance or carelessness, the defendants mistook the nature of the plaintiff's injury, and treated the plaintiff for injuries he had not received."

The defendants claim that they treated the case in a proper manner, and with care and skill.

This is a civil action for damages, and the facts are to be determined by you, according to the preponderance of evidence. The rules of law that regulate the duties and liabilities of physicians and surgeons, in cases of this kind, may be stated as follows:

A physician or surgeon is only responsible for ordinary care and skill, and for the exercise of his best judgment in matters of doubt. He is not accountable for a want of the highest degree of skill. And in determining whether

the practitioner possesses ordinary skill, regard must be had to the advanced state of the profession at the time.

"An action does not lie where it appears that the defendant refused to co-operate with the practitioner, and to comply with his prescriptions." (a)

The first question of fact in the case, is this. Were Glisan and Wilson possessed of ordinary skill, and did they exercise ordinary care and diligence in treating the case?

The words ordinary skill and ordinary care, are to be understood in their common acceptance and meaning, and they are to be so understood and construed by you.

By ordinary skill, is meant such degree of skill as is commonly possessed by men engaged in the same profession.

If, under the circumstances of this case, the nature of the plaintiff's injuries could have been ascertained by the exercise of ordinary skill, and by the exercise of ordinary care and diligence on the part of the defendants, either for want of ordinary care, or for want of ordinary skill, mistook the character of the injury, and failed to make a perfect cure, which otherwise might have been made, they are liable. But if they possessed ordinary skill, and used ordinary care, they are not liable for the injury in judgment, committed in a case presenting great doubt or uncertainty.

When you retire for deliberation, among the questions of fact that will present themselves to your minds, let some of the most prominent be, Did the defendants possess ordinary skill in their profession? Did they treat the plaintiff with care? Was the arm fractured? If there was a fracture, was it clear or was it doubtful to surgical skill? If there was a fracture? If the arm was not fractured, would ordinary skill and care would have discovered that there was a fracture? If the treatment proper to be used in a case, where there was a fracture?

In determining whether the defendants possess ordinary professional skill, it is proper to consider the evidence in regard to their education, the time, and greater or

(a) Wharton v. Stille, Med. Jurs., 1273.

tent of their practice and experience in the profession, as well as other evidence touching the question.

On the question whether the defendants used ordinary care in treating the plaintiff's case, all the evidence that tends to show what degree of attention they gave to the case, should be considered by you, as well as the proof of their mode of treatment, and the testimony of physicians and surgeons as to what is proper treatment. The opinions of men skilled in a particular art or science may be resorted to with propriety in all cases where the question involved depends on skill and science in a particular department. Some questions lie beyond the scope of the observation of men in general, but are quite within the experience and observation of those whose peculiar pursuits and professions have brought that class of facts frequently and habitually under their consideration." "And such opinions, when they come from men of great experience and in whose correctness and sobriety of judgment just confidence can be had, are of great weight and deserve the respectful consideration of a jury. But the opinion of a medical man of small experience, or of one who has crude and visionary notions, or who has some favorite theory to support, is entitled to very little consideration. The value of such testimony will depend mainly upon the experience, fidelity and impartiality of the witness who gives it." (b).

In determining whether the practitioner possesses ordinary skill you are to consider the degree or condition of advancement of the medical profession at the time the case was created.

In cases where it is doubtful which of two or more modes should be pursued, the practitioner must exercise his best judgment.

If the evidence shows that the defendants did not possess ordinary skill or did not use ordinary care, or in case of doubt, that they did not use their best judgment, and that for one of these reasons they failed to cure the plaintiff, they are liable. If the evidence does not show such failure

on their part, the defendants are not liable in this, even though they may have erred in judgment. The vision of law, that a case of doubt only requires practitioner ordinary skill and care and the exercise of best judgment, is founded upon the great truth in nature that there are injuries and diseases that baffle the skill of the most learned and most experienced of physicians and surgeons. If the faithful and skillful physician were held to answer for every error of judgment, it would place the medical profession beyond the reasonable protection of the law. Every death that occurs under the care of a faithful and skillful practitioner, is proof that there is a limit to medical skill and power.

The object of the law is, on the one hand, to guard the patient against the wrongful practices of ignorant or negligent men, who set themselves up as physicians or surgeons, and on the other, to protect the faithful practitioner of ordinary skill from loss either in character or in his purse on account of matters for which it would be unreasonable to hold him responsible.

You are to decide all questions of fact involved in this case, unbiased by sympathy or by regard for either party, according to your convictions of the truth. And you are at liberty to swerve from those convictions by assenting to a compromise that is contrary to what your convictions of the truth justify.

Either the plaintiff is entitled to recover compensation for the whole injury he has suffered by the fault of the defendants, or the defendants are entitled to be wholly exonerated. It is the right of each of these parties that the case should be determined upon the evidence and according to the law. It is the duty of each juror carefully and patiently to pass and consider the evidence, in all its bearings, with an honest and conscientious effort to reconcile any differences that may exist between him and his fellow jurors, as to the truth of the matters put in issue, and with a willingness to adopt the views of his fellow jurors, when he can see that they accord with the law and the evidence. But it would be a gross wrong to one or the other of these parties

to carry the spirit of compromise to the extent of yielding to that which you do not believe to be true, and to render a verdict merely for the sake of compromise, that you do not believe to be in accordance with the truth.

The jury, after being out forty-eight hours, failing to agree, were discharged without a verdict. (b)

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Circuit Court for Multnomah County, February Term, 1869.

### STATE OF OREGON v. JAMES CONALLY.

**SELF-DEFENSE.**—The law of self-defense does not justify one in following up his adversary after the immediate danger has ceased.

**REASONABLE DOUBT.**—Reasonable doubt defined.

**BURDEN OF PROOF.**—When the prosecution has established beyond a reasonable doubt that the defendant has killed the person slain, by means of purposely shooting him with a gun, the burden of proof is thrown on the defendant to prove any additional facts that may tend to justify or excuse the killing.

**IDEM.**—In that case, if the evidence of the prosecution does not show facts or circumstances tending to justify or excuse the act, the burden of proof being thrown upon the defendant, the rule in regard to reasonable doubt does not apply to justification or excuse; but the defendant must show by a preponderance of evidence that the killing was justifiable or excusable.

**JUSTIFICATION.**—One may use all necessary force to prevent a forcible entry into his house, but he has no right to use unnecessary force; and if he unnecessarily follow and shoot the party, after he has ceased to attempt to enter, the attempt forms no justification.

**PREPONDERANCE.**—The question whether the killing was necessary in order to prevent a felony, is to be determined by the preponderance of evidence.

**REASONABLE DOUBT.**—Yet, if the jury, upon the consideration of the whole of the evidence, entertain a reasonable doubt as to whether shooting the deceased was unlawful, they must give the prisoner the benefit of that doubt, and acquit him.

A. C. Gibbs, District Attorney.

(b) At the June term, 1869, the case was again tried, in substantially the same manner as at the first trial. The charge to the jury was the same. It is understood that on the first trial the jury stood: two for a verdict of \$50,000 in favor of the plaintiff, and ten for the defendants. On the second trial it is said the jury stood: six for giving the plaintiff some large amount (the amount not determined upon), and six for the defendant. Before the commencement of the following term the case was withdrawn.



— *Bronaugh, Esq.*, for the defendant.

THE defendant was indicted for the homicide of R. Hill, and charged with murder in the first degree.

The evidence tended to show that Mrs. Hill, the deceased, because of a quarrel, or abusive conduct of her husband, had left her own house recently, and was at the house of the defendant; that not many hours after her departure, so, her husband called at the house to see her, and she denied admission, or at least refused permission to take his wife away. This was at any early hour in the evening, when the deceased went away; and one or two hours later he returned, and again sought to see his wife. The defendant's temper was violent, and that considerable angry altercation took place between the deceased and the defendant, and the defendant's wife. There was some evidence offered to show that the deceased attempted to force his way into the house, the door of which was several yards from the sidewalk. Before any shot was fired, the deceased ran out of the yard on to the sidewalk. It appears that the defendant and his wife had come out of the house to see the deceased, while standing on the sidewalk, was shot by the defendant and killed; the weapon being a revolver which had been brought to the defendant's house within a few days. The shot produced instant death. A revolver was found in the person of the deceased.

Many of the instructions asked on behalf of the defendant are embodied in the general charge. Of those which are not a part of the defendant, the court *declined* to give.

"A man has no more right, under the laws of this state, to commit an assault and battery upon his own wife than upon any other person.

"If the jury believe that Mrs. Hill, the wife of the deceased, having reasonable ground to apprehend that her husband was using violence at the hands of her husband in the nature of a beating and whipping, had on the night of the homicide sought a temporary refuge from such violence in the house of the defendant, and that the deceased sought her out

her up, with the apparent design of abusing her by blows, in said house, or of forcing her by violence and against her will, to return to the house of the deceased, then either the prisoner or Mrs. Conally, the wife of the prisoner, had the right to compel deceased to leave the house, and to prevent his return into it while he evidently remained in the same humor.

"That if, after being induced by artifice or force to leave the house of the prisoner, the deceased went away, and procuring a pistol, armed himself with the same, and then returned to the house of the prisoner with the intention or apparent design of effecting an entrance into the house by force, or by intimidating the prisoner and his family, in that case the prisoner had a right to repel force by force even to the extent of taking the life of the deceased, if the conduct of the deceased was such as to give the prisoner reasonable cause to apprehend great bodily harm to himself or his family.

"That a man has by law as good right to defend the person of his wife as his own person from violence at the hands of another; and if the jury believe from the evidence that, at the time of the killing, the prisoner had reasonable cause to believe, and did believe that the person of his wife was in imminent danger of great bodily harm at the hands of deceased, then the prisoner had the undoubted right to slay the deceased in order to ward off the apprehended mischief.

"That in arriving at a conclusion as to whether the prisoner had reasonable grounds for such apprehension, the jury have a right to consider the character of deceased for violence as it may appear from the evidence; also so much of his brutal treatment of his own wife as may be shown by the proof, to have been known to the prisoner; also the acts of deceased and threats made by him against the prisoner within an hour or such matter prior to the killing, as well as the conduct of deceased at the time the shooting occurred."

UPRON, J., at the request of defendant's counsel, reduced the instructions to writing. The charge was as follows:

GENTLEMEN OF THE JURY:—The defendant charged with the crime of murder.

The killing of one human being by another man is murder in the first degree, murder in the second degree, manslaughter; or the act may be either justifiable or excusable.

When a defendant is indicted for murder in the first degree, the defendant may be found not guilty, or may be found guilty of manslaughter, or of murder in the second degree, or he may be found guilty of murder in the first degree, according as the evidence shall establish the facts.

It, therefore, is important carefully to examine the evidence, and consider what is the law in regard to the several degrees of criminality, and as to what constitutes an excuse or justification, in cases of homicide.

(The court here read from criminal code, ss. 506, 515, 517, 518.)

To prevent the commission of a felony upon a person, or upon his wife, parent or child, master or servant, is a justification.

A felony is a crime, punishable in the state prison, and a person has no right to kill his adversary, to prevent a simple assault, or simply to prevent a person from entering his house, but only when it is necessary to prevent the commission of a felony.

When a person is attacked by an armed man, and he is obliged to shoot him with a gun or pistol, and the person is not the aggressor, and is not in fault himself, and is obliged to wait until his adversary has actually drawn his weapon, if the danger is imminent and there is no time to avoid it except by force. But if he follows up his adversary when his adversary has retired, and when it is not necessary to follow him up, and then shoots him, the fact that the person killed was armed, and even had his pistol drawn, is not a justification.

The law of self-defense does not justify one in following up his adversary, after the immediate danger has passed, and then killing him. Such a law would make every man his own avenger.



In a criminal case, a defendant is presumed to be innocent, until the contrary is proven.

Before he can be convicted, his guilt must be established by evidence, beyond a reasonable doubt.

If the jury have a reasonable doubt as to what degree of crime has been established, the defendant is also entitled to the benefit of that doubt, and a defendant should not be convicted of any degree of crime, in regard to the commission of which, the jurors entertain such reasonable doubt.

A reasonable doubt is one that exists in the mind after a full and careful examination and comparison of all the evidence, and one that is consistent with the facts that are fully proved to the satisfaction of the jury. The doubt must not be an unreasonable one, nor a mere supposition inconsistent with the evidence which you credit and believe.

If from the evidence you feel that degree of certainty, in regard to a matter of fact, upon which you would feel safe in acting in your most important undertakings, such matter of fact is established beyond a reasonable doubt, and it is the duty of the jury to act upon such conviction and decide accordingly.

If the killing was not justifiable or excusable it was unlawful, and if it falls below the crime of murder and was yet unlawful, the act was manslaughter.

A bare fear that the deceased was about to commit a felony, will not justify a killing. It must appear that the circumstances were such as to excite the fears of a reasonable man, and that the slayer really and in good faith acted under the influence of those fears and not in a spirit of revenge.

If the prosecution has established beyond a reasonable doubt that the defendant has killed the person slain, by means of purposely shooting him with a gun, the burden of proof is thrown on the defendant, to prove any additional facts or circumstances that may tend to justify or excuse the killing. In that case if the evidence already adduced do not show facts or circumstances tending to justify or excuse the act, the burden of proof being thrown on the defendant, the rule in regard to reasonable doubt does not apply to justification

or excuse, but the defendant must show by a preponderance of evidence, that the killing was justifiable or excusable.

It does not devolve upon the prosecution to show beyond a reasonable doubt that the act was not done in self-defense, if it is proved beyond a reasonable doubt that the killing was done purposely, by shooting with a gun. If the prisoner defends on the ground that the deceased was making an attack on him or his wife, and that there was no other mode of escape, you will decide that matter according to the preponderance of the evidence for or against that position. In such a case the question whether the killing was actually necessary at that time, to prevent a felony, or whether the defendant really believed that the killing was absolutely necessary to prevent the deceased from committing a felony is to be determined by the preponderance of evidence.

Human life should be held sacred. That is not a good government where the life of the meanest or worst citizen is not protected by the law with the same certainty and care with that of the best and most reliable citizen. The juror is bound by duty as well as his oath to see that a defendant is not convicted, unless his guilt is fully established by the evidence; and that same duty and the same oath requires that the life of the citizen, be he high or low, great or small, noble or mean, should be held sacred. If jurors by their verdicts should justify parties taking the life of a bad man without trial, because he is a bad man, it would not only be a violation of law and of an oath, but it would be the beginning of a condition of things the most lamentable that any people can fall into.

It is the duty as well as right of every householder in this State to prevent breaches of the peace in his dwelling; and for the accomplishment of such purpose, such householder has the clear legal right to expel from his house any person guilty of an attempt to commit a breach of the peace therein, and may use all the force necessary to such expulsion. But it is not his right or duty to kill or shoot a man to prevent a breach of the peace, or to prevent a simple assault on himself or his wife or on any other person. When the intruder refuses to leave a man's house, the lawful occu-

pant of the house has a right to take hold on the intruder and put or carry him out, and to call to him as much aid of others to assist in putting him out, as may be necessary; but the refusal to depart, or even the commission of a simple assault, does not authorize shooting the intruder. The deceased had no right to enter the defendant's house, and there beat the deceased's wife; but if he did so, that would not justify Conally in attempting to kill the deceased, unless killing the deceased was then necessary, to prevent the commission of a felony. If Mrs. Hill, the wife of deceased, having reasonable ground to apprehend personal violence at the hands of her husband, sought a temporary refuge in the defendant's house, and the deceased, being forbidden, sought to enter, then either the defendant or his wife had a right to use all necessary force to prevent him from entering. But that gave the defendant no right to use unnecessary force, nor to pursue him after he ceased the attempt to enter, and if the defendant unnecessarily followed Hill, the deceased, and shot him after he had ceased to attempt to enter, the attempt which the deceased made to enter the house, forms no justification of the shooting.

If, after being induced by force or artifice, to leave the house of Mr. Conally, the deceased went away, and procured a pistol, armed himself with the same, and then returned to the house with the intention or apparent design, of effecting an entrance by force, or by intimidating the defendant or his family; in that case, the defendant had a right to repel force by force, even to the extent of taking the life of the deceased; if such force and such taking of life was actually necessary, in order to prevent the deceased from committing a felony, or if the defendant had reasonable cause to apprehend that that was necessary, in order to prevent the deceased from doing great bodily harm to him, or to a member of his family. The jury have a right to consider whatever has been proved in regard to the character of the deceased for violence, and to consider the acts of the deceased, and any threats made by him prior to the killing, as well as the conduct of the deceased at the time the shooting occurred.

Although deceased may not really have intended Mrs. Conally, yet if his known character, and his conduct at the time, were such as were calculated to excite in the mind of a reasonable man, and did excite in the mind of the defendant, a reasonable ground of apprehension of such intent, and the belief, that the danger was so great and imminent, that the death of his wife could not be avoided by shooting the deceased, the act was justified and excusable. This question is to be determined by the preponderance of the evidence. Yet if there be upon consideration of the whole of the evidence, even a reasonable doubt as to whether the shooting the deceased was unlawful, they must give the prisoner the benefit of the doubt, and acquit him.

If the defendant, by his own fault, sought the quarrel, by his own unlawful acts, produced the necessity above mentioned, he cannot be justified or excused by it.

The right of self-defense, or defense of one's family or habitation, does not justify pursuing and killing the aggressor after he has retreated, and after the necessity has ceased. It is only necessary killing that can be justified by the rules of law, of which I have spoken. If the defendant and his wife were acting in concert, and were murdering the deceased up while he was retreating, and the necessity had ceased to be necessary for the purpose of preventing the deceased, from committing a felony, the law of self-defense, or of defense of family, or of habitation, is inapplicable. If the defendant unnecessarily pursued the deceased, and sought an opportunity to shoot, and did shoot Hill, the deceased, after all necessity and all immediate danger had ceased, for the purpose of gratifying wrong feelings, the offense is murder.

There must be some other evidence of malice than the proof of the killing to constitute murder in the first degree, unless the killing was effected in the commission or attempt to commit a felony, and deliberation and premeditation were necessary to constitute murder in the first degree, as evidenced by poisoning, lying in wait, or some other act, that the design was formed and matured in cool blood.

not hastily upon the occasion.

If the jury believe from the evidence in this case, that there was reasonable ground for the defendant to believe his life in danger, or that he was in danger of great bodily harm from the deceased, and that such danger was imminent, and he so believed, and acting on such belief, killed the deceased, he was excusable.

If the jury believe, from the evidence in this case, that there was reasonable ground for the defendant to believe his wife in danger of great bodily harm from the deceased; that such danger was imminent, and that the killing was necessary, and he did so believe, and acting on such belief killed the deceased, he was excusable.

"A man may repel force by force in defense of his person, habitation or property, against one who manifestly intends by violence or surprise to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he finds himself out of danger. And if in a conflict between them he happens to kill, such killing is justifiable."

But if he pursue him one step after he finds that he is out of danger, and then kills him for the purpose of gratifying his malice or his passion, it is either murder or manslaughter.

The jury found the defendant guilty of manslaughter, and he was sentenced to the penitentiary for a term of two years.

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Circuit Court for Clackamas County, March Term, 1869.

JOSEPH HEDGES and J. K. BINGHAM v. JOSEPH PAQUETT, PETER PAQUETT, JACOB S. HUNSACKER and THE CANEMAH LUMBERING COMPANY.

**JURY IN EQUITY SUIT.**—Stockholders of a corporation sued the directors and the corporation, charging fraud and mismanagement; a jury was empanelled to pass upon the question whether there had been gross mismanagement on the part of the directors, and on the question whether the directors had been guilty of actual fraud.

**CORPORATION.—EQUITY JURISDICTION.**—A court will not interfere to review or correct the proceedings of the directors of a corporation,

on the ground of fraud or mismanagement, unless there is cause for a displacement of the officers, or for a final winding up of the affairs of the corporation.

**INTEREST OF DIRECTOR.**—The statute contemplates that directors will sometimes act on matters where the director has an interest.

**IDEM.**—The rule that prohibits one from being judge in his own cause applies so far to directors, that the decision of the interested director is not conclusive, but it is subject to be set aside if it is not equal and just, and free from any taint of fraud or partiality.

**DIRECTORS, VOIDABLE ACTS OF.**—Acts of a board of directors, even if voidable, on the ground of interest of members in the question, are not for that cause absolutely void. And whoever seeks to avoid them, at his own instance and suit, must show that he is injured in consequence of the act complained of.

THE plaintiffs bring this suit against Joseph Paquett, Peter Paquett, Jacob S. Hunsacker and The Canemah Lumbering Company, alleging that that company is a corporation, whose board of directors consists of three members, and that the purpose of the corporation is the manufacture and sale of lumber; and these plaintiffs and the individuals named as defendants, are stockholders owning all the stock of the corporation.

That the defendant, Hunsacker, refuses to appear as plaintiff, and is for that reason made defendant.

That the stock of said corporation consists of ten shares, of the nominal value of \$500 each, of which the plaintiff, Hedges, owns two; the plaintiff, Bingham, one; the defendant, Hunsacker, one; and the said Joseph and Peter Paquett, each three shares.

That in December, 1866, the said Joseph and Peter, confederating together, and with others, to wrong and defraud the plaintiffs, obtained a majority of the stock of the corporation, and elected themselves directors thereof, and appointed the said Joseph, president, and the said Peter, secretary of the corporation; and that they have continued themselves in said offices from that time to the present, and as such officers, have from that time continued to exercise exclusive control of all the affairs of the corporation. That, although required by the by-laws to keep and render full accounts, they have not done so. That they have audited large bills in their own favor, and paid each other large

sums of money for personal services. And that they, by gross negligence and inattention to the duties of their trusts, and with intention to defraud these plaintiffs, have totally destroyed the business of the corporation, and have wasted the funds and property of the corporation, and involved the corporation in debt to a great amount, and reduced the value of the capital stock from par to a condition nearly worthless, and prevented the making of any net profits during all that time. And the plaintiffs aver that, if the affairs of said corporation had been properly managed during that time the net profits would have been at the least \$3,000, the capital stock would have been of par value in coin; and that the defendants threaten to continue to hold the exclusive control of the affairs of the corporation, and to divert the proceeds thereof from the plaintiffs and to their own advantage.

The answer denies all the allegation of mismanagement and of improper proceedings, and claims that the affairs of the corporation have been well and properly conducted.

At the October term, 1868, the court, on its own motion, directed that certain issues be submitted to a jury, and the following questions were accordingly submitted:

1st. Have the defendants, Peter Paquett and Joseph Paquett, as directors or managing agents of the Canemah Lumbering Company, been grossly negligent of their duties as such directors or agents?

2d. Have they grossly mismanaged the business of said company between December 1, 1866, and March 6, 1868?

3d. Have they within the same time been guilty of actual fraud against said company or against the plaintiffs, as stockholders?

The jury having heard the testimony, the cause was argued and submitted, but the jury failed to agree, and were discharged without a verdict.

By consent of parties, the cause was submitted to the court for final determination, upon the same testimony, together with the depositions of two accountants, who at the request of the respective parties, had examined the books of the corporations, and were examined as experts.

*S. Huelat*, for the plaintiffs.

*Johnson & McCown*, for the defendants.

UPTON, J. Filed the following opinion:

The evidence in this case fails to show that the defendants have been guilty of actual fraud.

It is shown that the business of the corporation under their management, has been unprofitable, and their management has not been such as to commend itself either for energy or business capacity; but the evidence does not show either gross negligence or gross mismanagement of the affairs of the corporation. It cannot be considered the province of a court to superintend the current business of corporations, with a view to measure the degree of industry, skill and shrewdness to be required of, or exercised by the directors and other officers or agents. As a consequence, a court of equity will not interfere to review or correct their proceedings, on the ground of fraud or mismanagement, unless there is cause for an absolute displacement of the officer or officers complained of, or for a final winding up of the affairs of the corporation.

The evidence shows that the defendants, Joseph and Peter Paquett, attempted to mortgage the property of the corporation, and it tends to show that the attempt was for the purpose of gaining to themselves an advantage over other creditors, and to reimburse themselves for advances they claim to have made.

It may be assumed as true, that the attempt to mortgage the property of the corporation was without authority, and that the mortgage is void. But it does not follow that the other acts of the directors, having no necessary connection with that attempt, are invalid; nor that the directors have been guilty of any actual fraud. The mortgages, if void, are so because the directors went beyond their powers and jurisdiction in attempting to execute them, and if void, they are of no force, and injure no one.

The most important question presented, relates to the exercise of the powers of the board, consisting of three



directors, by a bare majority—when acting upon matters in which one or the other of the two directors composing the majority had a direct personal interest. By the act concerning corporations, section 9, all the powers of the corporation are exercised by the board of directors, and by sec. 11, the powers vested in the directors may be exercised by a majority of them. These include the election of president and secretary, and probably the fixing their salaries, and the compensation of all other officers, agents and employees, if not determined by the by-laws. The provisions of the statute necessarily involve the idea, that the directors will vote for each other, in filling other offices; for the president must be one of their number.

It seems to be a recognized doctrine in the various states of the union, that "the relation existing between a director and the corporation is that of trustee," and it has been held as a consequence that a director can not, as such, exercise a discretion in a matter involving his own individual interest. And this has been put upon the ground that "the office of common agent infers a natural disability which *ex vi termini* imports the highest legal disability, because a law which flows from nature is paramount to all positive law."

On the authority of cases cited in *Gardner v. Ogden* (8 Smith, 327), it is sought to apply to this case the maxim, "*Nemo debet esse iudex en propria causa!*" If the maxim is to be applied to these cases, on the ground that to do otherwise would violate a principle that is paramount to all positive law, it will render proceedings, in corporations having only three directors, exceedingly difficult, and when the directors are more numerous, it will be difficult to draw the line that separates the direct from the indirect interests of the director or even the stockholder.

When a stockholder votes for a particular set of men as directors, he has, or thinks he has, an individual interest in electing those in preference to others; but it is not necessarily a direct pecuniary interest. When, however, one of these directors votes in electing a paid president, the director knows, that if he votes for himself, he votes in favor of his own personal interest, and if against himself,

by voting for and assisting to elect another, he votes in a matter not only involving his own interest, but absolutely decisive of his right to the emolument of the office. I am irresistibly led to the conclusion that the law of this state contemplates that directors will sometimes act and exercise the powers of the corporation, in matters, where the interests of the individual director are not in all respects coincident with those of the corporation, and that the rule in regard to transactions by trustees should apply only so far that the decision of the interested director should not be conclusive, but subject to be reviewed and set aside, if it is not equal and just and free from any taint of fraud or partiality. In other words, the decisions and proceedings of such interested directors are always open to examination, and it is always incumbent on them to show that the utmost good faith has characterized their actions.

If it should be established as a rule, that every vote of a stockholder, and every vote and act of a director, given or done in a matter in which he had a personal interest not coincident with that of the corporation, should be held fraudulent and void, it would be impossible for corporations under our law to transact business, and the act concerning corporations would become impracticable.

If a strict and correct administration of the law required such a rule, the resulting inconvenience would be no excuse for disregarding the law. But is such a rule made necessary by the law of the case? I think it is not.

It is a familiar principle in equity jurisprudence that he who complains and asks relief, in addition to showing that a strict rule of law has been violated, must also show that he is injured by the violation. If he shows that a salary has been audited and paid in a manner not in strict compliance with the law, to invoke equitable relief, he must also show that no salary was due, or that too much was paid, or that in some other respect it caused injury to the complainant.

The language of the statute evidently imports that, if not prevented by the by-laws, the directors may fix their own compensation, and may pass upon other questions in which the individual director has an interest.

If the rule stated in the very impressive speech of Lord Thurlow, cited in *Gardner v. Ogden*, is to be deemed applicable to this subject, such provisions of the general law relating to corporations are not only unconstitutional, but they are in violation of "a law which flows from nature, and which is paramount to all positive law."

Lord Thurlow undoubtedly alludes to some such undefined or supposed doctrine as that which is so often and so flippanantly mentioned in later years, under the name "The Higher Law."

It is not clear that this doctrine, so positive in its avowed effects and yet so undefined, so often mentioned and yet so little known, has any application to the matter under consideration. If there is such a rule, which renders it impossible to enact a law that permits a director to vote upon a question in which his personal interests may be involved, because such an act would be contrary to a rule that flows from nature, by the same reasoning the congress of the United States would be prohibited from fixing by law the compensation of its members. A governor would not be capable of signing an appropriation bill appropriating money for the payment of his salary. And no constitution could confer the power, for the rule, as Lord Thurlow declares, is paramount to all positive law.

When a particular application of the language of that learned jurist will lead to a conclusion so manifestly erroneous, there must be some error in the application.

I think the directors of a corporation may, under our law, by their votes select the president and other officers and agents of the corporation, and if not prevented by by-laws, may audit, and allow their own compensation. The right of election by votes of the directors, necessarily includes the volition in each director to vote for or against each candidate in cases where he has a voice. Whether it includes a right on the part of a director to vote for himself for an office which must or may be held by one of the directors, I will not attempt to decide, as the point in question may be placed on the less questionable ground, that such acts of the board of directors, even if voidable, are not absolutely void.

And whoever seeks to avoid them, at his own instance and suit, must show that he is injured in consequence of the act complained of.

I do not think the plaintiffs have shown direct injury growing out of the manner of selecting officers or agents, or out of the manner of auditing or allowing accounts. Nor have they shown any actual fraud, or any such gross mismanagement of the affairs of the corporation as warrants the interference of a court of equity.

An order should be entered dismissing the bill.

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Circuit Court of Multnomah County, June Term, 1888.

## WILLIAM OLIVER v. THE NORTH PACIFIC TRANSPORTATION COMPANY.

**CORPORATION LIABLE FOR NEGLIGENCE OF AGENT.**—A corporation is liable to the injured party for damages caused by the agent of the corporation in carelessly firing a signal gun from the corporation's ship, although the agent acted contrary to instructions as to the manner of firing.

**PRINCIPAL LIABLE, WHEN.**—If an agent abandon his principal's business and do something not pertaining thereto, the agent or actor is alone liable. But if he do his principal's business in a careless manner which he was directed to do in a careful manner, the departure from orders will not exonerate the principal.

**MEASURE OF DAMAGES.**—In estimating damages for injury to the person carelessly shot and hit by the wad of a cannon, it is proper to consider loss of time, money necessarily expended, or debts necessarily incurred in curing the bodily injury, and whatever bodily pain the injury may have caused the injured party.

**IDEM.**—The object of the law in such a case is compensation.

**EXEMPLARY DAMAGES.**—Exemplary damages denied.

THE complainant charges, that the defendant, a corporation engaged in navigating the waters of the State of Oregon, and plying between Portland, Oregon, and Victoria, a foreign port, was owner and had control of a steam-vessel called "The Gussie Telfair." That at the departure of said vessel from Portland, the plaintiff was on the wharf, and the defendant's servants in the conduct and management of

the vessel, fired a loaded cannon from on board the vessel as a signal of departure, in such a careless and unskillful manner, that "the plaintiff was hit and struck upon his face and head by the wadding and other material," fired from the gun, and was greatly injured and wounded. Loss of time, expense, suffering and permanent personal injury are alleged, and damages laid at \$25,000.

The answer denies that defendant then had control of the vessel, and avers that it was under the control of a pilot. Denies that the gun was fired "by defendant's agents as such agents." Denies want of care and skill. States that if the gun was fired as charged, "it was done without authority or direction of defendant," and not by persons in the discharge of their duty as agents; and done directly in violation of the directions and instructions of defendant. That the alleged injury was not the fault of defendant. Denies that plaintiff was greatly injured, or detained from his business more than one week, or has suffered any damage.

The replication denies the allegations of the answer.

*David Logan*, for the plaintiff.

*Lansing Stout*, for the defendant.

The facts proved on the trial were substantially as alleged in the complaint. The gun was fired while the ship was turning in the river. It was the duty of the persons in charge of the gun to fire it while the vessel was headed across the stream, so that the wadding would have been discharged down the channel of the river, but by negligence or mismanagement, the firing was delayed until the bow of the vessel was so far turned down the stream that the direction of the gun was toward the wharf, which the vessel had just left, and upon which the defendant and numbers of others were still standing. Plaintiff's injuries were severe abrasions about the face, rendering his condition critical for a few days; and there was some evidence tending to show that he is to some extent permanently injured.

The defendant offered to prove that the vessel was in

charge of a pilot appointed, in pursuance of the law of this state; claiming that under a law, compelling commanders and owners to receive a pilot on board, and to pay him for taking charge of the vessel while in the river, the owners cannot be held responsible for negligence of subordinate officers.

The plaintiff objected for irrelevancy, and the objection was sustained.

There was some evidence tending to show that the gun did not point in the direction of the wharf, but that the wadding divided, and a piece of it only, being deflected, struck the defendant.

The following instructions, asked by the defendant, the court refused to give.

"If you believe, from the evidence, that the firing of the gun was in violation of the orders of the company, as given to the master of the ship, the defendant is not liable."

"If the person who fired, or directed the gun to be fired, acted in violation of the instructions of defendant, then they, and not the defendant, are liable."

"If the man fired the gun in response to orders from a superior in defendant's employ, and that superior violated his instructions from defendant, in so ordering the gun to be fired, the defendant is not liable."

"This being an action for the wrongful acts of agents of defendant, unless you believe from the evidence, that the defendant directed the assault to be made on plaintiff, you cannot, in estimating the damages, consider anything but plaintiff's loss of time, and actual expenses attending the injury."

The following instructions, asked by the defendant, were given to the jury:

"In this case, the defendant is not liable for anything beyond the actual damage sustained by the plaintiff."

"Actual damages are the measure of the liability of the defendant."

The plaintiff requested instructions, that it was within the province of the jury to find exemplary damages, which were not given.

UPRON, J., also gave the following instructions:

In cases of this kind, the jury are to determine all questions of fact, and all questions of fact are to be determined according to the weight of evidence.

It will be a question of fact for you to determine whether the gun was fired by the plaintiff's agent, while acting in the course of the plaintiff's business, as his agent. If an agent doing business for a company, do the business in such a careless or negligent manner, that one who is without fault, is injured by the carelessness or negligence, the company is liable to pay the injured party the damages actually sustained in consequence of the injury. If one who is agent for another, and authorized to transact his business, as, for instance, to sail a ship upon a particular voyage, depart from the business he is directed to transact, and without authority, divert the ship from his principal's business, the principal may be exonerated from liability. But the fact that the agent does the principal's business in a careless manner, which he was directed to do in a careful manner, will not exonerate the principal.

The burden of proof is on the plaintiff, to show that the person who fired the gun, or gave the order, was acting at the time as the agent of the company, that the act was negligently or carelessly done, and that the plaintiff was injured by the carelessness or negligence.

If the evidence satisfies you that the plaintiff is entitled to recover, it will be for you to determine from the evidence what amount of damages plaintiff has sustained.

Under the pleadings, the measure of damages is the loss and injury actually sustained by reason of the negligence. The defendant is not liable for anything beyond the actual loss and injury sustained by the plaintiff. And the plaintiff, if entitled to anything, is entitled to such a sum of money as will fully compensate him for all loss and injury to him, caused by the negligence or wrongful act.

In estimating damages, it is proper to consider loss of time, money necessarily paid or debts necessarily incurred in curing the bodily injury, and whatever bodily pain it may have caused to the plaintiff.

The object and intent of the law in this class of cases, is to establish such a measure of damages as will fully compensate the injured party for all the injury he has sustained, whether the injury be loss of time, loss of money, bodily pain, or permanent bodily injury. But this is not a case where there is occasion to give what is called exemplary damages.

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Circuit Court for Multnomah County, June Term, 1899.

### BENJAMIN STARK v. CYRUS OLNEY.

**COVENANT OF WARRANTY.—OUSTER.—NOTICE.**—In an action for damages for the breach of a covenant of general warranty, the grantee was ousted in an action of which the warrantor had no notice: *Held*, that it devolved on the plaintiff to prove that he was ousted by paramount title.

**COVENANT.—DAMAGES.**—Where a deed contained two covenants and both were broken: *Held*, that the defendant is entitled to recover on that which will give him the largest amount of damages.

**MEASURE OF DAMAGES.**—In estimating damages upon breach of covenant of warranty, when the title fails as to a part only of premises, interest should be computed upon the relative proportion of the purchase price.

**RATE OF INTEREST.**—Where the rate of interest had been increased by statute, the rate prescribed by the old law was adopted up to the time of the change, and that of the new law during the time subsequent.

**COSTS.**—The covenantee was not allowed to recover the costs of an action defended by him, subsequent to the eviction.

**CONSIDERATION.**—The consideration expressed in the deed is *prima facie* evidence of the actual price, but the presumption may be rebutted.

THIS case was tried by the court upon the pleadings and proofs, a jury being waived.

The facts are stated in the opinion filed.

*William Strong*, for the plaintiff.

*Page & Thayer*, for the defendant, present the following points:

1. The plaintiff is bound to prove that the title by which his vendee was evicted was paramount to Olney's.



2. The rate of interest is to be determined by the law in force at the time the contract was made.

3. The defendant is not liable for the expenses or fees of the action between the plaintiff and his vendee; nor does the amount recovered in that action constitute a basis for the estimate of damages in this case.

UPTON, J. This is an action for damages for breach of covenants of seizin and of warranty, in a conveyance of certain lots from the defendant to the plaintiff. After alleging the eviction of the plaintiff's grantee, from one of the lots, the complaint sets up the proceeding in an action brought by the plaintiff's grantee against the plaintiff, for breach of the plaintiff's covenant, wherein the said grantee recovered a judgment against the plaintiff, for \$1,447.40 damages and \$85.15 costs, and paid an attorney's fee of \$75. *The answer* puts in issue the allegations in regard to the amount of damages recoverable in this action; averring, among other things, that the lot in question in this action was sold by the defendant to the plaintiff for \$200 and that at the date of the deed it was worth \$200, and no more.

The defendant, Olney, conveyed to the plaintiff, Stark, February 8, 1854, four city lots, covenanting that he was well seized, had a right to convey, and also covenanting to warrant and defend Stark and his assigns in the possession. The deed recited that \$2,000 was the consideration. Stark's grantee was evicted, by final process, December 2, 1863.

Stark's grantee recovered from Stark, in an action upon Stark's warranty, \$1,447.40 damages, and \$85.15 costs. The defendant, Olney, had notice of this last action, but had no notice of the action of ejectment. I think it may be conceded that it devolved on the plaintiff to prove on the trial that the eviction was by paramount title. (*Beddoe v. Wadsworth*, 21 Wend. 120; *Kelly v. Dutch Church of Schenectady*, 2 Hill, 105.) But I find from the evidence of the defendant that such was the case.

The plaintiff, although not pleading each breach separately, states facts showing a breach of the covenant of seizin, and also a breach of the covenant of warranty. The

former covenant was broken as soon as the covenant was made; that is, February 8, 1854, and a cause of action then accrued to recover the damages, the measure of which would be the purchase money with legal interest (then six per cent.) from that time.

The covenant of warranty was broken at the time of the eviction; that is, December 2, 1863, and that cause of action did not accrue until that time, but in either case the measure of damages is the purchase money and interest from the date of the deed.

The statute of limitation has not been plead, and it would seem that the plaintiff has a right to recover upon the cause of action, which will give him the largest damages, if there is a difference in that respect.

In estimating damages, I think interest should be computed upon the relative proportion of the purchase price, at the rates prescribed by law; namely, at six per cent., from February 8, 1854, up to May 1, 1854, at which time the rate was changed by statute, and from that time at ten per cent., on the principal sum.

The plaintiff claims to recover costs and attorneys fees incurred in the action between the plaintiff and his grantee, instituted by his grantee after eviction. This claim is clearly distinguishable from a claim for expenses incurred in defending against eviction. In the latter case a defense is necessary, either to protect and defend the title, if it be good, or to make record evidence of the fact, if it is bad, and if the covenantor is notified to appear and defend, it seems just and in accordance with precedent, that in case of failure of title, he should be at the expense of the defense.

In the present case, after the invalidity of the title had been established, the plaintiff permitted himself to be sued for money which it was his duty to pay, and which he must pay before he could recover in this action.

It does not appear by the complaint in this case that any defense, in which the present defendant had an interest, was or could have been set up.

The plaintiff may have been compelled to pay a greater

amount than he is entitled to recover here, because of the greater value of the land at the time he covenanted; but to allow him to recover the additional amount in this action, would be a departure from the well settled rule that the amount of damages is the purchase money and interest. (*Staats v. Ten Eyck*, 3 Cains, 112, and note.)

The amount expressed in the deed is *prima facie* evidence of the value as determined by the consideration, but it is subject to be rebutted by parol.

The actual price fixed by the parties is to be taken as the value (*ib.*).

The complaint states that the four lots were conveyed "for the consideration of \$2,000," and "that the value of said lot one, counting the four lots at \$2,000, was \$600." The answer says in regard to this, merely: "The consideration for which he conveyed said lot one, was not six hundred dollars, as the plaintiff has alleged, but was two hundred dollars, and no more."

How far it is necessary for a defendant to deny matters of evidence, or conclusions or inferences appearing in the complaint, I will not here say, further than this: The material allegation upon which the plaintiff relies is, that the value of the land was \$600. This being met by a direct denial, I think the pleadings authorized the defendant to prove the real consideration. This was shown by the defendant's testimony to be \$200 for the lot in question.

The judgment should be for the plaintiff in the sum of \$507.73 and costs.

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Circuit Court for Multnomah County, March Term, 1869.

## OREGON CENTRAL R. R. CO. v. AARON E. WAIT.

In an action to condemn land to the use of a railway company, the defendant denied that the plaintiff was a corporation, and also presented issues, as to the value of the land, and the amount of resulting damages; Held, that these issues could not be tried together.

The defendant declined to elect, and the denial of the plaintiff's corporate capacity was struck out on motion of the plaintiff.

Neither a railway company, nor the owner of land adjacent to the railway, is required by law to fence the line between them. Each is left by the law to fence or not, as the interest of each shall prompt it or him.

The defendant is entitled to the actual value of the land appropriated; and, if injury, resulting from constructing the road, will exceed the resulting benefits, the excess of such injury is to be added to the value of the land appropriated.

A denial of the plaintiff's corporate existence, may, in some instances, be a plea in bar; but when establishing the truth of the plea, will not authorize a judgment that will bar a future action, but will abate the present action, the plea is in abatement.

THIS was an action by a railway corporation, to obtain a right of way, for the plaintiff's railroad through a parcel of about three hundred and twenty acres of the defendant's land. The answer denies knowledge or information, sufficient to form a belief whether the plaintiff is a corporation; denies that the parcel sought to be appropriated contains no more than seven and a half acres, and alleges that it contains ten acres; and it avers that the construction of the proposed road, will injure and damage the residue of the defendant's said parcel, \$1,200.

The replication denies that the parcel sought to be appropriated, is greater than alleged in the complaint; denies that the damages resulting to the defendant, will be \$1,200, or more than \$50.

The plaintiff moved that the defendant elect between the defense, that the plaintiff is not a corporation, and the residue of the answer. It was ruled that the defendant may elect, whether he will first go to trial on the issue first mentioned, or abandon that defense, and have his damages assessed. The defendant declined to elect, and claimed the right to try all the issues together.

The plaintiff moved that that part of the answer, denying that the plaintiff is a corporation, be struck out, and the motion was granted.

The cause being tried by jury, at the defendant's request the jury viewed the premises, and the evidence and argument having been heard, the cause was submitted.

The following instructions, requested by the plaintiff, the court declined to give:

"There is no law requiring the defendant to construct or maintain fences along the line of the railroad, and the plaintiff would have no assurance that the defendant would make or maintain a fence, even if he were to be paid for the same by your verdict.

"If the plaintiff needs a fence for its own protection, or should be compelled by law to fence, it would be compelled to fence at its own expense.

"The plaintiff is liable, at any session of the State legislature, to be required to fence its road, and in that case the plaintiff would be obliged to fence at its own expense."

At the request of the plaintiff the court gave the following:

"If the benefits to the land resulting from the proposed road are equal to the resulting damages to the land of the defendant, all that is to be assessed is the value of the land sought to be condemned.

"There is no law requiring the defendant to construct or maintain a fence or fences along the line of the railroad."

The court added to this instruction the following:

"Nor does the law require either party to do so. The railroad company and the defendant are each left, by the law, to fence or not to fence, as the interest of each shall prompt it or him."

The defendant asked the following instructions, which the court declined to give:

"The plaintiff is not required by law to fence the lines of the land sought to be appropriated, nor to construct cattle guards, or crossings, for crossing from one part to the other of the land of the defendant."

At the defendant's request the following instruction was given:

"The plaintiff is not entitled to take any of the defendant's land for the purpose of a railroad without compensation being first made or secured, and building a railroad in the future can not be considered any part of such consideration."

And the court added the following:

"But advantages resulting from the construction of a railroad may be considered as a set-off to, or a compensation for resulting injuries to the land not appropriated or taken by the plaintiff."

At the defendant's request the court gave the following:

"The verdict of the jury in this action should secure to the defendant compensation for all the damages resulting from the appropriation of the land sought to be appropriated, irrespective of any increased value thereof by reason of the proposed improvement."

And the court thereupon added:

"The defendant is entitled to the full value of the land actually taken, no matter how great advantages he may derive from the construction of the road. Such advantage can not be set off against the value of the land. But if you find that there is resulting injury or damage to those lands of the defendant which are not sought to be appropriated by the plaintiff, such resulting injury or damage may be compensated by resulting advantages caused to the same land by the construction, if such resulting advantages are sufficient in amount.

"You will first find the value of the land actually taken or sought to be appropriated. Under any and all circumstances defendant is entitled to recover what that parcel of land is worth.

"The estimate of all other damages, except the actual value of the parcel taken, is based upon reduction in the value of the premises that will be caused by laying out, constructing, maintaining and operating the proposed railroad. If the injury will exceed the resulting benefits, you should add the excess of injury or the depreciation, to the value of the land which is actually taken. If the benefits are equal to, or will exceed, the resulting damages, all that the jury should assess is the value of the parcel of land sought to be appropriated."

The jury rendered a verdict assessing the defendant's damages at \$50.

The defendant moved for a new trial, assigning as error the several rulings above mentioned.

*J. N. Dolph and S. Huelat for the plaintiff.*

*Wait & Kelly, for the defendant.*

The motion for a new trial was overruled upon the following grounds:

UPRON, J. This is a proceeding under the statute providing a special mode of obtaining the right of way by a railway corporation. (Code, p. 670.)

The statute provides, that "the defendant in his answer may set forth any legal defense to such appropriation of such lands, or any portion thereof; or, omitting such defense may aver the true value of the land in question, or the damages resulting from the appropriation thereof, or both. And the act further provides, that "such action shall be commenced and proceeded in to final determination, in the same manner as an action at law, except as in this title otherwise specially provided." The first question presented on the motion for a new trial is, whether a defendant may at the same time set up that the plaintiff is not incorporated; and also the true value of the land in question, together with a claim for the damages resulting for the appropriation thereof?

I do not think the statute above quoted places the matter of joining these defenses in an attitude more favorable to the defendant's position than does the ruling in the case of *Hopwood v. Patterson*, 2 Ogn. 49. I think that clause of the statute which speaks of setting forth "any legal defense," uses the word defense to denote a statement of facts that will debar or preclude the plaintiff from appropriating the land upon any terms. That is, the defendant may plead any matter that will defend him against being compelled to yield the right of way. And I presume the defense thus spoken of may be a statement of facts, in abatement, which, if found true, will defend him against yielding up the right of way in this action; or it may include facts that will perpetually bar the plaintiff from obtaining such right. The statute provides that he may set forth such defense, "or omitting such defense," he may have the damages ascer-

pende for its solution upon construction of statute; and cannot be determined by abstract reasoning on the subject of man's natural rights.

If it was the claim of a neighbor for damages, whose lands lay so near the track as to suffer similar inconveniences without actually being touched by the railway, the statute would not apply. But one who is compelled to part with some part of his tract of land has, by virtue of the same statute which compels him to part with it, a standing in court, to ask, not only for compensation for that which is taken, but for resulting damages beyond that.

If the statute had said he should have full payment for the land taken, "irrespective of any increased value thereof," and full compensation for all damages done to any land not taken, irrespective of any increased value of *that which is not taken*, it would come up to what is now claimed as the construction of the present statute.

But the statute falls short of that; the increased value that is not to be considered is, "the increased value thereof;" the word "thereof" evidently refers here to the land to be appropriated, and not to the residue. I am convinced that, if beyond the loss of the land taken, the defendant is not on the whole injured, but is in fact benefited, he cannot under this statute recover resulting damages for a proposed road the construction of which will as a whole be an actual benefit to him over and above all damages. I think the jury were correctly instructed on the subject of fencing the line of the road, and that no error has been committed, to the prejudice of the defendant.

The motion for a new trial must be overruled.\*

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\* After the overruling the motion for a new trial, costs were erroneously taxed in favor of the plaintiff, and the taxing of costs was reversed on appeal to the supreme court. The ruling of the circuit court was affirmed on the several points involved in this motion. See Post, *Ogn, Central R. R. Co. v. Wait*.



Circuit Court of Clackamas County, October Term, 1869.

**WILLAMET FALLS CANAL AND LOCK CO. v.  
JAMES K. KELLY and the PEOPLE'S TRANSPORTATION COMPANY.**

**MEASURE OF VALUE.**—It is not competent to show what a parcel of land brought at a sheriff's sale for the purpose of proving its value.

**ACTION BY A CORPORATION FOR RIGHT OF WAY.**—In an action by a corporation to condemn land for a canal, the plaintiff cannot disparage the defendant's title.

**PARTIES.**—It being the duty of the plaintiff to bring all owners into court, if he does not, he cannot avail himself of the neglect to reduce the amount of damages.

**COMPENSATION.**—The defendants are entitled, in any event, to the actual value of the parcel sought to be condemned to the plaintiff's use. But whether the defendants recover in addition to that, depends upon whether the injury done to the residue will be greater than the benefits.

**WATER POWER.**—If the appropriation will carry with it water power, or render such power less valuable, such water power should be considered by the jury in making the estimate.

THIS was an action by a corporation to have certain lands of the defendants, and a right of way upon the same, appropriated to the plaintiff's use, under the general incorporation law, for the construction of plaintiff's proposed canal.

The complaint set out the time, place, manner, object and purposes of plaintiff's incorporation; particularly designated the parcel of land sought to be condemned and appropriated; asserts the necessity of the appropriation, and that each of defendants is owner of an undivided half of the

*land* in question. This parcel of land is sixty feet wide and thousand feet, more or less, in length, and extends from designated point below, to a point above the Willamet falls, along the western margin of the Willamet River.

The answer avers the true value of the land, and that the defendants are owners of other lands of which this forms a part (describing the whole tract), and that the damage to the residue of the tract that would result to them from such appropriation would amount to \$50,000.

The replication denied that the value of the land was

more than \$———, and denied that any damages would result from the appropriation of the premises.

*S. Huelat*, for the plaintiff.

*Mitchell, Dolph & Smith*, for the defendant, The Peo. T. Co. (a)

A jury being empaneled, and it being held that the affirmative of the issue, was with the defendant, after the case was opened the defendant proceeded with his evidence; after which, the plaintiff's witnesses were examined and defendant called witnesses in rebuttal.

The following are the points ruled in the course of the trial:

The defendant asked his own witness, the following question: "What is the value of the land sought to be appropriated, including whatever water privilege would be appurtenant to that part of the land when it is segregated?"

The plaintiff objected; that the plaintiff is not authorized to use water, except for a canal, and could not use all the water that may be deemed appurtenant. That the question calls upon the witness for an opinion, as to what water would be appurtenant. That the inquiry here should be, what will the defendant be damaged, and how much will the plaintiff gain.

The objection was sustained.

Defendant's witness having testified that the whole tract was worth \$50,000, was asked on cross-examination, if he knew of its having been sold at sheriff's sale, and, if yes, what was it sold for? Defendant objected for incompetency.

*By the court.*—Usually a cross-examiner may ask any question pertinent to the issue, tending to explain or contradict what the witness has testified, and sometimes may ask questions for the purpose of contradiction, that are not

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(a) The defendant, J. R. Kelly, being a stockholder in, and an officer of the plaintiff, declined to take a part personally in the trial of the cause. It is probable there was no disagreement between him and the plaintiff as to the amount of compensation. But his relation to the plaintiff did not appear by the record made in this case.

otherwise relevant. But it is not obvious here, that the answer will either explain or contradict the witness' statements should a sale for ever so small a sum be proved, because a sheriff's sale may have been a sale of the interest of some one who had a doubtful, or only a colorable title, or there may have been an irregular sale, or a sale without authority; in that case, it would not tend to contradict the witness. If the evidence is allowed to go to the jury, it will be necessary to permit the defendant to go into an investigation of all the circumstances attending the sale; an investigation, that might be as difficult as the issue now before the jury. The objection should be sustained.

The plaintiff asked his own witness: "Do you know whether this land has been sold at public auction, and if so, for how much?" The question was objected to, as irrelevant and incompetent. The objection was sustained.

The defendant's witness being asked, on cross-examination, what he paid for the undivided half of the whole tract, and the question being answered without objection, on re-examination, the defendant asked the witness: "For what purpose did you purchase the property?" The question was objected to as immaterial, and not responsive to the cross-examination. The objection was sustained.

The plaintiff offered to prove that certain parts or lots of this ground, sought to be appropriated, belonged to persons not parties to this action, and not to the defendants. And also, that the defendants' title to the tract generally was disputed. *Held*, that the plaintiff must pay the full value of the land sought to be appropriated; that there was no occasion to inquire about the ownership, and that as to resulting damages, the plaintiff having sued these defendants as owners of the parcel, he can not question their title in this proceeding.

UPPON J., instructed the jury as follows:

The defendants have admitted by their pleadings, that the plaintiff is entitled to take the land designated, upon making reasonable compensation to the defendant, and you have been called to determine what is reasonable compensation.

There are two distinct branches, or grounds of estimate, to be considered in arriving at your conclusions. One is the actual value of the strip or parcel of land, sixty feet wide, that the plaintiff proposes to take; and you are also to estimate such other damages, if any there be, as will result to the owners of the residue of the whole tract, in consequence of taking part of it.

Under any view that can be taken of the case, the defendants are entitled to recover the actual value of the parcel that is to be condemned to the plaintiff's use. But whether the defendants recover, in addition to that, damages for injury that will be caused to the residue of their land, depends upon the question whether the injury thus done to the residue of the land will be greater than the benefits that will accrue to such residue, in consequence of the appropriation and use of the land taken. .

In regard to damages over and above the value of the land actually appropriated, the subject for your consideration is the reduction in value of the premises, by reason of the projecting and construction of the canal in the manner the plaintiff may pursue. Will the land and its appurtenances be worth less, and if any less, how much less. You will, therefore, see the necessity of keeping these two branches or grounds of your estimate distinct from each other. The plaintiff proceeds upon the theory that there is a public necessity for the projected canal, and it is upon that theory that the law permits private property to be taken without the owner's consent. Under the constitution and laws, private property cannot be taken even for public use, without compensation, and the land actually taken must be paid for, independently of any advantage that may result to the defendants from the plaintiff's proposed enterprise. But if, in your opinion, the other damages caused to the defendants will not be greater than the benefits to them, resulting from the plaintiff's enterprise, you will not include in your verdict any other damages than the value of the land to be appropriated. Should you think such other damages will be greater than the resulting benefits, you will strike a balance between such resulting damages and benefits, and add

that balance to the actual value of the land that the plaintiff seeks to appropriate, to make up the total of your verdict.

Whatever water power the owner of the land is entitled to because of his ownership of the land, must be treated by the jury as the property of the owner of the land. And if the appropriation asked for will carry with it any water power, or render it less valuable, or interfere with the defendant's use of any water power, to which they would otherwise be entitled, such water power should be taken into consideration by you in making your estimates.

The jury rendered a verdict in favor of the defendants for \$1400. (b)

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Circuit Court for Washington County, October Term, 1869.

### CHARLES S. WHITE et al. v. ISAAC ALLEN.

**THE DONATION LAW.—DECEASED WIFE.**—Where a husband and wife settled upon 640 acres of land in 1844, and the family continued to reside upon and cultivate the land, but the wife died on the twenty-sixth day of September, 1850, no land was granted to the wife by the donation act, and the survivor can take under that act but 320 acres.

**PLEADING.**—Evidence ought not to be inserted in, or made part of an answer.

**MOTION TO STRIKE OUT.**—On a motion to strike out part of an answer, if the motion contains but a single specification, and includes some matters that ought not to be struck out, the whole motion must be denied.

**EQUITABLE DEFENSE.**—It is essential to an equitable defense that the defendant has no legal defense.

**BILL OF REVIEW.**—A defective decree may be reformed under a prayer for general relief.

**PATENT TO A WRONG PARTY, NOT VOID.**—Where equity relieves from the effect of issuing a patent to a wrong party, the patent is held to be effective to pass the title from the United States, but the patentee is held to be a trustee for the benefit of the rightful claimant.

**SUPPLEMENTARY ANSWER.**—Material facts that did not exist at the commencement of the suit may be set up by supplementary answer.

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(b) The final adjournment of the term occurred before the money was paid into court and judgment was not rendered until the May term, 1870. It being held that judgment could not be entered until after payment of the damages assessed by the jury.

**ERROR MAY BE CURED.**—If it is error for a witness to voluntarily state the contents of a written memorandum, the error will not vitiate the residue of his deposition if he at the time produce and exhibit the memorandum.

**MEMORANDUM.**—The fact that a witness has looked at a memorandum to refresh his recollection before being called, does not render him incompetent.

**A PATENT IS PROOF OF REGULARITY OF PROCEEDINGS.**—After a patent has issued, the exhibition of the patent proves the regularity of preliminary proceedings.

**SUPREME COURT.**—If the question whether a woman who died before September 27, 1850, or her representatives, become entitled under the donation act; is still open to discussion, since the ruling in *Ford v. Kennedy*, 1 Oregon, 166, its review should be had in the supreme court.

**PRIVITY.**—One who has no right to or interest in the land cannot set up the disqualification of a donee. But one who settled on government land, in compliance with the donation act, while it was still government land and before a certificate issued to another, acquired such an interest as rendered him competent to set up the disqualification.

**BILL OF REVIEW.**—By our code, section 377, whatever subject matter could formerly have been presented by any of the various formal bills in chancery, may now be brought before the court as an "original suit;" and if the subject matter constitutes a defense, it may now be presented by an answer.

*W. W. Chapman*, for the plaintiff.

*Mitchell & Dolph and W. D. Hare*, for the defendants.

THE complaint in this case is in the statutory form for the possession of a parcel of land in Washington County, known as the north half of the "White Donation Claim."

The answer is voluminous, containing copies of sundries, documents and records. Its material parts are as follows:

It denies plaintiff's ownership of the premises and right of possession, and alleges that one Samuel P. Soule, a white male citizen of the United States, and then a married man and resident in Oregon, and entitled as a donee under the donation law, settled upon the lands in controversy, March 27, 1855, and from that time, with his wife, resided upon and cultivated the said premises for four consecutive years, claiming the same as a donation from the United States. And before November 17, 1860, said Soule and his said wife became owners of said lands by virtue of a full compliance with the donation law; having filed with the register of the land office his notification and proofs.

That on the seventeenth of November, 1860, the defendant purchased from the said Soule and wife, for a valuable consideration, one parcel (designated in the answer) of said premises; which parcel said Soule and wife then conveyed to him by their deed; and about that time said Soule and wife, for a valuable consideration, conveyed to defendant the residue of said premises, "by a mortgage duly executed and delivered, and they at that date delivered to the defendant the possession of the whole of said tract of land under said deed and mortgage."

That prior to September 27, 1850, Richard White, one of said plaintiffs, and his then wife, Caroline White, who was the mother of the other plaintiffs aforesaid, claimed a tract of six hundred and forty acres of land that included the premises in controversy. But that said Caroline departed this life on the twenty-sixth of September, 1850. That said Richard White, on the tenth of November, 1859, elected to take, and did take, the south half of said tract, containing three hundred and twenty acres, being the south half of the said parcel known as the "White Donation Claim." And the said Richard White, for himself and the heirs of said Caroline, abandoned the premises in controversy.

That after defendants' said purchase, said Richard White, on the twenty-second of September, 1862, by means of false, fraudulent and *ex-parte* affidavits, procured a donation certificate, for the whole six hundred and forty acres, to be issued to him and to the said Caroline White, and afterwards, and by means aforesaid, procured a patent to be issued, granting the south half of said tract to said Richard, and the said north half to the said heirs of said Caroline White. That this defendant, on the sixteenth of February, 1863, commenced a suit in this court against these plaintiffs, setting up the foregoing facts as cause of suit, and said plaintiffs were duly served with process therein, and such proceedings were therein had; that this court, on the twenty-second day of December, 1863, rendered a decree therein decreeing against these plaintiffs: "That all benefit and advantage of said certificate, or any patent that may be issued in pursuance thereof, be vested in plaintiff (this defendant meaning), and

that said certificate, or any patent that *may be* issued in pursuance thereof, *be adjudged void* and of no effect as to said plaintiff (meaning this defendant), and that said plaintiff (meaning this defendant) be adjudged to be the absolute owner of said land in fee, and that said defendants (these plaintiffs meaning) be adjudged to have no right thereto or therein." The answer prays that plaintiffs be compelled to convey to defendant the premises; that any color of title which plaintiffs may have in the premises, be decreed to be held for the benefit of the defendant, and the answer concludes with the prayer for general relief.

The plaintiff moved to strike out a part of the answer, including copies of affidavits and of divers other papers used and filed in the surveyor-general's office, which were annexed to and declared to be made a part of the answer.

The court held that some of the matters embraced in the motion were statements of fact material to the defense set up, and for that reason overruled the motion; but expressed the opinion that if the motion had pointed to the copies alone, the motion should be granted, and that setting forth in the pleadings such copies, or any other matter that is merely evidence, is an inconvenient and troublesome practice not authorized by the Code.

The plaintiff demurred to all that part of the answer that precedes the allegations in regard to a former suit, that it "does not constitute a defense in equity;" and to so much as relates to the former suit, "that it does not constitute a suit or defense in equity, and if pleadable at all is pleadable in law;" and that the facts there set forth are the same facts stated in the first mentioned part of the answer.

*By the Court, UPRON, J.* If the decree that the defendant sets up is effective to confer the legal title on the defendant at the present time, the decree is a good defense at law, and it is upon this idea that the plaintiffs' counsel claims that the first part of the answer is bad, being an attempt to set up both an equitable and legal defense at the same time. If one have a good defense at law, he cannot be heard to set up an equitable defense. It is a *sine qua non* in an equit-



able defense, that the plaintiff has no defense at law. I am of opinion that the decree is not available, as conferring the legal title, or as a good defense at law. It was within the power of the court in the former suit to have compelled the parties who are now plaintiffs to execute conveyances, but the decree stops short of that. The decree seems to be, in fact, somewhat vague if not contradictory in itself; for it directs that the certificate or any patent issued in pursuance thereof be adjudged void and of no effect. The theory of cases where equity has relieved a rightful claimant under a patent issued to a wrong party, is, that such patent is effective to pass the title from the United States,—but the patentee is held to be a trustee for the benefit of the rightful claimant. The case made by the answer warrants the defendant, if he can now show that he is entitled to the premises, in asking to have the decree reformed for the purpose of enabling him to obtain the legal title. The material facts stated as new matter in that part of the answer that precedes the statement of a former suit, are those upon which the former suit is based, and are material and necessary to be set out in some form in his present answer, if the defendant would show a case in the nature of a bill of review or bill to reform the decree. These statements of fact, with the allegations in regard to the former suit, should all be taken as constituting but one defense.

The demurrer was overruled and the plaintiff filed a replication putting in issue much of the new matter alleged in the answer, and stating that said Richard White had no authority to bind the other plaintiffs by his alleged abandonment of the premises.

The answer was filed on the 17th of May, 1869. A replication was filed May 19.

At the October term, 1869, the defendant filed an affidavit showing that said S. P. Soule resides in Washington Territory; that in August last the defendant sent to said Soule a blank deed to be executed by Soule for the purpose of conveying to the defendant, in fee, the premises embraced in the mortgage; that on the day of filing the affidavit the de-

fendant had learned for the first time that the deed was executed and delivered. And the defendant moved the court for leave to file a supplementary answer. The plaintiff opposed the motion. The leave being granted, the defendant filed a supplementary answer, setting up that for the purpose of saving the expense of a foreclosure of the mortgage, said Samuel P. Soule and his wife conveyed said premises, in fee, to this defendant on the 6th of September 1869.

On the trial the only material question of fact upon which the evidence was conflicting or doubtful, was the date of the decease of Caroline White, the wife of the plaintiff Richard, and the mother of the other claimants. The evidence establishes the fact that her decease took place on the 25th or 26th day of September, 1850, either one or two days before the passage of the donation act. The evidence shows that Richard White and his said wife settled upon 640 acres, including the land in controversy, in 1844, and resided upon it and cultivated a portion of it, up to the time of the wife's death; and that Richard White, with his children, continued to reside in the same house, situated on the south half of the 640 acres up to 1855 or 1856. Richard White filed a notification for himself and his wife's heirs December 9, 1852, claiming the whole 640 acres. He was afterwards advised that he could not hold more than 320 acres, in consequence of his wife having died before the passage of the donation law; and, if compelled to select, he preferred the south half.

At the land office an indorsement was written on the notification previously filed by him, in the following words:

"To C. R. Gardiner, Surveyor-General of Oregon: Being reduced to 320 acres, in consequence of the death of my wife before the 27th of September, 1850, I desire to retain the south half of my original claim.

Salem, Nov. 10, 1859.

RICHARD WHITE."

Said Richard White testified on the trial that the indorsement was written by the surveyor-general without White's request, and being advised by the surveyor-general that it

was necessary for him to sign it, he did so, knowing but little about his rights or the nature or effect of the indorsement.

Soule and his wife settled upon the north half March 27, 1855, filed a notification and settler's oath May 31, 1855, preliminary proof March 21, 1856, and final proof April 1, 1859. Soule and wife deeded to the defendant, Nov. 17, 1860, one part, and mortgaged the residue, and let the defendant into possession of the whole June 8, 1858. Soule was notified at the time of his settlement by the plaintiffs that the land was claimed by them. January 3, 1861, an order was made at the land office, that said Soule appear and show cause why a certificate should not issue to Richard White and the heirs of Caroline White.

It does not appear that either the defendant or Soule was notified of the order. Proceedings were taken at the land office, upon notification filed by White on December 9, 1852, which resulted in a certificate issued September 22, 1862, to Richard White, for the south half of the claim, and to the heirs-at-law of Caroline White, for the premises in controversy, which certificate was followed by a patent, issued September 11, 1865.

The case was argued and submitted for final determination, on the pleadings and proofs.

UPTON, J., filed the following opinion:

Before examining what I deem the merits of the case, it is proper to refer to some points that arose in the course of the trial.

The deposition of Dr. Barclay was taken, out of court, before the trial. He deposed that Mrs. Caroline White departed this life on the twenty-sixth of September. That he noted the day of her death in his medical day-book, in these words: "Mrs. White died this morning." The answer was objected to as incompetent and not the best evidence. On cross-examination, he deposed in answer to interrogations, "I have examined the memorandum this morning." "Without looking at the memorandum, I could have stated the fact, but could not state the day of the month." "I examined the mem-

orandum some years ago, when a witness in the same matter, and have always recollected the day and date since that time."

The witness presented the book to the plaintiff's attorney at the time the deposition was taken.

On re-direct examination, the witness deposed: "I made the memorandum on the day of the occurrence. Since examining it, I know that the death occurred on the twenty-sixth of September, 1850."

The plaintiffs *now* move to suppress the deposition, because of the witness having looked at, and quoted from, a memorandum that is not *now* produced.

I think the motion to suppress the deposition should not be sustained. If the book had not been produced, the reasons for the motion would have been much stronger. Since the taking of the deposition, the production of the book is within the power of either party; and the cross-examiner has had an opportunity to inspect it. The quotation from the book was not competent evidence, but it was not asked for by either party. This parol evidence of the contents should be rejected, but there is no good ground for suppressing the whole deposition. The fact that a witness has refreshed his recollection by examining a memorandum recently before taking the stand, may go to the credibility of his statements, and is a proper matter of cross-examination, but it does not render him incompetent.

The objection to the supplementary answer, which the defendant has been permitted to file, would be of more weight, if the plaintiffs had shown that they had been misled, or taken by surprise. No objection, that the previous conveyance from Soule and wife was a mortgage and not an absolute deed, seems to have been made in the previous suit, nor on the demurrer in this suit, nor until after leave was asked to file the supplementary answer. The mortgage on the one part of the premises, accompanied by delivery of possession, seems to have been treated by all parties as if it was a conveyance in fee. The defendant, from the first, had an unconditional conveyance of one part of the subject matter of the suit, and as an unconditional conveyance of

the other part has taken the place of the mortgage pending the suit, I think it is beyond question that leave to file the answer was properly granted.

As to the alleged abandonment. If the plaintiffs ever became entitled to the land, it is not important whether or not Richard White once believed that he and the other plaintiffs were not entitled, or whether he once abandoned the intention of prosecuting their claim; for that would not divest him of a title actually acquired, much less would it divest the other plaintiffs. If the plaintiffs were persons entitled to claim a donation under the donation law, the legal title vested in them on the passage of the act, and not at a subsequent time. (13 Pet. 499.) If they ever had the legal title; the evidence fails to show that it has been divested by abandonment.

The objections made to the mode of proofs and other preliminary steps taken by White, in the land department, are of no force, because the patent proves the regularity of all preliminary proceedings. *Hoofnagle v. Anderson* (7 Wheat. 214.)

The case on its merits presents but two or three questions for consideration:

*First.* Did the settler, whose wife had died before the passage of the donation law, and the children of the deceased wife, become entitled to the three hundred and twenty acres known as the wife's share?

*Second.* If they did not, and were persons not authorized to take the donation, is the defendant in an attitude to raise the question of disqualification?

*Third.* Is it competent in this proceeding to reform the decree rendered in the former suit?

The first of these questions was substantially determined by the supreme court of the territory of Oregon, in the case of *Ford v. Kennedy*, 1 Or. 166. The granting clause of the donation act relied upon by the plaintiffs, is in these words, "And in all cases where such married persons have complied with the provisions of this act, so as to entitle them to the grant, as above provided, whether under the late provisional government of Oregon, or since, and either shall have died

before patent issues, the survivor and children or heirs of the deceased, shall be entitled to the share or interest of the deceased in equal proportions." That court said, "The right to take donations under that section, is restricted to persons now residing in said territory, or who shall become residents thereof, on or before the first day of December, 1850. 'Such,' then, in that clause of the act, relates to the foregoing, as well as to the other qualifications of grantees under that section, and makes the clause mean as if it read, 'In all cases, married persons now residing in, or who shall become residents.' " The court refuses to give the act a retro-active effect, or to adjudge a grant to, or a title in, persons who died before the passage of the act.

The facts of the present case differ from those in *Ford v. Kennedy*, in that the husband, as well as the wife in that case, died before the passage of the act. But if the principle there announced, is correct, it is fatal to the position here taken by plaintiffs' counsel, because, unless the law can have a retro-active effect, the donee, being a "single man" on the day the act passed, and not since married, within the period allowed for taking a claim, is limited by the terms of the act to 320 acres.

The soundness of the principle there announced, is attacked by the plaintiffs' attorney, whose argument displays great care and research in the examination of the subject. He claims that the donation law, both in spirit and by its terms, recognizes rights acquired under and sanctioned by the provisional government, and that the supreme court fell into an error by not giving sufficient consideration to the expression, "Whether under the late provisional government or since," and to the situation and condition of the territory and its inhabitants, at the time of the passage of the act. With that opinion standing as the decision of the supreme court, it would be supererogation for this court to enter into the subject further than to say, that the reasoning of the plaintiff's counsel does not prevent that certainty, and that clear conviction of error, in the prior adjudication of the point, that warrants a circuit court, in departing so far from the rule, *stare decisis*, as to disregard what seems to have been

contemporaneous construction by the land department, as well as the decision of the highest tribunal of the territory, and to be in accord with the position announced by the Supreme court of the United States, in the case of *Lownsdale v. Parrish*, 21 How. 290. If this question is still open to examination, its review should be had in the supreme court, either of this state, or of the United States.

The second question refers to the right of the defendant to raise the question of the plaintiff's disqualification. There is a class of cases where land has been erroneously granted by the United States land department to persons not qualified according to the terms of the acts of congress, in which third persons claiming the same lands as having been *subsequently* acquired, have been denied the right to plead the disqualification, upon the principle that it is a matter between the patentee and the government only. (*Moore v. Wilkinson*, 13 Cal. 478; *Terry v. Megerle*, 24 *ib.* 609; *Curle v. Burrel*, 3 *Sneed*, 62.) For the purposes of this case, it may be assumed that if the defendant had no right to or interest in the land, when it was granted to the plaintiffs, the defendant cannot raise the question of qualification or disqualification. But if the defendant then had a right to claim it, he may be heard to defend the right; and if the plaintiffs were not persons qualified to claim under the donation law, his standing upon this question depends on his relation to the land at the time it was granted to the plaintiffs. As has been before remarked, the donation act being in words of present grant, operated to convey the title at the time of its passage to the person possessing the prescribed qualifications and then settled upon the lands; but one not qualified took nothing by his *actual settlement and cultivation*. Whatever color of title passes to such unqualified claimant by virtue of a decision in his favor, he derives from the action and decision of the agents of the government in the land department. In this case the certificate was not issued, and the record discloses no decision made, until September 22, 1862. If the plaintiffs were not within the provisions of the act, they acquired no color of title until that time. The land up to that time was government land, if the plaintiffs were disqualified. If the

defendant's grantor lawfully settled upon the premises before it had been granted to another by the department, and before it was claimed by a qualified settler, his settlement and cultivation immediately gave him an interest. (*Doll v. Meador*, 16 Cal. 295; 12 How. 76; 13 Pet. 499.)

His settlement being made before the certificate issued, if the certificate was improperly issued to another, the defendant became so connected with the title as to be authorized to attack the certificate and the patent, if one was improperly issued.

The remaining proposition involves a question of practice upon which but few precedents are to be found, arising since the enactment of state codes dispensing with bills of review. By our code, §377, whatever subject matter could formerly have been presented by any of the various formal chancery bills, may now be presented by an "original suit." And if the subject matter constitutes a defense, by §§72 and 93, it may now be presented by an answer.

Under the equity practice, a party claiming what is claimed by the defendant in this case, would have resorted to the circuitous method of filing a bill of review, or a bill in the nature of a bill of review; (1 Paige, 200; Coop. Eq. Pl. 73; 2 John. Ch. R. 488;) and of enjoining the action at law until he could be heard in equity.

The former decree was rendered on the twenty-second of December, 1863, and the patent was issued to the plaintiffs September 11, 1865. If there was not such error or omission, in the rendition or entering of the decree as would sustain a bill of review, the defendant being *cestui que trust* of the premises, and without any other means of obtaining the legal title or other means of defending himself against the acts of his trustees, would have been allowed to file his supplemental bill, setting up the issuing of the patent.

The plaintiffs should have a decree for the parcel of land not embraced in defendant's deeds, and the defendant should be decreed the residue of the premises. And the decree of December 22, 1863, should be so reformed as to declare the patentee to that extent, a trustee for this plaintiff, and the trustee should be compelled to convey.



Circuit Court of Washington County, October Term, 1869.

WM. WHITE v. J. W. THOMPSON, NORMAN MARTIN and ——— BRIDGWATER.

**REGULAR PROCESS PROTECTS AN OFFICER.**—An attachment issued on an insufficient affidavit will protect the officer who served it, but not the party and justice of the peace who caused it to issue.

**JUSTICE'S DOCKET ENTRIES.**—When a judgment is attacked collaterally, a court will not look outside the record to learn that the appointment of a special constable was not properly made.

**EFFECT OF APPEARING.**—When a docket entry shows that the defendant appeared, and does not show that the appearance was special, parol evidence will not be heard to attack the judgment collaterally.

**IDEM.**—Withdrawing defendant's appearance does not oust jurisdiction of the person.

**EXEMPTION FROM EXECUTION.**—Property cannot be recovered as exempt from execution "unless selected and reserved by the judgment debtor, or his agent, at the time of the levy or within a reasonable time after the levy shall be known to him.

**IDEM.**—When the constable was about to levy on wheat, and the defendant asked him to levy on the defendant's team, in place of the wheat, claiming no exemption, the levy is good.

**ACTION** for damages for the taking and detention of a pair of horses, the property of the plaintiff.

The answer defends, on the ground that the property was taken under an attachment, issued by the defendant, Martin, who was a justice of the peace, in an action for \$20, commenced before him by defendant, Thompson, against this plaintiff, and was delivered to and served by defendant, Bridgwater, who was specially appointed by the justice, to serve the attachment; and alleges that eleven days after the seizure, Thompson obtained judgment in the action and issued execution, and Bridgwater, being specially appointed for that purpose, levied upon, and from that time held, the property on an execution.

The replication denies that the court had jurisdiction of the person of the defendant, jurisdiction to issue the attachment, under the judgment, or to issue the execution; and denies that the attachment was duly or regularly issued, and makes the same denials in regard to the execution.

The justice's docket was introduced in evidence and contains the following entry: "H. Jackson, having appeared as attorney for the defendant, made and filed a writ of attachment to discharge the attachment above stated. Said writ was denied, the defendant withdrew."

The affidavit for attachment was as follows:

"In justice's court, before Norman Martin, justice of the peace of Wapatoe, state of Oregon, county of Washington."

"J. W. THOMPSON

v.

"WILLIAM WHITE.

"J. W. Thompson, the plaintiff above named, being sworn, says:

1. "That a sufficient cause of action exists against the defendant, William White, the grounds of which appear in the sworn complaint hereunto annexed and the statements contained in which are true to the knowledge of this deponent.

2. That the defendant is about to convey away the property of his personal property in such a manner as to defraud his creditors of their just and lawful claims.

3. That the said plaintiff has commenced an action against the defendant by issuing the summons hereto annexed against William White, upon the cause of action above stated.

Subscribed and sworn, etc.

The affidavit was not annexed to the complaint. The evidence shows that said White (the defendant) was a farmer at the time his team was levied upon. That the acting constable, Bridgwater, was about to take a quantity of wheat, but said White, desiring to use the wheat for seed, requested the constable not to take it, but to levy on the team instead. Thereupon the constable took the team in the presence of White, and without objection. Parson was offered, to show that the defendant's appearance in the original action was special. Both the attachment and the original action were regular on their face.

H. Jackson, for the plaintiff, claimed that the appearance in the original action was special, and did not constitute a special appearance.

diction of the person, so as to enable the court to render judgment on the merits, after the defendant withdrew; that the defendant should show a case within sec. 120, p. 605 of the Code, to authorize a special constable; that the affidavit was insufficient; and that the property was exempt from execution.

*W. D. Hare*, for the defendant.

The writ protects the officer. The appearance of the defendant is shown by the docket, and does not appear to be special. The levy on the horses was made at this plaintiff's request. He did not demand the property as exempt. (Code sec. 279.) The affidavit for attachment is colorable, and sufficient to give jurisdiction.

UPTON, J. The following rulings were made in the case:

The affidavit for the attachment was insufficient to confer jurisdiction to issue the writ.

The writ of attachment is regular on its face, and protects the officer when sued for damages only.

The order appointing Bridgwater to serve process is in the form prescribed by sec. 120 of the justice's act. The court had jurisdiction to pass upon the necessity of the appointment, and has made such record as the law requires. When a court has acquired jurisdiction and is acting within it, error will not be presumed.

There being no fraud alleged, parol evidence is not admissible to dispute the docket of the justice of the peace, or to so explain it as to make it import a want of jurisdiction, when on its face it imports jurisdiction of the person.

The docket entry is evidence that the defendant appeared in the cause, and the appearance is equivalent to service of summons. The defendant's withdrawal from the cause did not oust the jurisdiction. The court had jurisdiction to render judgment and issue the execution.

A void attachment, although regular on its face, does not protect the defendants Thompson and Martin.

Property can not be claimed as exempt from execution, unless "selected and reserved by the judgment debtor or his agent at the time of the levy," or before sale and within

a reasonable time after the levy shall be known to him. It is too late, for one knowing of the levy from the first, to set up the claim after sale. (Code sec. 279.)

The plaintiff should recover from the defendants Thompson and Martin for the detention, from the time of the seizure of the property to the levy of the execution.

The plaintiff had a verdict for \$24.00.

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Circuit Court for Multnomah County, November Term, 1899.

B. S. BOYDSTON v. J. S. GILTNER.

**PLEADING.**—The complaint contained the following statement: "The fracture was a simple fracture, and one that could easily have been reduced and caused to heal and become strong by a surgeon of ordinary skill, by ordinary diligence and care," and the statement is not denied by the answer." *Held*, that it is admitted that the fracture is a simple fracture, but the statement that the injury could have been cured, etc., is a conclusion, and is not to be deemed admitted.

**EXPERT—OPINION.**—A medical expert was not permitted to give his opinion in regard to the skill of the defendant, but was allowed to state how [with what degree of skill] the defendant performed a certain surgical operation. *Williams v. Poppleton*, referred to.

**SURGEON, DISCRETION OF.**—If a surgeon purposely refracture a broken arm without informing the patient of the nature of the operation, it does not follow from that fact alone that he was guilty of bad surgery.

**GROSS IGNORANCE.**—But if the arm was refractured by the defendant because of gross ignorance or the want of ordinary care or skill, that act of itself renders the defendant liable.

**COMPROMISE VERDICT.**—Jurors not to compromise in this class of cases contrary to the individual juror's convictions of the truth.

THE complaint alleges that the bones of plaintiff's right arm were broken about midway between the wrist and the elbow. That the fracture was "a simple fracture, and one which could easily have been reduced and caused to heal and become strong, by a surgeon of ordinary skill, by ordinary diligence and care." That the defendant, as a physician and surgeon, undertook the case for hire, and that the plaintiff strictly followed the directions of the defendant. That the defendant, "by reason of gross ignorance,

carelessness and inattention to his duties as surgeon, entirely failed to treat said limb with ordinary surgical skill," and by reason of said failure, said fracture was not reduced and said bones have failed to unite, "and said fore-arm is crooked and deformed, and plaintiff has lost the use of said arm."

The complaint sets out loss of time and expenses incurred; and claims \$10,000 damages.

The answer denies want of care, skill and diligence; denies ignorance; denies that plaintiff followed defendant's directions; alleges that the injury was treated with care, skill and diligence; alleges that the fracture was properly reduced and treated, and that the bones of the arm became firmly and properly united, and that in that condition the plaintiff was discharged from defendant's care, and that "the plaintiff did not in divers ways and at divers times follow the directions of the defendant."

The replication denies the new matter alleged in the answer.

*Logan, Shattuck & Killin*, for the plaintiff.

*Caples & Moreland*, for the defendant.

The case coming on for trial, a jury was impaneled, and on motion of the defendant, all witnesses, except medical experts, were directed not to be present at the examination of other witnesses.

The plaintiff, *B. S. Boydston*, sworn:

"My arm was broken about the middle of August, 1868. At the first the defendant applied a splint. \* \* \* The second or third day he dressed it again in a similar manner. A little more than three weeks after the injury, defendant took the splint off at his office, examined the arm particularly, and said, 'It has commenced to heal.' He then did it up in a hurry and went away, saying he would be back in half an hour. He came back in half an hour and took the bandage off; the arm lying along on the table, and the hand fell over on to the palm. I said to him, 'You said it had united.' He replied, 'It was just stuck.' I



was under defendant's care in all about three months. At the end of that time the arm was in the condition it is now." (The arm was exhibited to the jury; its present condition was thus described by a medical expert):

"The injury was an oblique fracture of both bones of the right forearm (*ulna and radius*) just below the middle. The fragments have united in a deformed or crooked condition. That is, the superior or upper end of the inferior or lower fragment of the *ulna* projects backwards and slightly upwards—in other words, *overrides* the upper fragment of the same bone (the *ulna*). The superior or upper end of the lower fragment of the *radius* projects a little forwards, or in technical language *anteriorly*. The right hand is considerably turned inwards—or *pronated*. The forearm presents a distorted and twisted appearance, with somewhat of a lump or projection on the back of the seat of fracture.

"The union is probably *osseous* or bony. The arm is almost as strong—though not as useful as prior to the injury. The injured fore-arm appears about three fourths of an inch shorter than the other, and is flexed or bent forward or inward at the point of fracture; the direction of the arm from that point to the wrist being about eight degrees from the natural position."

The plaintiff testified further: "I followed the defendant's directions as to the treatment. When defendant discharged me he took the splints off, helped me to put my coat on, and said 'It is all right.' About three weeks after that he looked at it; he said 'It is crooked.' I told him it was just so when he discharged me. He told me to come to his office. By his advice a tin straightener or splint was made and applied, in order to render the arm more straight."

Dr. Watkins, testified: "Last spring I saw the arm. The *radius* was slipped-by a little more at its fractured ends than the *ulna*. I think the *ulna* was united, and that the *radius* had not a bony union. The arm was somewhat bent. Ordinarily the bones will unite in six or eight weeks. There is a union of the *radius*, the union is *cartilaginous*. If bony union had taken place, and the bone became solid, a steady strain would not displace it (so as to cause an angle).

If the fracture is very oblique it will be more difficult to keep the bones in place."

*Dr. Chapman* testified: "I saw the plaintiff's arm nearly a year ago; it was crooked. He was at work, but had not a good use of it. My mode of treating such a fracture, after reduction, is to dress it in splints, putting a roller bandage on first, then splints on the inner and outside of the arm, and bandage outside or over the splints."

*Dr. Wythe*, deposed: "I saw the arm about — months after the injury. I advised that it be broken over again."

Burch, Starr, and Hay, each testified that the arm was about in its present condition, when the plaintiff was discharged from treatment.

The defendant, *Dr. J. S. Giltner*.—Testified in his own behalf. "I am a physician and surgeon. I was graduated in 1836, at the medical college of Pennsylvania. When called to treat the plaintiff, I reduced the fracture, and applied a roller bandage, commenced bandaging at the fingers, and carried it up towards the elbow, then applied splints on the inner and outer side of the fore-arm. I applied a compress (made by wrapping a small stick with cloth) on the inner and outer side of the arm, under the splints, to press between the *ulna* and *radius*. When the splints were wrapped, I placed the arm in a sling, with the hand in a position between *supination* and *pronation*. On the morning of the eighth of September, plaintiff came to the office, and the bandages were loose. I examined the arm; the fractured parts were in proper position, and were as when the fracture was first reduced. I saw him on each alternate day after that. On the twelfth and fourteenth of September, I told the plaintiff I wanted he should procure another surgeon, to act in consultation with me; that I was not disposed to take the risk of a prosecution. He said that if I did the best I could, I should not be responsible for the result. I took off the wooden splints on the thirty-first of October. The arm was then straight, and in proper shape. I then dressed it again, using pasteboard splints. I then discharged the plaintiff, telling him to wear the pasteboard splints six weeks. Before the wooden splints were taken

off, plaintiff told me he had removed the bandages, because they were painful. He went to work in a tin shop without my knowledge. Dr. Wythe being consulted, advised with me, the support made of tin. The *ulna* and *radius* were both fractured, the latter obliquely. If the bones had been grown together, they could have come to their present position without a refracture. But not so, if they had been joined by a bony union. I follow Gross' system."

Dr. Chapman, called by defendant, testified: "There are cases where, although the bones are in proper position, a bony or *osseous* deposit will not take place. The first union is *cartilaginous*; after a long time generally, the *cartilaginous* deposits will gradually assume an *osseous* character, and may in time become bone."

This statement was objected to, and the plaintiff moved to strike it out, on the ground that the plaintiff alleges, (which the answer does not deny), that the fracture was simple, and the injury one that could have been easily cured: *Held*, that the allegation that the fracture was a "simple fracture," must be deemed admitted, but the statement that the injury could have been cured by ordinary care and surgical skill, is the statement of a conclusion, and cannot be treated as a fact, admitted by the pleadings. The motion was overruled.

Dr. Bodman, testified: "Absorption may take place after the fractured bone has united. It may be caused by too much exercise, by physical debility, or other and perhaps complicated causes."

Dr. Loryea, testified: "A proper degree of excitement in the system favors the secretion and deposit about the place of fracture, of plastic *osseous* matter, that afterwards takes the consistency and form of bone. But if the system becomes too much excited, amounting to inflammation, the deposit will be suspended. If the excitement ceases and the system becomes torpid, that will also suspend such secretions. My opinion is, that the *ulna* is in a state of *osseous* union, and the *radius* in a state of *cartilaginous* union, and that it is probably the union of the two bones with each other that now prevents the ordinary and natural mo-



tion of the wrist. What union there is, is very nearly a bony union. When the *nutricious* artery is injured, ossification will be tardy."

*Rev. Mr. Myers*, sworn: Corroborated the statement of Dr. Giltner as to the mode of dressing the arm in the first instance. And testified that both arms appeared of the same length at the time defendant was discharged from treatment.

*F. M. Grey*, testified: "On one occasion, when the defendant was dressing the plaintiff's arm, the plaintiff said he had dreamed and hurt his arm in the night. And that the bandages had become loose. About the time the defendant was discharged the arm was straight and of the same length as the other. When the defendant looked at it some weeks after that, a lump was on it, and the plaintiff then said 'it was straight when the splints were taken off,' and that the lump 'had come since.'"

*Dr. B. Glisan*, testified: "I have been acquainted with the defendant and his practice four or five years. I once saw him amputate a fore-arm."

Question.—"Have you known enough of his practice to be able to judge in regard to his skill as a surgeon, and if yes, what is your opinion on that subject?"

The question was objected to as incompetent and the objection sustained.

Question.—"How did he perform the surgical operation you have witnessed?"

The same objection was made, but was overruled, and the witness answered:

"He performed the operations skillfully." Witness continued—"If this fracture was properly reduced, and if a bony union then took place, the parts might acquire their present position by a re-fracture, or possibly by re-absorption of the *osseous* deposit. Cases of such absorption are rare."

*Cross-examined*.—After a firm cartilaginous union, it would not be likely to get into this position, but if the union was slight, such a thing would not be very uncommon or very improbable.

Question.—"If the arm had not been reduced or dressed with splints, what would have been its present condition?"

Answer.—"The same as it is now."

*Mr. Crouch*, testified: "About the tenth of January, I heard plaintiff say his arm was getting along pretty well, and that he took the splints off because they hurt him while turning the crank at the tin-shop."

*John Kersher*, testified: "In March I heard the plaintiff say he took the splints off because they hurt him when he was at work."

*Parrish Giltner*, testified: "When the defendant took the wood splints off, he told the plaintiff he ought not to work for some time. My father (the defendant) measured both arms at that time; they were of the same length."

The evidence also showed that the plaintiff, about the time or soon after the wood splints were permanently removed, commenced to exercise the arm by turning a light crank of a machine used for rimming or edging small tin-can heads.

The plaintiff testified that the exercise was in pursuance of defendant's advice and direction. The defendant testified the contrary. The plaintiff testified that he wore the paste-board splints after his discharge, and while exercising, for some weeks, and that he wore them until they were literally worn into fragments. Several medical experts were examined as to the probability of the present condition of the arm being produced without a perceptible and painful refracture, if *osseous* or *cartilaginous* union had once taken place, while the fractured parts were in apposition. But no very decided opinions were elicited on that point.

UPTON, J., in charging the jury, after stating the issues made by the pleadings, explained the duties and liabilities of physicians and surgeons, substantially as in the case of *Heath v. Glisan et al.*, the judge proceeded to say: "If you should find that Dr. Giltner, the defendant, refractured the arm, it does not follow from that fact alone that he was guilty of bad surgery. Nor does it follow from the fact that the plaintiff was not informed what the surgeon was doing or about to do. If you find from the evidence that the arm was purposely refractured by the defendant under circumstances that disclose a want of ordinary care and skill on his

part—or that he refractured it improperly, either because of gross ignorance or the want of ordinary care or skill on his part, that act of itself renders the defendant liable. But unless you do find from the evidence both that the defendant refractured the arm, and that it was the result of a lack of ordinary skill or care, there is no blame to be attributed in consequence of that act, and your inquiries should be directed to other branches of the case.

Counsel both for the plaintiff and for the defendant have remarked upon the propriety or impropriety of what they term a compromise verdict. In regard to that, it is my duty to say to you, that jurors should carefully and patiently canvass and examine all the evidence, with an honest and conscientious effort to reconcile any differences of opinion they may entertain of the truth of the matters put in issue. And it is sometimes the case, when only dollars and cents are involved, when it is probable the exact truth can never be known, and where there is an honest difference of opinion among jurors, as, for an instance, when the matter between the parties is the state of their accounts, which have been loosely kept, and there is doubt as to the true balance, that concessions may be made for the benefit of both parties, which are not fully in accord with the individual juror's view of the facts proved. But in this class of cases, each party has a right to insist that the jury, and each juror, should render a verdict, if at all, literally "according to the law and the evidence, as given on the trial."

When a man enters upon a trade or profession for his life's business, he stakes the efforts of a lifetime in building up for himself a character and a name in that trade or profession; and if the plaintiff's case is not established by the proofs, the defendant is entitled to a verdict at your hands, which you have no right to withhold from him. But if the defendant assumed to act in a profession of which he is grossly ignorant, or if, after undertaking the grave responsibility of treating the plaintiff's broken limb, he has failed to treat the case with that ordinary care and skill that every one has a right to expect of his physician and surgeon, and has thus deprived the plaintiff, for the remainder of his life,

of the proper use of his right hand, your verdict should compensate the plaintiff for the injury he has sustained, and place a mark on the defendant's professional standing that time will not efface.

The jury rendered a verdict for the defendant.

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Multnomah Circuit, November Term, 1869.

### THE CITY OF PORTLAND v. JOHN WHITTLE.

**DEDICATION.**—When the owners of land lay it off into blocks and streets, and sell lots abutting on a street so laid off, so that the street is a convenience to the purchasers of the lots, those acts amount to a dedication of such street.

**DEDICATION BINDS PURCHASERS.**—Such persons, and all persons subsequently claiming under them, are bound.

**NOT REVOCABLE.**—When the land is dedicated by the owners and becomes a street, the subsequent assent of such owners, that it should be used as a public square, would not change its character from that of a street.

**CITY COUNCIL.**—If the *locus in quo* is a street, an order of the city council directing it to be fenced up is void.

In form this was an action for a violation of city ordinance No. 321, which provides against breaking "any gate or fence placed around any public square" of the city of Portland. It was tried in the recorder's court, and judgment being had against the defendant, he appeals to this court.

*David Logan, Esq.*, for the defendant, admits that the defendant forcibly broke the gate and entered upon the premises in question; namely, the ground commonly called "the public square," situated between Madison, Salmon, Third and Fourth streets in the city of Portland. But he says the gate, and the place upon which the defendant so entered, was on a public street called "Main street," which runs through and over the centre of the said ground called the public square. That the officers of the city had unlawfully caused a fence, and the said gate, to be erected across said Main street. That the entry was made in the course of defendant's lawful use of said street, without unlawful de-

sign or intent, and for the purpose of testing the question whether the place of said entry is a public street of the city or a public square of the city.

*C. A. Dolph, Esq.*, city attorney, for the plaintiff, claims that the ground in question is a public square. He also claims that the question whether it is lawfully so or not cannot be tried here; that the city council are clothed with discretion to the extent, that if they erroneously erected such fence, it is not the right of an individual to remove it by force.

The plaintiff introduced city ordinance No. 148, passed October 22, 1863, directing the ground to be fenced. Defendant admits that the city council directed the fence and gate to be erected, and that said council also approved and accepted the work.

The proof shows that the title of the city to the premises rests upon dedication made by the owners of the soil, there being no deeds of conveyance and no written evidence of right in the city, except certain maps made by the owners of the soil at the laying out of the city into town lots; that at the time the proprietors of the soil laid out the surrounding grounds into blocks and town lots, for the purpose of sale, the maps used by them represented the premises in question as consisting of two blocks, numbered 53 and 54, each two hundred feet square, and separated from each other by a street sixty feet wide, running through said premises, marked "Main street;" that said maps were publicly used and known in the city; that upon such representations made by the proprietors of the soil, said surrounding grounds have been by them sold as town lots; that many of the lots so sold abut upon Main street;\* that the city au-

\* NOTE.—The maps or town plots used by the proprietors and those occupying lots as early as 1850, represented Main street extending through the premises in question. These maps, which were relied upon as authentic and approved by the city council as late as 1856, represented several public squares, which the city holds in different parts of the town, and claims by virtue of dedication by owners of the soil. All these squares are denoted on said maps by a particular color, different from that on any other lots or blocks, and blocks 53 and 54 have the same coloring on these maps that is used to denote the other public squares. But the space in controversy, sixty feet wide, is left between these two blocks uncolored, and is represented as a street passing between these two blocks, and marked "Main street" on said maps: and blocks 53 and 54 are marked 200 feet square and surrounded on all sides by black lines, separating those blocks from said Main street in the same mode as from other streets.

thorities accepted of the said dedication as made and evidenced by said maps, and with a knowledge that the same proprietors of the soil who made the said maps and the said dedication, had sold divers city lots abutting on said Main street—there being no evidence of any title in the city or in the public to the premises, except that of the dedication aforesaid. The case was submitted to the jury.

UPTON, J. instructed as follows:

If you find that the whole premises enclosed, including blocks 53 and 54 and the space between them, marked on the map "Main street," is one public square, not subject to a right of way from east to west through the middle of it, the plaintiff is entitled to a verdict.

If you find there are two public squares within the enclosure, and that Main street is a public street, leading through the premises in question, your verdict should be in favor of the defendant.

When a man or company of men own land, and lay it off into blocks and streets, and sell lots abutting on a street so laid off, so that the street is a convenience to the purchasers of the lots, those acts amount to a dedication of the land so laid off into streets, and the persons so laying it off can not recall it or in any manner prevent its being used as streets.

Such persons are barred or estopped by their acts, and all persons or corporations subsequently claiming under them are equally bound.

If the city derives its title from Lownsdale, Coffin and Chapman, or from either of them, and that part of the premises on which the gate was placed was dedicated as a street before or at the time the city became owner of the blocks 53 and 54, the city can not now claim that it is not a street.

If the owners of the soil once dedicated it, and it became a street, their subsequent assent that it should be used for a public square, would not change its character from that of a street.

If the place in question was a public square and not a street, the acts of the city council in regard to it are valid. But if it was a street, the council had no authority to order

it fenced up, and in that case, any order of the city council directing it to be fenced up is void.

The jury rendered a verdict for the defendant. The plaintiff moved for a new trial, and, after argument, the motion was overruled and judgment rendered in favor of the defendant.

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Circuit Court for Multnomah County, November Term, 1868.

L. BESSER v. J. C. HAWTHORNE et al.

**FORECLOSURE OF MORTGAGE, EFFECT OF**—Where S. conveyed land to A. and took back a mortgage for the purchase money which was duly recorded, and A. mortgaged the same land to B., and the latter mortgage was also duly recorded. And afterwards S. foreclosed his mortgage without making B. a party to the suit of foreclosure, and S. purchased the premises under the decree of foreclosure, and regularly obtained his sheriff's deed under the decree, and then sold and conveyed to H. The title of H. is subject to the mortgage executed by A. to B.

**PARTIES ON FORECLOSURE**.—When the statute is silent as to the necessity of making a junior mortgagee a party, the rule applies, that all incumbrancers, as well as the mortgagor, should be made parties, if not as indispensable, at least as proper parties to the suit, whether they are prior or subsequent incumbrancers.

**IDEM**.—If any incumbrancers, whether prior or subsequent, are not made parties, the decree of foreclosure does not bind them.

**LEGAL TITLE OF MORTGAGOR**.—Equity of redemption defined. Our system has so changed the law, that the mortgagor retains the right of possession and the legal title.

**REDEMPTION**.—The equity of redemption cannot be cut off, unless by the intervention of a court or by an actual conveyance by the mortgagor.

**IDEM**.—It cannot be divested by a suit to which the mortgagee is a stranger.

**IDEM**.—The statute defining the mode of redemption does not create the equity of redemption. It only defines the mode in which that right is to be exercised.

**JUNIOR MORTGAGEE**.—A junior mortgagee is not so far bound by a decree rendered without notice to him, as to be compelled to apply by bill for leave to redeem. But he may resort to the ordinary mode of foreclosure as if no sale had been made.

**ACCOUNT**.—If the rule formerly bound the party not served, to abide "by the account," unless he could show fraud or collusion, it does not follow that his right to redeem was cut off.

**MERGER.**—When the holder of the senior mortgage, purchased the premises under the decree of foreclosure, and acquired the legal title, the equity which he previously held, would, by strict rules of law, be deemed merged in the legal title.

**ISSUE.**—But it has long been the practice in courts of equity to hold the legal and equitable title distinct, although both were vested in the same person, when it can be clearly gathered from all the proceedings that such was the intention of the holder when he acquired the legal title. And whenever the nature of the case shows that such severance of the legal and equitable title is evidently to the interest of the holder, such intention will be presumed.

**PRIORITY.**—On a foreclosure of a junior mortgage, the proceeds will be applied; first, to satisfy the prior mortgage; second, the junior mortgage; and the residue to the holder of the legal title.

**INTEREST.**—A note, made before the passage of the statute prescribing rates of interest which calls for three per cent. per month, will be enforced according to the terms of the note.

**THIS** is a suit to foreclose a mortgage, executed on the twentieth of June, 1859, by Cincinnati Shultz and his wife, to the plaintiff, to secure the payment of \$500, two years from its date, with interest, at three per cent per month.

On the seventh day of the same month, said Cincinnati Shultz had purchased the lands thus mortgaged, from James B. Stephens, and had given his note, payable in ninety days, for \$400 of the purchase money and interest. Said Shultz and his wife then executing a mortgage on the same lands, to James B. Stephens, to secure the \$400 and interest, which mortgage was recorded on the twentieth of June, 1859.

The mortgage from Shultz and wife, to the plaintiff, was duly recorded on the twenty-first of June, 1859.

In October, 1859, Stephens commenced suit of foreclosure, to recover the \$400 and interest, making said Cincinnati Shultz and Mary, his wife, defendants, and omitting the subsequent mortgagee, L. Besser, and on the twenty-third of November, 1859, obtained a decree of sale, to satisfy principal and interest, then amounting to \$424.60. On the thirty-first of December, said Stephens purchased the block under said decree, for \$620, and received a sheriff's deed on June 22, 1860, duly approved by the court, and caused the same to be recorded.

On the twentieth of December, 1860, said Stephens and



his wife, conveyed the premises to Mary White, and her deed was recorded September 25, 1865. On the thirtieth of October, 1866, said Mary White and her husband, W. L. White, conveyed the premises to the defendant, James C. Hawthorne.

On the thirtieth of January, 1867, the plaintiff filed his bill in this suit, against said Shultz and wife, and said J. C. Hawthorne to foreclose the junior mortgage.

The cause was submitted on the pleadings and written evidence.

*Mitchell, Dolph and Smith*, for the plaintiff.

*J. H. Reed*, for the defendant.

URTON, J. The controverted questions in this case, arise from the failure to make Besser, the junior mortgagee, a defendant in the original foreclosure suit, instituted by Stephens.

The statute in force prior to 1862 was silent as to the necessity of making a junior mortgagee party upon foreclosure, and the general rule, as stated in Story on equity pleadings, § 193, "That all incumbrancers, as well as the mortgagor, should be made parties, if not as indispensable, at least as proper parties to such a bill, whether they are prior or subsequent incumbrancers," was then undoubtedly applicable.

But counsel in the argument of this case differ radically from each other in defining the position and rights of one who is "not an indispensable party," and as to the effect of omitting to make such an one a defendant. The plaintiff claims that, if omitted, he is in no case, and in no way, bound by the decree. But the defendant urges that he is bound by the decree, and can only attack the proceedings on the grounds of fraud or collusion; and he refers to a note appended to § 193 Story's Eq. Pl., and numerous English cases there cited, to the effect:

1st. "That mortgagees have been allowed to foreclose in the absence of subsequent incumbrancers."

2d. "That the decree is not conclusive upon subsequent

mortgagees who are absent, and that upon *proof of collusion* they have been allowed to *open the account*."

From these and other authorities introduced by the defendant, he argues that *nothing else* would be left to the junior mortgagee who is not served, but the privilege of opening the account on proof of *fraud* or *collusion*. And that in every other respect his position would be the same as if he were served: that his right to redeem would cease sixty days after a confirmation of sale, or under the act of 1854, three months after the day of sale.

The authorities cited in the note are not accessible to us, and the inference sought to be drawn does not necessarily arise from the language of the note.

It may be a sound rule, that the junior mortgagee, not served, should be bound by the *account*, unless he can show *fraud* or *collusion*, and yet it may not follow that his right to *redeem* is forever cut off by a proceeding in which he was not a party, and of which he had neither actual nor constructive notice.

The construction thus placed upon the language of the note is also in direct opposition to the text with which it is cited. For the learned author says in the same section: "If, indeed, any incumbrancers (whether prior or subsequent) are not made parties, the decree of foreclosure does not bind them, as also a decree of sale would not."

Formerly, on the execution of a mortgage, the legal title and the right of possession passed to the mortgagee.

The mortgagor retained an interest in the premises, but it was simply a right to redeem—a right lying dormant in him for the present, but which by payment and discharge of the debt, would ripen into a power in him, to demand and have the legal title by a reconveyance. From the meagreness of this interest, and for the want of a more appropriate designation, the estate or right remaining in the mortgagor was called "the equity of redemption." The name indicates in a marked manner the nature of the right or property remaining in him. Yet, intangible as was his right or interest, it was capable of subdivision by the execution of one or more junior mortgages. In which case, the original

mortgagor, who had already divested himself of the legal title by conveying an estate in fee to the first mortgagee, could, by the execution of a subsequent mortgage, convey that which was theoretically treated in some respects as a legal title, and which, by the action of the subsequent or junior mortgagee, might be converted into a legal title. For it gave to the latter the right to redeem from the prior mortgagee, and to entitle himself to have the possession and to hold the legal title subject to the original equity of redemption.

Our system has so changed this class of contracts, that the mortgagor retains the right of possession and the legal title. But we still call the interest remaining in him "The equity of redemption." We still respect the aphorism "Once a mortgage always a mortgage," and under the law, the equity of redemption can not be barred, brought to an end, or cut off, unless by the intervention of a court, or by an actual reconveyance by the mortgagee. Before any foreclosure takes place, the junior mortgagee occupies an intermediate position in point of priority, or of superiority of right, between his mortgagor and the mortgagee under the senior mortgage. For the junior mortgagee, by taking the mortgage, voluntarily accepted a security which is subordinate to the rights of the latter, and the original mortgagor, by giving the mortgage, has consented that all the interest which remained to him, after he executed the first mortgage, should be subjected to the rights of the junior mortgagor.

Virtually the mortgagor has made a conditional assignment to the junior mortgagee of all his interest in the premises, intended to be valid and binding on him until he redeems and cancels the junior mortgage. This includes, among other rights with which it clothes the junior mortgagee, that of redeeming from the prior mortgage, and of *substituting himself* in the place of the prior mortgagor as the party having the right to redeem.

How far, then, is the prior mortgagee bound by this transfer, made subsequent to his mortgage? Every system of jurisprudence recognizes in the mortgagor the power to make a valid and effectual assignment and disposition of *all*

*his interest* in the mortgaged premises. His assignee has the right to redeem, and must be made a party to the suit in order to foreclose, and the rule goes so far as to declare it unnecessary to make the mortgagor a party after he has absolutely transferred all his interest to another.

The mortgagor's interest being assignable, as a whole, it would seem to follow that any lawful assignment of a part of his interest, would clothe the assignee with similar rights *pro tanto*. If the mortgagor should assign one of several parcels mortgaged, or an undivided part of the whole, I think it cannot be argued, either upon authority, or the reason of the matter, that the assignee could be barred of his right to redeem, without making him a defendant.

He stands as a substitute for the mortgagor, having such an interest as the whole world, including the mortgagee, is bound by if chargeable with notice.

While such assignee of the legal title, is a substitute for the assignor, the junior mortgagee is not absolutely substituted, but he is conditionally substituted, and placed in the intermediate position above suggested, of which position, by force of the recording act, the whole world is bound to take notice.

The same principles and reasons that will reach the case of an assignee of the whole of the mortgagor's interest, and entitle him to a standing in court, will also reach the junior mortgagee.

This right cannot be denied to him, on any supposable ground, except that the prior mortgagee acquired such rights and power over the premises, that the mortgagor could not make a subsequent mortgage.

If the mortgagor can, without the mortgagee's consent, make a junior mortgage, having the force and effect to make the junior mortgagee a redemptioner, and which, upon being recorded, has the effect to notify the whole world of a right of redemption existing in the junior mortgagee, it follows that he cannot be divested of this right in a suit, to which he is not a party.

The argument of defendant, that the statute, in regard to the time and mode of redeeming after sale upon execution,

has abolished all existing rules as to the rights of redemption, although plausible, is without foundation. The right to redeem is an incident of the original mortgage. It existed in the mortgagor as soon as the first mortgage was executed, subject only to the maturing of the note. It so existed, liable to pass by assignment to his grantee. And it existed in his grantee as an equitable right, from the time of the grant to him, whether the assignment is made by an absolute deed or by a mortgage. The statute, instead of creating a right to redeem, only relates to the mode in which the right may be annihilated. The statute does away with the idea of a strict foreclosure, and substitutes the process of sale; and it expands the lifetime of the equity of redemption to a certain time after the sale, or after its confirmation. The right to redeem cannot be said to be in any sense the creature of the statute, and there is no reason, based upon such an idea, for construing the statute strictly as against that right. To argue that the statutory provisions settle this question, is to beg the question; for the construction of the statutory provisions which declare who may redeem, so far as they relate to a party not served with process, depends entirely on the original question with which the argument commenced; that is, whether one who was not served is barred of his equity of redemption by a sale.

The next question, I think one of more difficulty; that is, whether the junior mortgagor, not having been served, should be so far bound by the decree as to be compelled to apply by bill for leave to redeem from the prior mortgage, or whether he may proceed in the ordinary mode to foreclose his mortgage.

In favor of the former position, the defendant cites the case of *Bank of United States v. Carroll et al.*, 4 B. Monroe, 40. That case differs from the one before us in the very important particular, that the subsequent mortgage, or rather trust deed, was a secret conveyance, of which the prior incumbrancer had no notice until after the foreclosure and sale to him under the prior trust deed. I think it would not be contended, that, if in this case the prior mort-

gagee, had no notice of plaintiff's mortgage until after his purchase under the decree of foreclosure, the defendant's title would be subject to the plaintiff's claim. Under that view the case last cited is not in point.

The next case cited is that of *Wood v. Oakly*, 11 Paige, 400. The case rests upon the construction of certain statutes providing for notice in the nature of *lis pendens* and their effect, and affords very little aid in determining what is a correct rule in the absence of statutory directions.

The conclusions drawn from *Lowd v. Carpenter*, 2 P. Will. 482, that *lis pendens* is tantamount to actual notice, are applicable only to deeds and incumbrances executed pending the litigation.

In *Hains et al. v. Beach et al.*, 2d John Ch. 459, it is laid down, as well settled, that "to a bill for foreclosure and sale of mortgaged premises, all incumbrancers or persons having an interest *existing at the commencement* of the suit, subsequent as well as prior in date to the plaintiff's mortgage must be made parties, or otherwise they will not be bound by the decree."

It may safely be said that, except when changed by statute, this has been the rule from that day to the present. Nor is the essence of the rule changed by the code (sec. 411). "Persons having a prior lien" may be omitted; but in that case they are not bound by the decree. (3 John Ch. 459; 6 Ib. 450.)

If, then, it be true that mortgagees, not made parties, are not bound by the decree so far as to be barred of their right to redeem, is there any established rule that places them on a different footing from a subsequent purchaser of the legal title, or circumscribes their rights, because of the foreclosure to which they are not made parties?

In *Vanderkamp et al. v. Shelton*, 11 Paige, 28 the question whether such junior mortgagee is driven to his bill to redeem was directly presented and was very fully examined, and chancellor Walworth was very clearly of opinion, that the right of the junior mortgagee, not made a party, could not be affected by a sale on foreclosure — that he was not required to file a bill to redeem—but that his proper remedy

was by foreclosure of his mortgage. It is there held that a purchase by the junior mortgagee on foreclosure of his mortgage did not impair the rights of the subsequent mortgagee not served.

In this case, when Stephens, the grantor of the defendant, Hawthorne, purchased under the decree in his favor, he only obtained by the purchase the interest which Shultz and wife then had in the premises. He obtained, it is true, the legal title, but it was the legal title subject to the plaintiff's mortgage.

It was formerly the doctrine that in such a case, his equitable title merged in the legal title upon his purchase, the effect of which would be to give the plaintiff's mortgage priority to the defendant's entire interest; and such would be the rule now if the subject were under consideration in a court of law.

But it has long been the practice in courts of equity to hold the legal and equitable title distinct, although both were vested in the same person, wherever it could be clearly gathered from all the proceedings that such was the intention of the holder when he acquired the legal title. And whenever the nature of the case shows that such severance of the legal and equitable titles is evidently to the interest of the holder, such intention will be presumed. (*Roberts ads. Jackson*, 1 Wend. 478; *James v. Morey*, 2 Cow. 246, 284, 300, *Gardner v. Aster*, 3 John. Ch. 53; *Cooper v. Whitney*, 3 Hill, 95.)

If these views are correct, the plaintiff has a lien upon the mortgaged premises for the principal of the note with interest at the rate specified from the date of the note.

A decree must be entered in his favor directing a sale of the premises. And the proceeds must be applied—

*First*—To the payment to defendant Hawthorne of principal and interest on the \$400 note given to J. B. Stephens;

*Second*—To the payment of principal and interest of the note held by the plaintiff; and,

*Third*—The residue paid to the defendant, Hawthorne.\*

\* This case having been taken to the supreme court on appeal from the whole of the decree was tried *de novo* on the original evidence, at the term held September, 1869. The supreme court affirmed the decrees of the circuit court. No written opinion having been filed in that court, the case does not appear in the published reports of its proceedings.

Circuit Court for Multnomah County, November Term, 1869.

M. S. McCALL v. S. E. ELLIOTT.

**BURDEN OF PROOF—AGENT MUST DISCLOSE AGENCY.**—If the defendant pleads that he made the contract as agent of another, and not as principal, and issue is joined, it devolves on the defendant to show that he so contracted, and that the plaintiff had notice of the agency.

THE plaintiff sues for the value of work and labor done by him, as civil engineer.

The answer is to the effect that the work was done for the Oregon and California R. R. Co., and not for the defendant; and that the plaintiff agreed to do the labor for such instructions in the art as should be imparted to him in the course of the work.

The replication denies the allegations of the answer; and the cause was tried by jury.

The plaintiff proved that the work was worth \$50 per month.

The defendant proved that the citizens of Marysville, California, in the year 1863 raised money by subscription, and placed it in the hands of the defendant to meet the expenses of a preliminary survey of the route since known as the line of the Oregon and California Railway. That with a corps of engineers and assistants, of whom the plaintiff was one, the defendant surveyed the said line from Marysville to Oregon. That the plaintiff was then learning the business of a civil engineer. The evidence was conflicting as to whether the parties made a special agreement as to the mode of compensation, and as to whether it was understood by the plaintiff that all parties engaged in the work would rely upon subscriptions for compensation, or upon a company that was then being organized.

UPTON, J. instructed the jury that the burden of proof was on the defendant to show that he contracted as agent for others in employing the plaintiff, and that the plaintiff had notice of such agency; and that the plaintiff was entitled



to a verdict, unless the proof either showed such agency and such knowledge on the part of the plaintiff of the defendant's being agent, or established the making of the special contract as to the mode of compensation, which is set forth in the answer.

The plaintiff had a verdict.

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Circuit Court for Multnomah County, November Term, 1869.

LYMAN WILLIAMS v. EDGAR POPPLETON.

**MALPRACTICE—PLEADING.**—In a civil action for alleged malpractice, when the character of the wound is stated in the answer, and the statement is not disputed by the replication, the plaintiff will not be permitted to prove that the wound was not of the character alleged in the answer.

**EXPERTS—TECHNICAL WORDS.**—The opinion of an expert may be taken upon the meaning of technical words used in the pleading, but not on the construction of the pleading.

**REPUTATION.**—The defendant should not be allowed to prove what is his *reputation* for skill in his profession.

**OPINION.**—Nor is the opinion of another physician to be taken as to whether the defendant is a skillful surgeon, but the witness may state facts within his knowledge as to the defendant's skill.

**RES GESTAE.**—A consultation held on occasion of the alleged improper treatment, is to be treated as a part of the *res gestae*, and may be given in evidence.

**CONSULTATIONS.**—Consultations on other occasions are not admissible.

**SYSTEMS OF PRACTICE.**—If the treatment is in accordance with a recognized system of surgery, it is not for the court or jury to undertake to determine whether that system is the best, nor to decide questions of surgical science upon which surgeons differ among themselves.

**IDEM.**—It is sufficient if the practitioner follow a known and recognized system.

**JUDGMENT OF SURGEON.**—When a skillful and careful surgeon exercises his best judgment in a case of doubt, he can not be held responsible for a want of success.

**CONSIDERATION.**—The release of a doubtful claim is a sufficient consideration to uphold a counter-release of a claim for damages.

**IDEM.**—Parol evidence may explain a writing as to the consideration expressed therein, and the actual consideration may be proved.

**MISTAKE IN A RECEIPT.**—When a settlement has taken place and written receipts have been given, if an item has been omitted by mistake, the mistake may be proved by parol; but if the item was thought of at the time by both parties, or by the party who objects to the settlement, a receipt in full must be held to include the item.

**NEW TRIAL—CONFLICTING EVIDENCE.**—Where there was some evidence tending to show the damages to be the amount found, the court refused to set aside the verdict and grant a new trial.

**VERDICT—ACCEPTING JUROR.**—Where both parties voluntarily accept a juror who declares that he has formed a decided opinion on the merits of the case, the party asking to set aside the verdict for insufficiency of the evidence, should present a clear case.

**RECEIPT, EXPLAINED BY PAROL.**—Parol evidence of the surrounding circumstances is admissible to show that a particular cause of action is not included in a general receipt.

THIS is an action for malpractice. The complaint charged negligence and want of care and skill, on the part of the defendant as a physician and surgeon, in the treatment of the plaintiff, for an injury the plaintiff had received at his ankle joint. The plaintiff claimed \$20,000 damages.

The answer denied negligence, want of skill and care, and alleged that defendant treated the plaintiff for the alleged injury with care, skill and diligence.

The answer alleged that when the defendant undertook the treatment, the plaintiff was suffering from "an almost fatal injury; that plaintiff's leg had received a wound known in surgery as a compound, comminuted, complicated fracture of [at] the ankle joint, the joint being completely dislocated, the ligaments and tendons torn and separated, and the bone badly crushed, attended with all the secondary symptoms which usually result from such an injury." (a)

The answer also alleges that "on the twenty-fifth of February, 1869, said plaintiff and said defendant had a full adjustment and settlement of all claims and demands between them, and the said defendant then and there released to the said plaintiff all claims and demands, including a demand for professional services as physician and surgeon done and performed for plaintiff and his family before that time, and then justly due and owing from plaintiff to defendant, amounting to a large sum, to wit: \$200, for, and in full satisfaction and discharge of, all demands of the plaintiff

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(a) This description of the injury is copied literally from a complaint sworn and filed by this plaintiff, Williams, in an action which he had previously brought against one East to recover damages for occasioning the fracture of his limb. It is, probably, for this reason that the replication is silent on the subject. The limb having been amputated above the knee, and the foot dissected, it is now said, that if there was any fracture it was but a slight comminution.

against the defendant, including all damages in the complaint mentioned, and which said release of this defendant, he, the said plaintiff, then and there accepted and received, of and from this defendant, in full satisfaction and discharge of all demand, against this defendant, including all damages in the complaint alleged, and thereupon releases the same."

The replication denies all the defendant's allegations in regard to a settlement and release.

*Coples & Moreland, for the plaintiff.*

*Mitchell, Dolph & Smith, for the defendant.*

At the preceding term the jury failed to agree, and the case is now brought on for re-trial.

The evidence shows that plaintiff was injured at the ankle joint by being thrown from a wagon; and that the defendant and Dr. Chapman were called to the case soon after the injury, and after reducing the dislocation and adjusting the parts, the limb was dressed, being supported by roller bandages, with a splint at the bottom of the foot, and a splint adjusted to the inner side of the limb. The limb was then placed by the two surgeons in a fracture box extemporized for the occasion.

The two surgeons visited the patient on the following day, after which the defendant alone treated the case.

The defendant testified that at a visit made three days after the accident, he found that the limb was much swollen, with evident signs of threatened mortification over the internal *mallois*, the feeling being doughy and the limb in a state of extreme congestion. At this visit the defendant took off the splint, relieved the limb from pressure, and placed it upon a support, made by inverting an ordinary deal box about 20 x 10 x 7 inches in its dimensions. The upper surface of the inverted box being so cut as to form a hollow or groove, to receive the leg and permit the heel to rest without pressure; the bottom of the foot being supported against a board fastened to, and projecting above the box. There was much conflicting evidence as to the manner of fastening the piece of board to the box. Similar supports were sub-

stituted frequently during the treatment. The limb was eventually amputated above the knee after the defendant had ceased to treat the case. At the time of the amputation, which was some five or six months after the accident, the wound was not healed and the bones at the point of injury were in a diseased state. The foot had taken permanently, a prone position, and the *tibia* and *fibula* at their inferior extremities had become much diseased, affected with *caries*, and somewhat wasted.

The treatment most complained of, was the manner of supporting the limb. The propriety of removing the supports, and allowing the limb to be without splints or fracture-box, on the third day from the accident, was also attacked; but the course pursued on the third day was sustained, by the opinions of the surgeons who testified, as correct practice under the circumstances.

The defendant offered in evidence a receipt given him by the plaintiff, purporting to be in full of all demands.

In the course of the trial the following rulings were made and the rulings excepted to:

The plaintiff offered to prove that the wound was only a dislocation.

The defendant objected that the character of the wound is admitted by the pleadings, and that at least a compound fracture is admitted.

The objection was sustained.

The plaintiff asked a medical expert: "Is there any such thing known in surgery as a fracture of an ankle joint?"

The defendant objected that, if this is more than verbal criticism, the question calls for the opinion of the witness upon the construction of the pleadings. The objection was sustained.

The plaintiff also asked: "Is there any such injury known in surgery as that described in the answer?"

The defendant objected as before, and on the ground that the replication admits that the injury in this case is the same that is described in the answer.

*Held*: That, although it is competent to take the opinion of experts upon the meaning of any of the technical terms

used in the pleadings; for the information of the court, yet the question in its present form is inadmissible.

A medical witness stated that he had been acquainted with defendant and with his practice as a surgeon for several years. He was asked by the defendant: "What is defendant's reputation for skill in his profession?" This was objected to as incompetent, and the objection was sustained.

The defendant asked: "What do you know of your own knowledge of his skill?"

The plaintiff objected, that the question calls for the opinion of the witness on facts that are not disclosed to the jury. The court admitted the question, but informed the witness that he was not to state, in reply, matters of opinion.

The witness testified that he had been associated with defendant in difficult surgical cases; and he was asked by the defendant to state any facts within his knowledge going to show whether or not defendant was a skillful surgeon.

The same objection was made and overruled; and the witness described several surgical cases in which he had seen the defendant operate, and testified that the defendant performed each of the operations skillfully.

The defendant being a witness, his counsel asked: "When you and Dr. Chapman made your first visit and were in consultation upon the case, what was said or advised by yourself and Dr. Chapman in the course of the consultation in regard to the proper mode of treating the case?"

The plaintiff objected to the question as irrelevant and incompetent.

*By the court:* "If the plaintiff claims that the treatment on that occasion was improper, I think the consultation may be treated as of the *res gesta*, and what was advised may be given in evidence."

The plaintiff disclaimed objection to the treatment on that occasion, and the objection was sustained. (b)

(b) The evidence is too voluminous to be inserted. Many medical witnesses were examined at length, upon modes of treatment, causes of *anchilosis* and on other subjects, and there was much conflicting testimony of other witnesses as to the mode of supporting the limb resorted to. The dissected bones of the amputated limb had been exhibited to the jury on the former trial, and had been examined by some of the experts before testifying, but the bones were not exhibited to the jury at the present trial.

UPPON, J. instructed the jury as follows:

*Gentlemen of the Jury:* In this case I am required to reduce the charge to writing, and will proceed to read to you such instructions as to the law, as seem necessary to a proper determination of the case.

It is a rule of law that any material fact stated in the complaint and not denied in the answer is admitted by the defendant, and any such fact stated in the answer and not denied by the replication is admitted by the plaintiff to be true. In regard to facts so admitted in the pleadings, neither party is at liberty on the trial to gainsay or contradict.

It is the duty of the court in this, as in all cases, to construe the pleadings and to determine what the issues are, or in other words, what is admitted and what is in dispute between the parties.

In this case what is said about the name, nature and character of the injury is not denied, and is therefore to be taken as true. It is, consequently, admitted in this case, both by the plaintiff and defendant, that the injury which the defendant was called upon to treat was of the kind which the answer declares it to be.

It is important that you understand clearly what is complained of by the plaintiff, and what is set up as a defense, in order that you may confine your deliberations to the points involved, and apply the evidence to questions that are in controversy.

The plaintiff complains that the defendant failed to treat the plaintiff in a skillful and proper manner for the injuries he had received; that the defendant, through ignorance or neglect, failed to furnish proper support to the foot of plaintiff, so that the bones of the ankle and leg could or would unite, and that the defendant improperly removed the support that had been placed under, and to, plaintiff's foot to keep the same in position.

The defendant, by his answer, denies the alleged neglect, sets up a description of the injury, avers that he treated the case with care and skill, and as an additional defense sets up that he has been released.

It is important to ascertain and have in mind correct rules in regard to the duties and obligations of surgeons when employed professionally.

In cases like this the court and jury do not undertake to determine what is the best mode of treatment, or to decide questions of medical science upon which surgeons differ among themselves.

If the treatment is according to a recognized system of surgery, it is not for the court or jury to undertake to determine whether that system is the best among the many that may be adopted by different branches of the medical profession. It is sufficient if the practitioner follow any of the known and recognized systems.

A physician or surgeon is never considered to have warranted a cure unless it is expressly proved that he contracted to warrant a cure.

And he cannot be held responsible for mere want of success. There must also be a want of ordinary care, or of ordinary skill, or a failure to exercise his best judgment.

By ordinary skill is meant such skill as men in the same profession usually possess. It would be contrary to reason to hold that every professional man is bound to possess remarkable or unusual talent. In order to hold the defendant liable in damages it must be satisfactorily shown by the evidence, not only that he failed to treat the case properly, but also that the damage which the plaintiff complains of is attributable either to unskillful or negligent treatment.

The learned professions, like other avocations, are open to every person who sees proper to prepare himself to pursue them as an avocation.

When a young man sees fit to enter his name as a student of medicine and surgery, there is no rule requiring that he should be possessed of uncommon talent. It is a profession upon which every youth of common ability may enter as a student with a view to make it the business of his life, and it is not the intention of the law, nor would it be consistent with human reason to require that every aspirant for professional honors should bring to the labor remarkable and

uncommon natural aptitude. The education and choice of profession or occupation of most individuals is to a great extent influenced and directed by parents or others who have their care in childhood, and make the choice or give the impressions and bias that lead to the particular trade or profession before the individual arrives at years of discretion. This choice is often made at too early an age to enable any one to determine whether or not the individual possesses great natural talent or great aptitude to that particular calling. But the law which opens every trade and profession to each one of us, is intended for the protection of all.

It would be equally unjust, and contrary to human reason, to require of every physician extraordinary talent and extraordinary natural ability and judgment, as it would to refuse to call the physician to an account who neglected to treat a case with that care men ordinarily bestow in the business of life, and according to the best judgment his Creator has given him. The law does not go to either extreme. The law is intended for the protection of all, both physician and the patient.

The faithful, honest and conscientious physician is called upon to administer to every kind and class of men, the high and low, the rich and the poor, the virtuous and the depraved. Common humanity demands that the sick and distressed should be administered to, whatever may be their circumstances. The physician is obliged by his calling, constantly to enter the abodes of others, and frequently to undertake difficult cases and to perform critical operations in the presence of those who are ignorant and credulous.

He is liable to have his acts misjudged, his motives suspected and the truth colored or distorted even where there are no dishonest intentions on the part of his accusers. And from the very nature of his duty, he is constantly liable to be called upon to perform the most critical operations in the presence of persons united in interest and sympathy by the ties of family, where he may be the only witness in his own behalf.



It is the intention of the law to protect the physician or surgeon as well as the patient, and to protect the patient as well as the physician or surgeon. If the surgeon is grossly ignorant of his profession, or knowing his duty, grossly neglects it, he should be held to the full rigor of the law and should suffer the full consequences of imposing himself upon a confiding public. His trust and responsibilities are of the highest and gravest character, and he is bound to a faithful discharge of the trust. In case of doubt he is bound to use the best of his judgment, but the surgeon is not responsible for an error of judgment when the expediency of the remedy or operation is involved in doubt, if he acts with ordinary care, skill and diligence.

A fracture or dislocation, or both combined, may be so complicated that no human skill can restore it. Or the patient may, by disregarding the surgeon's directions, impair the effect of the best conceived measures. The surgeon does not deal with inanimate or insensate matter like the stone mason or brick layer, who can choose his materials and adjust them according to mathematical lines, but he has a suffering human being to treat, a nervous system to tranquilize, and an excited will to regulate and control; where a surgeon undertakes to treat a fractured limb, he has not only to apply the known facts and theoretical knowledge of his science, but he may have to contend with very many powerful and hidden influences; such as want of vital force, habit of life, hereditary disease, the state of the climate. These or the mental state of his patient may often render the management of a surgical case difficult, doubtful and dangerous; and may have greater influence in the result than all the surgeon may be able to accomplish, even with the best skill and care.

From these and like considerations arise those cases and conditions so frequently alluded to by medical witnesses in the course of this trial, in which the surgeon is called upon to exercise his best judgment, and in which he is justified in changing the mode of treatment from time to time as the nature and exigencies of the case shall indicate a necessity, or the propriety of a change.

This is not, as was ingeniously said in the course of the argument, establishing a rule "that every surgeon must be the judge in his own particular case," but it is applying a necessary and well established rule, that in cases of doubt as to what is the best course to be pursued, it is the duty of the surgeon to exercise his best judgment.

And it follows as a consequence of this duty, that when the skillful and careful surgeon does exercise his best judgment in a case of doubt, he ought not to be and cannot be, held responsible for a failure of success.

The fact that medical cases arise in which the practitioner is compelled to rely on his own judgment, makes such a rule necessary.

If he is qualified to act and is faithful to the great trusts confided to him, he deserves the full protection the rules of law afford him.

On the other hand, if he is grossly ignorant, or fails to use ordinary care in the treatment of the case he has in charge, it is most just that he should suffer the consequence of his acts.

Applying these principles, therefore, to this case, you will inquire:

1st. Did the defendant possess ordinary skill and treat the injury of the plaintiff with reasonable and ordinary diligence and care? If he did, and if in case of doubt he used his best judgment, he is not liable, and your verdict should be for the defendant.

If you believe from the evidence that the defendant did not treat the plaintiff's limb with reasonable and ordinary diligence and skill, and with reasonable and ordinary care, then he is liable for all damages necessarily resulting from such improper treatment.

If you believe from the evidence that whatever injury the plaintiff has sustained has been the result of the severe injury originally received, and not the result of negligent, unskillful or improper treatment, then your verdict should be for the defendant.

Another branch of this case is presented by the pleadings and evidence, namely—an alleged settlement and release or receipt.

Where two parties have mutual unsettled dealings, or are asserting and in good faith making claim to debts or demands, each against the other, and they each execute to the other a release or a receipt in full, the execution of such release or receipt on the part of one is a sufficient consideration to uphold the release or receipt on the part of the other. Surrendering a claim which is asserted in good faith against the other, and which the other is in some risk of having to pay, is a sufficient consideration; and it is not necessary to prove that it could have been successfully prosecuted. In this case, if the parties agreed to a full settlement of all their claims, a release by one was a sufficient consideration for a release by the other.

A written receipt is sometimes open to explanation by parol evidence.

When parties make what they intend for a final settlement, it sometimes happens that an item of account is omitted by both parties by mistake, so that although both parties intended to include their entire dealings, and believed they had done so, yet there is an item that was not in fact settled. It is permissible, notwithstanding the language of the receipts, in a proper case, to show the mistake. But if it is true that both parties thought of the item which is said to be omitted, it was the duty of him who claims that there is a mistake, to have attended to the matter at the time; and if he did not it is his own fault, and he cannot introduce parol evidence to vary the import of the language of the receipt.

Parol evidence is also admissible to show that there was no consideration, or to show that the consideration mentioned in the receipt is not the true one, and that the parties acted upon other or different consideration from that mentioned in the receipt, when that question is material. But in this case if there was any consideration for the receipt it is not material whether it was great or small.

There can be no such thing allowed and considered by you as a condition of the receipt or release, thought of and agreed to at the time, but not expressed in the writing.

That is, the writing must be taken as containing the very

words the parties intend to use to express what was agreed to at the time, and all the conditions of the agreement.

Fraud will not be presumed, but must be established by proof. The burden of proof is on the plaintiff to establish fraud. If it has been proved that the defendant practiced deception upon the plaintiff and by that means obtained the receipt, the receipt is of no value. Such fraudulent practice must be proved by satisfactory evidence. The receipt cannot be avoided on the ground that Dr. Poppleton apprehended danger of an action. He was not bound to state that he feared an action. It would be no fraud or deception for him to remain silent as to his reasons for wanting the receipt. If the jury believe that the receipt was fairly or honestly obtained, and Williams, the plaintiff, suspected, when asked for the receipt, that defendant (Poppleton) feared an action for malpractice, and desired the receipt on that account, that of itself is decisive of the case.

If you find that such was the case, then the transaction at the time of executing the receipts was a full and final settlement of all that is involved in this action.

You are to decide upon every question of fact involved in the case, and upon every question you should be governed by the evidence that has been given on the trial.

The jury returned a verdict of \$900 for plaintiff.

After the verdict was rendered in this cause, the defendant filed a motion for a new trial, which, being argued and submitted, was taken under advisement. The following opinion was filed.

UPTON, J. The plaintiff having recovered a verdict for \$900, the defendant moved for a *new trial*, assigning insufficiency of the evidence; that the verdict is against law; and errors of law, committed on the trial. Although the verdict was probably the result of compromise of conflicting opinions in the jury room, and the amount is inconsiderable compared with the amount claimed, I think there was some evidence

tending to sustain the finding of this amount. (c) I am less inclined to review the facts, because both parties voluntarily accepted a juror after he had declared that he had formed an opinion on the merits of the case. I consider such practice open to criticism; and I think after a party has voluntarily submitted his case upon the chance or probability of such juror's being for him, he should present a very clear case, if he asks relief on the ground of insufficiency of the evidence.

One of the errors of law assigned, refers to the proceedings relating to the written release or receipt. On the trial the defendant produced in evidence his own receipt in full of all demands, and a receipt of the same date signed by the plaintiff, as follows:

"Received February 25th, 1869, payment in full for Dr. Edgar Poppleton, and settlement is hereby acknowledged, and that said Poppleton has fully paid me all dues and demands that I have against him of whatsoever nature or kind to date, the payment being two hundred dollars.

LYMAN WILLIAMS."

The court permitted the plaintiff to offer evidence that the defendant had admitted that this cause of action was not mentioned on occasion of executing the receipts. And the plaintiff being a witness, his counsel asked him to state the circumstances under which the receipt was given, claiming the answer for the purpose of showing, both that the subject matter of this action was not included in the settlement then made, and that the plaintiff was misled by the defendant. The defendant objected, that a receipt cannot be disputed by parol except as to the consideration or amount received; that fraud or mistake should be plead; and that the language of the instrument being clear and explicit, and its construction not doubtful, proof of surrounding circumstances was not admissible to vary or change its meaning.

(c) The defendant treated the limb during some months, and it was not amputated until after he ceased to treat the case. Some of the testimony of experts tended to show that amputation should have been resorted to a considerable time before the defendant ceased to treat the case. If the plaintiff's sufferings were improperly and unnecessarily prolonged, the \$900 may have been a reasonable compensation.

The objection was overruled, and the plaintiff testified in substance that the subject of this action had never previously been mentioned between the parties; that the defendant was excited when he came; that he proposed to remit his claim of about \$300 for medical attendance, because the plaintiff was poor, leaving it optional with the plaintiff to pay him \$100 at some future time, if the plaintiff should become able. The plaintiff said he thought at the time it was probable that the defendant was doing this from fear of being sued for malpractice; but nothing was said on the subject; that the whole matter was done hastily; that it was directly after the verdict in the case of *Williams v. East*, in which case the defendant's mode of treating plaintiff's case was first criticised.

On the trial I was not entirely confident of the admissibility of this evidence under the pleadings.

Had the answer specifically alleged, that the plaintiff had for a valuable consideration executed a release of this cause of action, and had the replication merely denied the execution of such a release, making no allegations of fraud or mistake, I should unhesitatingly have ruled out all evidence tending to show misrepresentation, imposition, or mistake. But these pleadings, when divested of surplusage, amount to this; the defendant asserts that the parties have made a settlement which includes this alleged cause of action; and the plaintiff denies having settled this subject matter. A receipt or release is produced which does not specifically mention this subject. I am not prepared to say the plaintiff was called upon to reply more specially or specifically than he has. Nor to hold that he is not entitled, under his denials, to show by parol, if he can, that the writing was not intended to include this subject matter, by showing the circumstances under which it was made. And if those circumstances indicate that he was deceived or mistook the nature of the transaction, I think he was authorized to lay them before the jury, to enable them to judge whether he voluntarily assented to a release of the subject matter of this action. The plaintiff undoubtedly had a right to show

the surrounding circumstances, to rebut the conclusion that this claim was included in the release. (d)

And it is difficult, if not impossible, to separate the circumstances that would tend to show that he did not voluntarily assent to release this claim, from those that might show that he was unduly influenced or deceived.

Exceptions were taken by the plaintiff to some of the rulings on the admissibility of testimony; but the only exceptions that are urged upon the argument, are those taken to the rulings which excluded the evidence of other surgeons, as to the reputation of the defendant, and refused to permit them to pronounce upon the question whether the defendant is a skillful surgeon.

Upon more mature consideration, I am satisfied of the correctness of these rulings.

Although in form, the latter question purported to ask witness what he *knew of his own knowledge* of the skill of the defendant, it in reality asked for the opinion of the witness. It virtually puts the witness in the place of the jury, so far as to call upon him to pass upon the facts that have come under his observation, and having drawn from his own observations, conclusions of fact, it asks him to express the opinion which he predicates upon those facts. The witness was certainly permitted to go as far in this direction as the rules of evidence can tolerate. And when, after detailing cases in which he had seen the defendant operate, he was permitted without objection, to express his opinion as to whether the operations were skillfully performed, I think as much latitude was given as can be permitted in such cases.

The motion for a new trial must be denied.

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(d) 2 Metc. 223; 5 Gill. 437.

Circuit Court for Multnomah County, November Term, 1869.

JACOB DAVIS v. JOHN MASON.

**GOLD COIN.**—Where the plaintiff sues for gold coin loaned to the amount of \$80, he will not be entitled to recover a judgment for \$114, on the ground that the coin was worth that sum in currency.\*

**IDEM.**—In such case, evidence of the relative value of coin and legal tender notes is not admissible.

**CUSTOM.**—Nor evidence of the custom of a particular bank to pay coin on checks that do not reduce the kind of currency, or of the customs of other banks in the place in this respect.

**EXPRESS CONTRACT.**—Where the pleadings admit an agreed price for labor, evidence of its reasonable value is not admissible.

**EXPRESS AND IMPLIED CONTRACTS.**—Where the parties have agreed orally that the wages shall be at a fixed rate in gold coin, but have failed to reduce the agreement to writing, it is held not to amount to a special agreement, and evidence of the reasonable value is admissible, under proper pleadings.

THE plaintiff declared for the reasonable value of his services from July 1, 1868, to July 1, 1869; and for \$80 gold coin loaned, which he alleged to be of the value of \$114 in legal tender notes.

The answer sets up a special contract that the defendant would perform the labor at \$60 per month; alleges payment, to an amount specified; and denies that the defendant borrowed any money from the plaintiff.

The replication denies making the special contract, and avers that no price was ever agreed to or bargained, except that the parties agreed that the labor should be paid in gold coin and should be at the rate of \$60 per month up to January 1, 1869, and from that time \$70 per month.

In opening the case to the jury, the plaintiff's counsel claimed the reasonable value of the labor estimated in legal tender notes. A question was raised whether he had not admitted a specially agreed value. The plaintiff obtained leave, and amended his replication, so as to assert that all that was ever assented to in regard to the wages was assented to orally, and not reduced to writing, and that one

\* The question was not raised whether the plaintiff could recover a judgment for gold coin, the only writing being a check drawn on a third party by the plaintiff, which did not mention the kind of currency.



of the terms of the agreement was that the wages should be paid in gold coin.

One or more of the plaintiffs' witnesses testified that the labor was reasonably worth \$109 per month. The plaintiff offered to prove that the \$80 loaned was worth \$114 in currency. This was objected to as irrelevant and incompetent, and the objection was sustained. The plaintiff testified that in loaning the \$80 he gave the defendant a check on his banker, which check did not specify the kind of currency. The plaintiff then offered to prove that it was the custom of that bank to pay gold coin on all checks that did not specify the kind of currency, and that such was the custom of all bankers in the same city. This evidence was objected to by the defendant as irrelevant and incompetent, and the objection was sustained.

UPTON, J. instructed as follows:

The plaintiff sues to recover \$80, which he alleges he loaned to the defendant, and also for the reasonable value of his services.

Where the parties agree upon and contract for a stipulated value or rate of wages, the plaintiff can recover no more than the amount agreed upon. But where the parties have not determined the rate by their own agreement, the party performing labor at the request of the other is entitled to recover the reasonable value of his services.

To constitute an express contract fixing the rate of wages, there must be the assent of two minds to one and the same proposition, and the contract must be such as can be enforced.

If these parties assented that the wages should be a certain amount of gold coin, and if its payment in gold was a material condition or term of the agreement, it was a contract that could not be fully entered into so as to make all its terms binding upon the parties without a writing. The parties cannot be considered as having made such a contract, unless some writing was made.

If no writing was made, the parties did not make a valid contract that the payment should be made in gold coin. If

payment in gold coin was one condition, and the rate of wages another condition, or term, that both parties intended should be part of the contract, it evidently was not agreed that such rate of wages was satisfactory if paid in something of less value than gold coin.

In that case, there was not a binding contract for the payment of gold coin; because for the want of a writing such contract cannot be enforced, and it was not a binding contract for that rate of wages payable in something of less value, because the minds of the two contracting parties never assented to that proposition. Unless there has been an assent of both parties, to a definite mode and measure of compensation, which can be enforced both as to the amount and the value they had in contemplation, they have not by their own act fixed upon the rate of wages, and the law determines it for them. In such case the law declares the compensation to be what the services are reasonably worth. If the plaintiff recovers a judgment for wages in this case, the defendant will be authorized to pay it, if he chooses to do so, in legal tender notes, and it is proper that the jury should estimate the wages in view of that fact, when estimates are made in different kinds of currency by different witnesses.

As to the alleged loan of money, there is no rule of law that will authorize the jury to render a verdict for a greater amount than was loaned, merely because the judgment can be paid in a currency of less value. This may appear to be a hardship in some cases, and it is impossible to institute a system of laws that will never work hardships. When one so far trusts to others as to contract for gold coin, and take no written agreement for its payment, he must suffer the consequence of his neglect, if results do not come up to his expectations.

Jurors are not at liberty to disregard the law in such cases, upon an idea that they can thus do justice between the parties. If courts or juries are at liberty to disregard the law in some cases, what is to prevent them from doing so in all cases, when they do not approve of the law. It is evident that such practice would undermine the foundation

of remedial justice, and would be substituting the arbitrary will of those who are called upon to administer justice, for the settled rules of law upon which every citizen has a right to rely for the protection, not only of his property, but his liberty and his life. It is better that we should sometimes suffer great hardship, whether caused by our own neglect or otherwise, than that we should exchange known rules of law for the arbitrary will of those who undertake to administer the law.

The plaintiff had a verdict, and judgment was entered without specifying the kind of currency.

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Circuit Court for Multnomah County, November Term, 1869.

**STATE OF OREGON v. JOHN LEONARD.**

**CONTINUANCE.**—Where it was not satisfactorily shown that there was a reasonable expectation of procuring the evidence at another term, a continuance was denied.

**INDEX.**—Where the witness has no fixed residence, a clear showing should be made of the circumstances tending to prove the probability of obtaining his evidence.

**ADMISSIONS.**—Where admissions were made to the arresting officer, and it also appears that the officer advised the defendant to make a confession, but it did not appear whether the admission was made before or after the advice was given, and the defendant's attorney neglected to question the witness on that subject, the court refused to charge the jury that they should disregard the evidence of the admissions.

AFTER the grand jury of the present term had been discharged, the district attorney presented the papers that had been certified by the committing magistrate in this case, and on his motion, the persons who had composed the grand jury were resummoned, in pursuance of section 32 of the criminal code.

The same foreman was reappointed, and the grand jury was again sworn; and afterwards presented a bill of indictment charging the defendant with larceny, in stealing twenty-eight ounces of gold dust, the property of one Morris.

*A. O. Gibbs*, district attorney, and *Charles Parrish*, for the state.

*Julius Moreland* and *R. E. Bybee*, under appointment of the court, appeared for the defendant.

The defendant pleaded not guilty, and filed a motion and his affidavit for a continuance.

The affidavit stated that the gold dust was the defendant's property. That defendant and Morris had traveled together from Mazoula, some hundreds of miles, to Portland, the gold dust being brought in the canteenas or saddle-bags of Morris. That owing to Morris being familiar with the route, and with traveling, the defendant had requested Morris to take the gold dust and carry it for the defendant. That the absent witness would testify to those facts; that said witness was present at Mazoula, and saw the gold dust delivered by the defendant to said Morris. That at the time of that transaction, the witness left Mazoula to go to a designated town in Montana, with the intention of returning from there to Portland; and that he had business engagements with the defendant, to meet the defendant at this place in a few weeks, and to go from this place to Ohio in company with the defendant, on business of theirs. That the defendant knew of no other witness to the fact of the delivery or of the ownership of the gold dust. That the motion was not made for delay; and that the defendant would be able to produce the attendance of said witness at the next term of the court.

UPTON, J. It is not satisfactorily shown that there is a reasonable expectation of procuring the attendance of the witness at another term. The residence of the witness is not stated, nor is the nature of the business which may bring him to this place disclosed. Taking the affidavit to be true, if he then actually intended to come to this place, because of business relations with the defendant, there is no certainty that he will now have the same inducements to come. At that time the defendant had twenty-eight ounces of gold dust, if his affidavit is true; now he has no certainty of having anything to embark in that business. There is no certainty that the witness, if he should come, would be willing to be detained here until the next term, or that he would

let his presence be known, and there is not much difficulty in his avoiding risk of such detention, if he chooses to do so. Where the witness has no fixed residence, a clear showing should be made of the circumstances tending to prove the probability of obtaining his evidence.

The case being brought on for trial,

*Philip Saunders*, City Marshal, one of the witnesses on behalf of the State, testified: "After hearing of the affair, about nine A. M., I went aboard the *Cascades* boat at Couches' wharf. I remained on the gangway until the passengers got off, and then went aft. A person on board pointed to a room where the boat hands sleep, and on entering the room I found the defendant in that room, lying on a bunk. I searched him and found this purse on him. I asked the defendant why he took it. He said he could not say what did possess him to take it. That he was sorry he took it. That Morris was a kind of loose man in his business. That Morris could spare it and not feel it. That he had never done such a thing before."

*On Cross-examination* the witness said: "I told him it would be better for him to make a clean breast of it, and throw himself on the mercy of the court." \*

The defendant's counsel requested the court to charge the jury that it was their duty to disregard all evidence of admissions made by the defendant to Marshal Saunders. And the judge refused to give the instruction; the defendant's counsel having seen proper not to question the witness as to whether the admissions were made before or after the advice was given.

The defendant was convicted.

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\* Marshal Saunders was not questioned as to whether any, or how much, of the confession was made after the witness gave the advice.

Circuit Court for Multnomah County, November Term, 1869.

J. A. CARR, Respondent, v. MOSES HURD, Appellant.

**SERVICE OF NOTICE OF APPEAL.**—Notice of an appeal from a judgment rendered by a justice of the peace, may be served either upon the party personally or on the attorney who appeared for him in the action, if such attorney resides in the county where the trial was had.

THE respondent appeared specially for the purpose, and moved to dismiss the appeal for want of a sufficient service of notice of the appeal. The respondent had appeared in the justice's court by an attorney who resides and has his office in the county, and the notice of appeal was served on the attorney and not on the respondent in person.

*Hill & Mulky*, for the respondent, cite *Daily v. Bergman*, decided in this court in 1866. 6 How. Pr. 106. 6 Cal. 245.

*O. P. Mason*, for appellant, cites *Lindley v. Wallis*, 2 Ogn. 203.

UPTON, J. The general practice act, sec. 527, provides, in regard to appeals from judgments rendered in courts of record, "The appellant shall cause a notice to be served on the adverse party, and file the original," etc. The justices' act uses this phraseology: "The appeal is taken by serving a notice thereof on the adverse party and filing the original." Code p. 595, s. 66.

In *Lindley v. Wallis*, 2 Ogn. 203, the supreme court having an appeal from a court of record under consideration, held that, "the service of notice of appeal may be made either upon the party or upon his attorney of record residing within the county where the trial was had. Outside the county the service can only be had on the party." It only remains to be determined whether there are sound reasons for sustaining a different rule, in appeals from a court not of record. There is force in the position that such courts have no attorneys of record, or rather that any person may appear there as attorney. There are not the same safeguards against misapprehension or negligence on the part of persons who appear there as attorneys, as there are in courts of record; and the former ruling of this court, if not in conflict with the opinion of

the supreme court, should be of great weight in determining the case. It should be borne in mind, however, that that ruling was made before the question had been determined in the supreme court, and at a time when the bar was much divided in opinion as to what ought to be the rule in appeals from courts of record. I am inclined to think my predecessor would have ruled differently if the ruling in *Lindley v. Wallis* had been announced before he was called to pass upon this question. A very grave reason against the ruling made in *Daily v. Bergman* is, that a plaintiff may sue by attorney in a justice's court and obtain judgment, without ever coming into the state. In that case, all right of appeal would be cut off, unless notice of appeal can be served on the attorney. I think the reasons in favor of service on the attorney stronger than those against it, and that the practice, in appeals from justices' courts, should conform in this particular with the practice in other cases, as established by the supreme court in *Lindley v. Wallis*.<sup>1</sup>

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Circuit Court for Multnomah County, November Term, 1869.

THE OREGON CENTRAL R. R. CO., Respondent, v. W.  
T. SCOGGIN, Appellant.

**PLEA IN ABATEMENT.**—When an answer sets up a defense in bar, and also denies "that the plaintiff is a corporation duly organized," the denial will be stricken out as within the rule established in *Hopwood v. Patterson* (2 Ogn. 49).

**PLEADING.**—It does not raise an issue of fact to say the plaintiff is not *duly* organized.

**CORPORATION.**—A corporation may receive subscriptions of its stock, and may sue before being fully organized.

**FRAUD.**—To avoid a contract on the ground of fraudulent misrepresentations it must appear that the party acted on the representations; and that the misrepresentations were concerning matters of fact and not matters of opinion or of law.

**AMENDMENT.**—Where the matters in abatement were plead at the same time with a defense in bar, leave to amend as to the matters in abatement was denied.

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1. The ruling in the case of *Lindley v. Wallis* is understood to require service to be made on the *party*, when the *attorney* resides outside the county.

THIS action was commenced in justice's court to recover \$188 alleged to be due on a subscription for ten shares of the plaintiff's corporate stock at \$25 per share.

The plaintiff had judgment, and the defendant appeals to this court.

The case is now presented on motion to strike out parts of the answer.

1. The answer "denies that plaintiff is a corporation duly organized."

2. Denies that the defendant agreed to take the ten shares.

3. Alleges that the plaintiff's capital stock is fixed at \$5,000,000, and that one half thereof has not been subscribed.

4. That the defendant did subscribe a writing wherein it was agreed that in consideration the plaintiff was donee of certain "government aid" of the value of seventy-five per cent. of the cost of constructing the road, or \$75 per share of the stock, the defendant would take and pay for ten shares (nominally \$100 each) at \$25 per share. But that in truth the plaintiff was not such donee, and said consideration has wholly failed.

5. That the agent of the plaintiff, acting for the plaintiff in procuring said subscription, made false representations that are set forth in the answer.

6. The answer states what is the construction of certain language used in the written contract, and alleges that the defendant has paid \$62 on the subscription, and that the \$62 was obtained by the same fraud before alleged.

The plaintiff moves to strike from the answer each of the several defenses above numbered.

THE COURT (UPTON J.) announced the decision as follows:

The denial that plaintiff "is a corporation *duly organized*" should be stricken out. Although such denial is sometimes treated as a plea in bar in particular cases, ordinarily it does not involve the merits of the action, and is within the rule established in *Hopwood v. Patterson* (2 Ogn. 49). In this case, however, it is subject to the further objection that it is not necessary that the plaintiff should be both incorporated



and organized, to enable it to receive subscriptions and to sue. Nor is it a sufficient denial to say the plaintiff is not duly organized. It does not raise an issue of fact.

The denial that defendant agreed to take ten shares, referred to in the second part of the motion, is admitted to be predicated on the disability of the plaintiff to make the contract. The motion raises these two questions: Can a corporation make and collect assessments before its organization is fully perfected by the election of officers, and in other respects? And can one who has contracted with the company as a corporation, question the regularity of its organization for the purpose of avoiding the contract?

The language of section 5 of the general law, if not controlled by other provisions, is broad enough to authorize assessments and collections before the election of officers. The corporators "may sue and be sued," purchase property, appoint agents, "make by-laws" \* \* \* "for the sale of any portion of its stocks for delinquent assessments due thereon."

By section 6 the corporators must have power to receive subscriptions before proceeding to organize by electing officers, and, as a necessary consequence, may do anything requisite and proper to be done in obtaining subscriptions.

If the corporators are empowered to contract in relation to subscriptions, to make rules for sales of delinquent assessments and to sue and be sued, it seems to be immaterial for the purposes of this case, whether the corporation is organized or not.

That one who subscribes to the stock can avoid the subscription, because of neglect to organize, is certainly a position difficult to sustain, and it is questionable whether the neglect can be set up, except by a proceeding in the nature of *quo warranto*, under section 353 of the code. This part of the motion should be allowed.

The fourth point in the motion is directed to the alleged failure of consideration. This part of the motion should be denied.

The fifth and sixth specifications of the motion are

directed to alleged misrepresentations. These parts of the motion should be sustained. The answer does not show that the defendant was misled by the misrepresentations; and the false representations are not confined to matters of fact, but include conclusions and matters of opinion.

The parts of the motion numbered one, two, three, five and six should be granted, but the motion should be overruled as to its fourth subdivision, relating to failure of consideration.

The defendant asked leave to amend his answer, and leave was granted as to parts five and six, above specified, but denied as to specifications one, two and three.

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Circuit Court for Multnomah County, November Term, 1889.

THE OREGON CASCADE R. R. CO. v. JOSEPH  
BAILY, Defendant, AND THE OREGON STEAM  
NAVIGATION CO., Intervenor.

**PLEAS IN ABATEMENT AND IN BAR—JOINDER.**—In an action to appropriate land to the use of a railroad corporation, the defendant will not be allowed to unite the several defenses in one trial, that the company is not incorporated, the land is not subject to appropriation, and its value is \$200,000.

**IDEM—CONSENT.**—The parties may consent to try the two latter issues together.

**VIEW.**—Duties of jurors in viewing premises, stated.

**ACTION TO CONDEMN LAND FOR A RAILROAD.**—Where the plaintiff sues to condemn sixty feet in width, he will not be allowed to give evidence of the value of, and ask a verdict for the condemnation of forty-five feet in width.

**PAROL.**—Parol evidence of a written statement of value furnished the assessor is not admissible.

**ADMISSIONS.**—Nor is the assessment roll admissible to prove the value of the land, or to prove at what sum the owner valued it.

**EVIDENCE.**—The plaintiff was not permitted to go into a general exhibit of the defendant's corporate transactions and rates of charge, to show that the defendant was claiming the land solely for the purpose of monopoly or to prevent competition.

**ARTICLES OF INCORPORATION.**—The evidence of the powers of a corporation is now to be found in the general law and its articles of incorporation, as formerly this was contained in the charter.

**THE CONDEMNATION IS TO A PUBLIC USE.**—When private property is condemned to the use of a corporation, it is condemned to a public use. It is because the corporation is to be a public agent that the legislature has power to authorize the condemnation. If the government authorizes the taking of private property for any use but a public one, the act is void.

**PURCHASE.**—A corporation has no higher or better right to property condemned by the judgment of a court, than to that acquired by purchase without condemnation.

**LIABILITY OF CORPORATION'S PROPERTY TO CONDEMNATION.**—In general, property held by a corporation and necessary to the public use for which the corporation is created, is not liable to be condemned and appropriated to another corporation for the same use.

**ARTICLES OF INCORPORATION, CONSTRUCTION OF.**—A company incorporated to transport freight and passengers on a river and its portages, is not necessarily limited to one side of the river at a portage.

**RIGHT OF WAY.**—A corporation has no right to the exclusive use of a right of way that is not necessary and useful in its corporate business.

**IDEM.**—If the defendant had voluntarily abandoned the use of the land in question as a part of its line of transportation, the land is liable to be condemned.

**IDEM.**—The question of forfeiture cannot be tried in a proceeding to condemn land.

THIS is an action to condemn and appropriate lands to the use of the railroad company.

The complaint states that the plaintiff is duly incorporated "for the purpose of locating, building, constructing, stocking and using a railroad" from a certain designated point (at the foot of "The Cascades"), to another point (at the head of "The Cascades"); and "for that purpose the plaintiff needs the right of way over certain lands, part of which lie in Multnomah County, Oregon, and a part thereof in Wasco County, Oregon." That the defendant (Joseph Baily) is in the possession of the whole of the said lands; "which lands it herein asks to have appropriated to its use." The description of the lands needed by the plaintiff being as follows, to wit: "Sixty feet in width along the whole length of the following described line; that is to say, twelve feet of said sixty, lying immediately on the northerly side of said line, and forty-eight feet lying immediately on the southerly side of said line." The line is described by courses and distances. The quantity of land within the sixty feet is stated at 32.62 acres.

The plaintiff states that it is "unable to agree with the owners of said land as to the compensation to be paid therefor."

The defendant, Joseph Baily, answers traversing the allegations of the complaint, by stating want of knowledge or information, and pleads that the lands are property of The Oregon Steam Navigation Company. That he has no possession or control of the lands, except that "he is a servant of said O. S. N. Co., and is on said lands solely for the purpose of carrying on the business" of his said employees.

The Oregon Steam Navigation Company, having filed its request in writing, and obtained leave to intervene, and to defend the action in the place of the said Joseph Baily, answered: that it "has not sufficient knowledge or information upon which to form a belief whether or not the plaintiff is incorporated."

That it (The Oregon Steam Navigation Company) is a corporation duly organized. \* \* \* \* That it was formed for, among other things, navigating the Columbia, Snake and Willamet rivers; setting out as a part of the answer, its articles of incorporation, showing that among its objects are the following: "Together with the construction and use of all necessary rail, or plank, or clay roads and bridges at any of the portages of said Columbia, Snake or Willamet rivers, or to purchase, own and use any such roads." That the said Oregon Steam Navigation Company is owner of the land described in the complaint, and now owns and is using in its said business a line of railroad on the precise line described in the complaint as the plaintiff's proposed line.

That the same is necessary and convenient for and in the said Oregon Steam Navigation Company's said business, and is not subject to appropriation by the plaintiff.

That the value of the land described in the complaint is \$200,000; and the damages to defendant which would result from the appropriation of them by the plaintiff will be \$200,000.

The replication, by alleging want of knowledge and information, traverses the allegations of the answer.

*W. W. Chapman and Mitchell, Dolph & Smith, for the plaintiff.*

*Logan & Shattuck and Wm. Strong, for the defendants.*

The replication having been filed at a preceding term, and the case now coming on for trial, the plaintiff moved that the defendant be required to elect upon which of the several classes of defenses pleaded in the answer, it would rely.

The defendant objected that it was too late after replication to make the motion.

It was held that the several issues could not be tried at the same time.

The plaintiff announced that he waived the first defense, namely, that the plaintiff was not an organized corporation.

The plaintiff renewed his motion, insisting that under section 45, page 671, of general laws, the defendant could not set up a defense that the land was not liable to appropriation, and at the same time claim damages and try the question of value. The court expressed the opinion that the two defenses required separate trials, if the plaintiff insisted on the objection.

Thereupon the parties stipulated that both questions be tried at the same time, and by the same jury, and that if the first of these issues should be found against the defendant, the defendant should pay the costs of the present term. The defendant filed a written motion that the jury view the lands in question.

A jury of twelve was selected and sworn, and the respective parties stated the case to the jury. The respective parties consented that the jury separate for such time as should the court be deemed proper, and waived the necessity of the jury being kept together, and of an officer attending or taking charge of the jury upon occasion of a view of the premises, and consented that the jury now separate to go by steamer to the premises in controversy. By consent, a person was appointed to show the jury the premises.

URTON, J. then admonished the jury as follows: "You are not to converse with each other nor with any other person, nor express any opinion on any subject connected with this trial, until the case is finally submitted to you. This direction must also be observed while you are absent from the court for the purpose of viewing the premises in question. The object of this view is to make you acquainted with the land that is sought to be condemned or appropriated, and with the country surrounding it, that you may be the better enabled to judge of the situation of the parties and their property, and the rights that may be affected by the result of the action. The person appointed for that purpose will point out to you the premises in question, the particular lands claimed by the plaintiff, and the lines and the monuments of the survey of the premises; and it will be your privilege and duty to observe these, and the geography of the surrounding country. You should not permit any other person to converse within your hearing on any subject connected with the trial.

On the trial of the cause the first important question will be whether the plaintiff is entitled to have this land appropriated. This may depend upon the law or upon the facts of the case, or it may be a question depending both upon the law and the facts.

It is the right of the parties to be fully heard on the question in controversy, before any conclusive opinions are formed by you. You will, therefore, as far as possible, avoid coming to any settled conclusions in your own minds, on any of these questions, until the case is finally submitted to you. It may become your duty, in the course of the trial, to estimate the damages that would be occasioned by appropriating the premises for the plaintiff's road. One object of the view is, that by seeing the premises and learning the situation of the surrounding country, you may be better prepared to understand and weigh the evidence the parties may offer on that subject. You are permitted to separate and will meet upon the steamer on Wednesday morning, and be present in court on Thursday morning next, at 9 o'clock."

On the trial it was shown by inspection of articles of incorporation of the plaintiff and of the defendant, that each was incorporated for the purposes stated by each respectively in the pleadings. That the proposed railroad line was identical in locality with a line of railroad constructed or purchased by the defendant, the O. S. N. Co., about 1862.

The evidence was conflicting as to whether that railroad ought to be considered as in use at the present time by the O. S. N. Co. as a part of their general line, or means of transportation between Portland and The Dalles. The Cascades is a *portage* on the Columbia River about midway between Portland and The Dalles, of about three miles, over which freight or passengers cannot be conveyed by boats. The evidence shows that at one time the railroad on the Oregon side, which is identical in locality with the plaintiff's proposed line, was used by the O. S. N. Co. as their sole means of connection between their steamers, above and below the *portage* at The Cascades. That about 1862, the same persons who were stockholders of the O. S. N. Co., became stockholders of a company, incorporated under the laws of Washington Territory, known as the "Cascades Railroad Company;" which last named company became and are owners of a good and well equipped railroad, extending from the upper to the lower extremity of the *portage* at the Cascade. About that time the last named company leased the last named railroad to the O. S. N. Co., at a certain price per ton for freight and a certain rate *per capita* for passengers. This lease has been renewed from year to year, and the O. S. N. Co. still holds possession of the last named railroad as tenant of the said Cascades Railroad Company, and nearly all its freight and passenger business at that point is done by means of that road, on the Washington Territory side of the Columbia, that road being a good T rail structure, operated by good locomotives. The road on the Oregon side is constructed with "strap rails," is in a bad state of repair, and operated only by horse power. There was conflicting evidence whether during the five or six years the latter road had been used at all as a connecting

link between the steamers above and below the portage. Some of the witnesses testified, that during that portion of the year when emigration was largest, it was used for transporting the wagons and furniture of through passengers or emigrants who chose to transport their own live stock over or around the portage. And also, that live stock was taken by that route at a lower price than on the Washington Territory side, and was detained one day longer on the trip when taken that way.

It was testified, that the Cascades Railroad Company was indebted to the O. S. N. Co. for money advanced in the construction of its road, and thus owed more than it could pay.

The intervenor introduced a patent and deeds to show title to the lands in question. Some of the intervenor's witnesses estimate the value of the land sought to be appropriated at \$200,000. Some of the plaintiff's witnesses estimate it at not more than two or three dollars per acre.

Mr. Burrage, an engineer, testified, that the line described by courses and distances in the complaint, followed the south rail of the O. S. N. Co.'s railroad.

The plaintiff asked his witness the following question:

"What is the value of a strip of land forty-five feet wide lying three feet southerly from where the south track of the old railroad was laid?"

The plaintiff objected to the question as irrelevant, and the object was sustained.'

The plaintiff asked of the defendant's witness, who was vice-president of the defendant, on cross-examination:

"Did you not, in 1869, furnish to the county assessor a written statement of the value of that property?"

The witness answered: "I did."

The plaintiff then asked: "What was the value stated by you to the assessor?"

The defendant objected that the writing was the best evi-

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1. The plaintiff claimed that by analogy to proceedings in possessory actions and by the provisions of section 317 of the code, the plaintiff may have condemnation of a *part* of the lands, if not the whole.



dence, and that the admissions of a stockholder were not the admissions of the corporation.

The objection was sustained.

The plaintiff offered in evidence the county assessment roll of 1869. The defendant objected to it as incompetent, and the objection was sustained.<sup>1</sup>

The plaintiff then proposed to prove that the object of the O. S. N. Company, in keeping possession of the ground in controversy, was not transporting over it, but was to prevent others from using it, to enable the O. S. N. Co. to monopolize the trade of the Columbia River, and asked the following: "What is the rate per ton for freight from the Lower Cascades to The Dalles?"

The question was objected to as irrelevant, and the objection was sustained.

The plaintiff asked the following instructions, which the court declined to give:

1. "The defendant, by mere act of incorporation, acquired no franchise from eminent domain, and therefore if the jury believe that the defendant has not condemned the land in controversy, under the laws of the State of Oregon then the defendant is a mere private owner, and the lands are subject to condemnation by the plaintiff, or to the plaintiffs use."

2. "If the defendant once acquired a right to use the railroad on the Oregon side, and a right to use it as part of their line of transportation, and has since forfeited it, the land is subject to be condemned to the use of the plaintiff."

The following, asked by the plaintiff, were given:

3. "If the defendant once acquired a right to use the railroad on the Oregon side, and has since abandoned all intention of using it as part of their line of transportation, the land is subject to be condemned to the use of the plaintiff."

4. "If the sixty feet claimed by the plaintiff has once been condemned to the use of defendant, under the laws of

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1. By the statute, the assessment is made on the estimate of the assessor, and not on that of the owner of the property.

this State, the same may be again condemned to the use of the plaintiff, if it can be so condemned and used by the plaintiff without interfering with its use for the purposes of the defendant."

The following instructions, asked by the intervenor, were given:

5. "To constitute an abandonment by the corporation, it must appear that the company has voluntarily abandoned and given up all intention to use the road as a part of their line of transportation."

6. "If the O. S. N. Co. purchased the land upon which this road is laid and appropriated it for a railroad across that portage, then it was not necessary that it should be condemned under the statute, to give the company all the rights they can in any way acquire under their article of incorporation or under the law."

7. "The Oregon Steam Navigation Company have a right to transport their freight and passengers on either or both sides of the river, without forfeiting their right to a line for a road on the Oregon side, provided they did not abandon their intention to use the Oregon side."

UPRON, J., gave the following charge:

In this action the plaintiff seeks to condemn lands for the purpose of constructing a railroad. A defense set up is, that the defendant, as a corporation, is entitled to use, and is using the same land for the purpose of operating the defendant's railroad. The value of the premises is also put in issue.

The first point to which I will refer is the defendant's rights as a corporation, if it has ever been empowered to operate a railroad on the premises in question.

Formerly, corporations were formed by a direct grant from the sovereign power. The instrument in which the grant was expressed was called a charter, and it was the practice in most of the states of the Union, until recently, for the legislature to grant charters. Each corporation was created by a special act of the legislature.

This practice conferred special favors, and was thought

to have a bad influence upon legislation. When our constitution was formed, it was provided that no corporation should be created by special act of the legislature. The words of the constitution are, "Corporations may be formed under general laws, but shall not be created by special laws; except for municipal purposes. All laws passed pursuant to this section may be altered, amended or repealed; but not so as to impair or destroy any vested or corporate rights.

The word corporation is here used to denote such ideal bodies as had formerly been created under that name by charter or by special legislative acts; and that meaning must be given to the word corporation in construing the general law that provides the mode of forming corporations.

Formerly, legislatures having power to grant charters, could place such restrictions upon the corporation at the time of its creation as legislative wisdom should suggest; but whatever right or power was then unconditionally conferred became inherent or vested in the corporation. Concessions to corporations are in the nature of grants. So our legislature acting under this provision of the constitution, has the power to provide by general law to confer such rights and powers on corporations.

The object and effect of the constitutional provision is, not to change the nature or character of the corporate body, but to place all men on an equality in obtaining these privileges, and to disconnect the business of granting charters from the business of legislation.

The legislature, in passing such general law, can undoubtedly place upon corporations such restrictions as the public good may require, and may provide by general law for conferring powers similar to those formerly conferred by acts of special grant. The evidence of the powers of a corporation is now to be found in the general law, and in the articles of incorporation filed by the company, as formerly this was contained in the charter.

In a case reported in 2 Gray, 1, Chief Justice Shaw says: "The act, like every act and charter of the same kind, is a contract between the government on the one part, and the

undertakers (corporators) accepting the act of incorporation on the other."

\* \* \* "It conferred on the persons incorporated the franchise of being and acting as a corporation." \* \* \* "It confers the right to collect such tolls as the corporation shall fix." \* \* \* "This is in every respect a *public* franchise, which no one could enjoy but by the authority of the government;" and still speaking of the character of the grant, it is added: "It was made by the government in its sovereign capacity with subjects who were encouraged by it to advance their property for the public benefit." \* \* \* "It was, therefore, a covenant for quiet enjoyment against its own acts and those of persons claiming under it."

The general corporation act of this state confers on the corporators the right to pursue the business for which they lawfully incorporate, and during the period fixed for their corporate existence. It allows private property to be appropriated for the use of the corporation, whether acquired by purchase or condemned by the judgment of a Court. And both as to the extent of its use, and the time it may be used, it confers rights that are fixed, certain and positive.

Corporations are *quasi* public bodies. When private property is condemned to the use of a corporation, it is condemned to a *public* use. It will not be contended that private property could be taken for the use of a corporation upon a different theory.

When the sovereign power authorizes a railroad company to appropriate private property, it is upon the assumption that the railroad company is a public agent, and it appropriates the property for a public benefit and to a public use. And it is to that end and upon that ground alone that the legislature has any power to authorize a condemnation of private property to the use of another, without the owner's consent.

When a railroad company acquires the right of way and constructs a road, under proper articles of incorporation, it acquires a right to hold such right of way and operate such road for the specified period; although the company is serv-

ing its own special interest and actuated solely by motives of self interest, this privilege and franchise is a right to act as a public agent, and to manage the road for a public use. The same jurist says: "If the government authorizes the taking of property for any use but a public one, or fails to make a compensation, the act is void." It is wholly immaterial upon this point whether such railway company obtains the property, which forms the road bed, by purchase or by the judgment of a court. The general corporation law and the act of incorporation under it, create the corporation and confer whatever franchises are granted or conferred. It is not the condemnation of property that gives character to the corporation. The judgment of the court is a means of placing the corporation in possession of what is necessary to a discharge of its franchise and its duties to the public. But when property is condemned, the corporation has no higher or better right to that property, than it has to property acquired by purchase.

It follows from what has already been said that, whether the right of way is acquired by gift, or by purchase, or by the judgment of a court, the corporation is so far a public agent, that what it holds in its corporate capacity is held for a public use.

In general, property necessary to such use and so held, is not liable to be condemned and appropriated to another corporation for the same use to which it has already been set apart.

A greater public necessity may arise, that will authorize a new appropriation or the subjection of the property to a new use. This may occur, for instance, when it is necessary for one railroad to cross the track of another.

If a railroad company could condemn and appropriate the ground and track of another similar corporation, so as to deprive the first of its use, a third company could immediately proceed in the same manner against the second. The proposition needs but to be stated to show its impropriety.

I have stated the law upon this point and the reason upon which it rests, thus fully, that the jury should be entirely

free from any doubt on this question while considering other important and controverted questions that arise in the case. It is claimed by the plaintiff that the defendant's business on the Columbia River is confined to a single line. That if the defendant operates a railroad on each side of the river, the defendant operates two lines and exceeds its powers, and that by using a road in Washington Territory, the defendant forfeits all rights to use a road on this side.

By the law and the articles of incorporation, the defendant is not limited to one side of the river, but has the right to transport goods and passengers around the rapids by such road or roads in its control as is necessary and profitable without being limited to either side of the river.

It is also claimed by the defendant, that the road on the Oregon side is not necessary in the business of the company, and therefore the Oregon Steam Navigation Company, as a corporation, cannot hold it. A corporation has no right by virtue of its corporate power to the exclusive use of property that is not necessary and useful in the course of its business as a corporation. It is for you to determine as a question of fact, whether the road on the Oregon side is necessary to enable the defendant to carry on their business, named in the articles of incorporation, in a judicious and profitable manner. The plaintiff also claims that if the defendant did once acquire the right to operate a road on the Oregon side of the river, the defendant has abandoned the road and forfeited the right to use it.

What is properly called forfeiture may be distinguished from an abandonment. A corporation may forfeit its franchises and render itself liable to have them declared forfeited, but that question cannot be tried here. The question whether the defendant has abandoned this road, can be tried here.

To constitute an abandonment, it must appear that the defendant has voluntarily given up the intention of using this road as a means of transportation on this portage. It is a question of fact for you to determine whether the defendant has voluntarily abandoned the intention of using this road as a link in their line of transportation.

As to the right of the defendant to operate a railroad on the track lying in Oregon, it is proper to consider the subject, first, with a view to determine whether the company ever acquired the right to use it. For this purpose we should examine their articles of incorporation and determine from the articles what was the business for which the incorporation was formed. When this is ascertained, it is to be determined whether this road was such an one as the company was authorized to operate, and if it is such, whether the defendant did acquire it and operate it. If the defendant acquired it and operated it, and you find that it is not now necessary and convenient for a profitable transaction of the defendant's business—or that the defendant has voluntarily abandoned its intention to use it in that business, it is subject to be condemned.

If the defendant acquired a right to operate a railroad on the Oregon side of the river, the fact that there is another road which they can and do use, does not preclude a right to operate the one on this side, provided this one is still necessary and convenient in their business. Nor is there anything in the law to prevent the defendant's using a road on each side, if the legitimate business of the corporation is such that the two roads are necessary and convenient in that business. It is a proper question for you to consider whether the use of this land is necessary to a profitable transaction of the defendant's business; because the defendant has no right to an exclusive possession of lands that are not necessary and convenient in its business.

But it is not the province of this court to deprive the defendant of property that is necessary in that business, on the ground that the defendant is a monopoly. The law has provided a different remedy for that evil. The defendant cannot object to the appropriation on the ground that opening the route will build up a rival company; and the plaintiff cannot claim anything on the ground that competition would be a public benefit.

The plaintiff must show a right to take the whole sixty feet described in the complaint, or it cannot take anything in this proceeding. It is for you to determine, as a question of

fact, whether the road is one of the means of defendant's transportation and necessary to the defendant for the business for which it is incorporated. The defendant cannot hold lands that it does not need, merely in order to prevent competition by a rival company. Nor can the plaintiff take from the defendant what the defendant does need in its business on any claim that the defendant creates a monopoly.

If you find that the land is not subject to appropriation, you will say so by your verdict, but if you find that it should be appropriated, you will estimate its value at what you think it is worth.

You are to judge of the credibility of the witnesses, and the weight of their testimony, their means of knowledge, and on questions of value, of the soundness of their opinions.

The defendants had a verdict, that the lands in question were not subject to condemnation.

The plaintiff moved for a new trial.

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Circuit Court for Multnomah County, November Term, 1889.

**THE OREGON CASCADES R. R. CO., Plaintiff, v. THE OREGON STEAM NAVIGATION CO., Intervenor.**

**NEW TRIAL—PREPONDERANCE OF EVIDENCE.**—A verdict that is subject to no other objection, should not be set aside because the Judge differs from the jury, as to the preponderance of evidence.

**POSSESSION—EVIDENCE OF TITLE.**—Quiet and exclusive possession is evidence of title, until a better title is claimed and shown by another.

**IDEM.**—A railway corporation cannot procure a judicial condemnation of lands, when it can agree with the owner, as to its purchase.

**NEW TRIAL—JUROR'S AFFIDAVIT.**—It would be of dangerous tendency to set aside a verdict, on the ground that the juror has, after the trial, a different conception of the law, or of the facts, from that under which the verdict was rendered. A juror's affidavit cannot be received to show a mistake in making up the verdict.



**WAIVER OF OBJECTION.**—When a view has been had and counsel have accompanied the jury, and knowing the facts, consent to conclude the trial, it is too late after verdict, to raise the point that the jury did not have a full view of the premises.

THE jury having rendered a verdict in favor of the intervenor, the Oregon Steam Navigation Company, the defendant filed a motion for a new trial. The exceptions are stated in the opinion filed.

*W. W. Chapman and Mitchell, Dolph & Smith, for the plaintiff.*

*Logan & Shattuck and Wm. Strong, for the intervenor.*

UPTON, J. The point first presented by the plaintiff as ground for a new trial, is, that the evidence is insufficient to sustain the verdict. To sustain the allegation of failure of evidence, these points are presented:

1st. That the defendant had abandoned the use of the premises for railroad purposes. On this subject the evidence is conflicting. A verdict that is subject to no other objection should not be set aside because the judge may differ from the jury as to the preponderance of evidence.

2nd. That the defendants proved no ownership of the land.

I think the evidence shows the intervenor to be owner in fee by legal title. Be that as it may, the intervenor was unquestionably in the quiet and exclusive possession. This is evidence of title until a better title is claimed and shown by another.

3d. That the land had not been condemned by a court to the use of the defendants. A railway corporation is not empowered to procure lands to be condemned by the judgment of a court, if it can agree with the owner and can purchase. It necessarily follows that the right of way may be obtained by purchase without resorting to an action.

The next point is one that was strenuously urged both on the trial and on the argument of this motion. When clearly stated it amounts to this: the land in question is the only pass through the Cascade mountains, lying in this state, and both plaintiff's and defendant's roads might be operated with-

in the sixty feet. This point is fully answered by saying the complaint in this case demands the whole sixty feet.

Another ground for asking a new trial is based on alleged misconduct of the adverse party.

In support of this ground two affidavits are produced; one is that of a juror who deposes that he was not taken on to the ground in *Washington Territory*; and gives a detailed statement as to how he understood the instructions of the court. The other is that of counsel in the case, who deposes that the jury was not taken into *Washington Territory*, and states the reasons that induced him to consent to go to trial with less than twelve jurors.

The affidavit of the juror is inadmissible to impeach the verdict or even to show a mistake in making up the verdict. (4 John. 487; 5 Cow. 106; 6 Id. 53.) Nor can it be received to show what passed in the jury room. (2 Tyler 11; 3 Gil. & John. 473.) Nor on account of an afterthought of the juror. (2 Sayre 85.)

It would be of dangerous tendency to permit jurors to reconsider their verdict after they have been discharged, on the ground that they now have a different conception, either of the facts or the law, from that under which the verdict was rendered. It would be permitting parties and counsel to retry their cases upon *ex parte* arguments addressed to individual jurors, who, from natural commiseration for the losing party, are not only open to new impressions inconsistent with the whole truth of the case, but are liable to be led into concessions and statements, imprudently or carelessly made, which, being once made, it is difficult for them to retract or to explain without appearing discourteous, or even appearing to be partisans in an affair that is not their own. Besides these considerations, we know that affidavits drawn by counsel to meet a particular point in cases of this kind, would frequently fail to disclose a full statement of the concessions thus incautiously made by jurors, with the reasons and the reservations that accompany them. Admitting such affidavits would open a new and alarming source of litigation, and if practiced it would be difficult to say when an action would terminate.

One point set up by the affidavits is that the intervenor having volunteered to convey the jury in its steamboat, the jurors were not taken over that railroad at the Cascades, which is in Washington Territory.

A person was selected, with the approbation of both parties, to show the jury the premises in controversy. He was instructed to point out to the jury the particular lands claimed by the plaintiff, and the lines and monuments of the survey of the premises. And the jury were instructed that in making the view it was their privilege and duty to observe the geography of the surrounding country. Nearly the entire line of the railroad which is in Washington Territory can be seen from the places which the jury visited. No instructions were given that the jury should be taken beyond the bounds of the state, nor is it necessary now to express any opinion as to the propriety of such an act, or as to the power of the court to direct it. One of the plaintiff's counsel went with the jury, and probably knew all that is now known on the point here raised, before consent was given by him to proceed with the trial with eleven jurors.

It was in his power then to refuse to go on without further proceedings in regard to the view, one of the twelve jurors who had been selected and sworn, having failed to accompany his fellow jurors to place of the view. With a knowledge of the facts, the plaintiff's counsel consented to excuse that juror and go to trial with eleven jurors without further view. There is no ground for this objection after such consent, given with a knowledge of the facts. Besides this, it is difficult for one having a knowledge of the locality, to come to the conclusion that one could go up one side of the river at that place with a desire to learn the facts, without being supposed to understand the nature of the ground on both sides, or without being able to understand the evidence relating to the character and situation of the roads on the respective sides of the river, and relating to the nature of the business transacted on the Washington Territory side.

Several errors of law are assigned.

The first, second, third and fourth points under this head

are founded on misapprehension as to what is contained in the written instructions read to the jury, and now on file.

The fifth relates to the point previously mentioned, that the land was not condemned to the intervenor's use by a court, but only acquired by the ordinary mode of conveyance.

The motion for a new trial must be overruled.

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Circuit Court for Multnomah County, February Term, 1870.

JOHN BOWMAN v. BEN HOLLADAY et al.

**BREACH OF CONTRACT—JOINDER OF ACTIONS.**—It is not an improper joinder of actions, to unite in the same complaint, a claim for wages, earned under a contract, and a claim for money due under the same contract, for time that has run since the plaintiff was refused employment contrary to the terms of the contract.

**INDEM.**—Where the plaintiff earned money, under a contract of employment, and the plaintiff was afterward discharged, contrary to the terms of the contract, and he has a claim also for money that has become due since that time under the same employment, for time that has run since his discharge, there are not necessarily two causes of action.

THIS case is presented, on demurrer to the complaint.

The complaint sets up a contract, under which the defendants employed the plaintiff to work for the defendants, as master machinist, one year, and agreed to pay him at the end of each month; for the first four months, \$125 per month, and for the residue of the year, \$200 per month. It is alleged that the plaintiff worked in pursuance of the contract, one and a half months, at the end of which the defendants discharged the plaintiff without cause, and the plaintiff was thereby thrown out of employment; that the plaintiff has, on his part, complied with the contract, and since his discharge, has been ready and willing to perform, and has tendered performance.

The suit was commenced after the expiration of the first two months, and the plaintiff claims \$250, now due upon

said contract, less \$100, which he admits has been paid. The defendants, for cause of demurrer, claim that:

- 1st. Two causes of action are improperly joined.
- 2d. The two causes of action are not separately stated.
- 3d. The complaint does not state facts, constituting a cause of action.

*Logan, Shattuck & Killen, for the plaintiff.*

*Mitchell & Dolph, for the defendants.*

UPRON, J. The argument in support of the demurrer, assumes that there is an action for *money, due on contract*, and another cause of action for *damages for the breach* of a contract, and that the two causes of action are so essentially different from each other, that they cannot both be properly set forth in the same complaint, or sued in the same action. In every action for money due according to the terms of a contract, the gist of the action is the breach of the contract, and a cause of action does not arise, until some condition of the contract has been broken. Every such action is an action for damages, for a breach or violation of the contract. There is no such distinction between the two alleged claims or demands, mentioned in the argument in this case, as exists between a cause of action for damages, for the breach of a contract, and an action for a tort.

If a contract has been broken in two particulars, even if the breaches are such as to give rise to two separate causes of action, I see no reason why redress may not be had for both injuries in the same action. I think the assumption that the complaint discloses two causes of action is erroneous. The only matter for which redress is asked in this case, is the non-payment of wages alleged to be due. If the plaintiff has a just claim for more money than he had earned up to the time he was discharged, that claim is for wages alleged to be due. It is true, that according to the allegations of the complaint, a portion of the wages accrued while the plaintiff was at work under the contract, and a portion accrued while he was offering to work in pursuance of the contract, and after he was refused permission to

work; but nothing else but wages is claimed, and the facts set out lay the foundation for nothing else. The plaintiff states that he "was thrown out of employment against his will," but the claim is not for damages sounding in tort, nor does the complaint indicate that the plaintiff avails himself of his privilege to rescind the contract.

In this class of cases, the law gives to the person who, without fault of his own, is thrown out of employment, an option to rescind the contract and sue at once for whatever damages result from the breach of the contract, or to hold the contract still in force and claim his wages as, from time to time, the money becomes due.

The demurrer should be overruled.

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Circuit Court for Multnomah County, February Term, 1870.

**J. M. RITCHEY v. O. RISLEY et al.**

**MECHANIC'S LIEN.**—Under the statute of 1853, the lien of the builder commences at the filing of the notice.

**RELATION.**—The lien of the mechanic may relate back to the commencement of the building, but it is not a lien until the notice is filed.

**COEXISTING LIENS.**—A sale under the statute of 1853 upon a foreclosure of the mechanic's lien, is intended to pass a title free from all liens created after the commencement of the work.

**PRIVIES.**—Judgments and decrees bind only parties and privies.

THE plaintiff sues to foreclose a lien for lumber furnished in the construction of the house of Caroline, the wife of David Wittenberg, at the request of the husband and wife; the plaintiff having filed notice of his lien on May 28, 1869.

*O. Risley*, alone defends. He claims title, as purchaser, under a decree of foreclosure rendered in this court, foreclosing a lien of O. D. Buck, for work and labor done in the construction of the same building. Notice of the lien of said Buck having been filed April 19, 1869, suit commenced May 3d, and decree rendered July 24, 1869.

The plaintiff moved to strike out all that part of the answer which sets up the title under the lien of O. D. Buck.

The merit of this part of the answer was argued as upon demurrer.

*Mason & Gardner*, for the plaintiff, cite 23 Cal. 208 and 522; 33 Cal. 497.

*Bronaugh & Bybee*, for the defendants.

UPTON, J. The points involved in the argument are whether one who holds an unrecorded mechanic's lien is entitled to be made defendant in a suit to foreclose. And whether, not being made a defendant, he is still entitled to hold a lien on the building, under the statute of 1853, after foreclosure by another, of a lien coexisting under the same statute. The lien law of California, passed in 1866, differs from ours in some particulars. The first section provides that all artisans, builders, etc., "shall have a lien on the building," and section 5 provides that "from the time of such filing all persons shall be deemed to have notice thereof." (Wood's Dig. 537.) Our statute (Code p. 763) provides, that persons performing labor, etc., "shall upon filing the notice prescribed in the next section have a lien upon such building." Section 7 gives mechanics' liens a preference "over all other liens after the commencement of the building," and provides, if the proceeds are insufficient to pay all, that the court shall order them to be paid *pro rata*.

The California act provides for bringing in lien holders by publication of a notice, while our statute merely gives them an option to come in as parties.

In California, it is held that the lien attaches from the time of the commencement of the work; that, I think is the obvious construction of that statute, but its language differs so materially in this respect from ours, that the decisions under it afford but little aid in arriving at a proper construction on this point.

I think, that under our act, the plaintiff had no lien until he filed his notice. He may have had such rights, as against other mechanics and material men, that had he made himself a party to the suit, his lien, although notice of it was not filed until after the suit was commenced, might have been en-

other than the People's Transportation Company, in 1865, executed a conveyance to the Willamet Steam Navigation Company, purporting to convey to said Willamet Steam Navigation Company, the said undivided half; and that the latter company afterwards executed a conveyance, purporting to convey the same to the People's Transportation Company. That the Willamet Steam Navigation Company was a corporation organized, "for the purpose of carrying freight and passengers on the Willamet River, from its mouth to the head of steamboat navigation on said river, and transporting said freight and passengers over the portage at the Willamet Falls, by a railroad then constructed on the *eastern* bank of said Willamet River." That the company last mentioned, then owned said railroad on the east side of said river; that the lands in question were neither necessary nor convenient to carry into effect the objects of said corporation, and that said company was incapable of holding said premises. Similar allegations were made in regard to the defendant, the People's Transportation Company, the object of its incorporation being alleged to be, "for the purpose of carrying freight and passengers on the Willamet River, from Portland to the head of steamboat navigation on said river, and transporting freight and passengers over the portage at the Willamet Falls, by a railroad then constructed on the east bank of said Willamet River."\*

A motion was made to strike out as immaterial and as being a statement of evidence and not of facts, the several matters set up affirmatively in these answers.

The motion was denied; it being *held* that some of the statements embraced in the motion were material allegations of fact.

The defendants, The People's Transportation Co., filed replications to the answers of the defendants, Thompson and

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\*On the trial, the articles of incorporation being exhibited, set out the objects of the incorporation of the People's Transportation Company, as follows: "The object of this incorporation, and the business in which it proposes to engage, is the transportation of passengers and freight on the waters of the Willamet and Columbia Rivers and their tributaries, and all necessary portages." The original answer failed to charge, in direct terms, what was the object of the incorporation, and being held bad on demurrer, the defendants filed their amended answer, setting forth the objects as stated in the text.



Lovejoy, and the cause was tried and submitted on the pleadings and proofs.

*J. K. Kelly* and *S. Huelat*, for the People's Transportation Co.

*Mitchell & Dolph*, for the defendants Thompson & Lovejoy.

UPRON, J. rendered the following decision:

The evidence shows that up to the present time the business of the defendant, the People's Transportation Co., at the portage, has been transacted wholly on the east side of the river. There was some evidence tending to show that, in case of very high water, a canal or railroad on the west side of the river, over the premises in controversy, would, if constructed, enable that company to do business more conveniently and profitably than it could be done on the east side. And that at some future time the P. T. Co. will, or may, have occasion to use a part of the lands in controversy, in the course of their business. And on the other hand, there was some evidence tending to show that the principal object of the P. T. Co. in holding the land, was to prevent its use by competitors.

I shall treat the case as if it were established as a fact, that the actual use of the premises in controversy, as a way or route for transportation, has not yet become necessary, and as if the transit on the east side of the river afforded a sufficiently good route; and shall consider the two questions—whether under this state of facts the corporation can hold the property; and whether, if a disability exists, the defendants, Thompson and Lovejoy are in a position to avail themselves of it. The former of these questions is now for the first time presented for adjudication in this state. This circumstance, as well as a knowledge that very large pecuniary interests may, in various ways and at various places, depend upon the rule that may be established, impresses me with the importance of arriving at correct conclusions; and I very much regret not being able to find authorities bearing more directly on the points involved.

There are several constitutional restrictions on the subject of corporations, but I am not sure that the questions here presented are affected by any of them, or by anything directly provided in the constitution, except the requirement that corporations should "be formed under general laws." By the general law, when three or more persons have complied with its provisions, "they shall thereafter be deemed a body corporate with power \* \* \* to purchase, possess and dispose of such, real and personal property as may be necessary and convenient to carry into effect the object of the incorporation."

The powers and the restrictions which we are to consider are to be found in the language above quoted, the articles of incorporation, and the common law, or the law as it would stand independently of the provisions of our constitution and statutes.

It is undoubtedly the intention of our statute, as well as of the common law, that a corporation should have power to make all contracts that are lawful and can ordinarily be made by individuals in the kind of business the corporation is authorized to transact.

To determine with what degree of strictness or of liberality the language of the statute is to be understood, is a principal question, and particularly in arriving at right conclusions, as to the use of the words necessary and convenient in this statute, and ascertaining the legislative intent they are designed to express.

It is evident we are not to construe the word "necessary" in a sense in which it is sometimes used, as nearly equivalent to indispensable. It is not indispensable that there should be a railroad or canal at the portage in question. It is possible to do the business by means of road wagons; but it is not to be inferred that the law would limit the corporation to the use of that kind of property. The difficulty is in determining at what point, in the broad range that lies between what is absolutely indispensable and that which is merely convenient or desirable, this language is intended to fix a limit.

To take a less extravagant illustration; a corporation

may need the use of lands or of buildings, and yet the existence of the corporation may be limited to a term of years. It might be said, it is not necessary, in order to carry into effect the objects of the incorporation, that it should be owner in fee of real estate. But yet such a corporation may acquire, hold and transfer the fee in real property. (*People v. Mauran*, 5 Denio, 389.) Or in the case of a railroad company, where it is necessary that the corporation should have a right of way, a mere easement, being only a privilege or liberty which one man has in the land of another; the ownership of the fee in the land over which the road runs may be convenient or profitable, but it will require a more liberal definition of the language of the statute than counsel have conceded, to enable us to say such ownership is necessary in order to carry the objects into effect. Yet it is held that such a corporation may acquire title in fee. (*Nicoll v. N. Y. & Erie R. R. Co.*, 2 Kern, 121.)

This corporation, according to the evidence, now holds, and is using in its business, a large amount of property, both real and personal, that, if we use the words in the more restricted sense, was not necessary in the business, at the time the land in question was conveyed, but which the increasing commerce of the country has rendered desirable, and which has now become an acknowledged necessity. It has been urged in argument in this connection, that an object of the law is to stimulate and encourage enterprise and to introduce the cheapest and most expeditious mode of transit, and that whatever is necessary to secure cheap and rapid transportation is necessary to carry out the object of the corporation, and this position appears to me sound.

What is necessary and convenient, must, of course, depend on the nature of the business, and the circumstances under which it is carried on. In all cases of uncertainty, it is evident the corporation, as purchaser, must judge in the first instance for itself whether the property is necessary and convenient; there is no tribunal to which it can resort to test the question in advance. After the property is pur-

chased, it may be still a disputed question of fact whether it is or not convenient and necessary; and it may remain doubtful until judicial determination. It would certainly be a very harsh rule that would, in all cases of an error in judgment as to the necessity of the purchase, hold the purchase absolutely void. And I presume it is to avoid so harsh a rule that courts have held that where lands have been purchased by a corporation and by it conveyed to a third party, a good title passes by the conveyances, even where the corporation was not authorized to hold the premises.

The power to purchase lands was incident to corporations at common law. (2 Kent, 281; 3 Pick. 239; 1 Ves. and Beam. 226.) And a corporation may do many things incidentally, although the power is not in the particular instance expressly conferred. (*Moss v. Oakly*, 2 Hill, 265; *Attorney-General v. Life and Fire Insurance Company*, 9 Paige, 470; *Jackson v. Brown*, 5 Wend. 590; *Gordon v. Preston*, 1 Watt. 385.)

These cases show that what is within the spirit and reason of the statute conferring the power, and pertains to the object sought to be obtained, is within the authority conferred.

I must say I am not fully satisfied that a corporation may not invest surplus funds in any property in which an investment will be advantageous, if it can be done without adding a new branch of business to that set forth in its articles of incorporation.

There is no statute expressly prohibiting a corporation from holding real estate; and evidently a corporation may increase its wealth. In most cases, the motive that induces individuals to create corporations is that of making profit; and the legislature knowing this, has not directed how or when surplus earnings shall be distributed. It will not be contended, I assume, but that corporations may, without any express grant to that effect, accumulate and hold money above what is actually necessary to transact the designated business. Yet, if we read the statute literally, their right to hold such surplus money is as restricted as their right to hold other property. Money may be held, if we treat its

acquisition as incident to the business, without entering on other business than that specified in the articles of incorporation. The question arises whether unimproved lands are not in the same category. It is certain that much of the business of the country is now based on the theory that such corporations may hold lands not directly used in their business.

Acts of congress and of state legislatures, and the business habits of the community, although not amounting to judicial construction, are resorted to, as being in the nature of contemporaneous construction, in cases where the legislative intent is doubtful. So also, whatever was the usage elsewhere under similar statutes, at the time this act was passed, is of peculiar weight. It has long been the practice of the general government to grant large bodies of land to corporations created under similar statutes, and our own legislature has, by its acts, recognized the right of such corporations to take, hold and dispose of lands, the direct use or employment of which was not necessary to carry into effect the object of the incorporation. Such grants were made to corporations, similarly empowered, in other states, before the enactment of our general law, and a vast amount of real property now rests upon titles thus acquired, and much real property is now held by corporations in this state, the *direct use* of which is not necessary to carry into effect the object of the incorporation. I refer to these grave considerations not because I am prepared to conclude from them, or to decide that a corporation has the right to hold such property, but as in my mind very cogent reasons against a rule that would hold such grants absolutely void. It is, I doubt not, upon considerations of public policy, and in view of circumstances such as are above mentioned, that it has been held that even a corporation that is disqualified from legally holding, may pass a good title to its grantee.

It is said that this land was purchased to enable this corporation to prevent all competition, and that such practices would foster monopolies to the great detriment of the country. To meet such contingencies, and to protect the public,

the law has provided (Code sec. 353) for an action in the name of the state, in cases where a corporation "exercises franchises or privileges not conferred on it by law." It would seldom be necessary to resort to an action there authorized, if all excessive acts of a corporation were absolutely void; and the legislature, I think, has proceeded on the idea that many such acts are voidable, and not void.

It is also said that this is not a case of mistake of fact, or of error of judgment, but that the corporation made the purchase knowing that the property was not needed in its business. The theory under which it is attempted to avoid the deed, is, that purchasing or holding this land is exercising "a privilege not conferred by law," and that the deed is for that reason absolutely void for want of capacity in the corporation to take. Under this theory, it is immaterial whether there was a mistake of judgment, or an intentional violation of the law; for, under this theory in either case the deed is void, and not voidable.

If the case of the defendants, Thompson and Lovejoy, was based on a claim that the deed is voidable, the question would be addressed to the equity side of the court, and of course they, as grantors, while still retaining the purchase money would have no standing in a court of equity upon which to ask to have the deed set aside. They, being grantors for value, cannot maintain their claim to the land, under any view that can be taken, except as a strict legal right, founded on the assumption that the conveyance from them is void, and not merely voidable.

If the corporation has usurped privileges or franchises not belonging to it, to the detriment of the public, the remedy is by an action in the name of the state.

If the sale is illegal, and Thompson and Lovejoy sold the property with a knowledge of the illegal purpose, they are so far in the wrong as not to be in a condition to ask equitable relief. If they sold under a misapprehension of its powers, or of the objects sought to be carried into effect by the corporation, and now find that the sale should be declared void, their pleading should set out their excuse, and they should offer to return the purchase money.

The prayer of the defendants, Thompson and Lovejoy, should be denied, and the property should be partitioned between the plaintiff and the defendant, the People's Transportation Company. (b)

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Circuit Court for Multnomah County, April Term, 1870.

FREDERICK NORMAN v. AL. ZIEBER, Sheriff.

**JURISDICTION OF THE SUBJECT MATTER.**—Although a complaint be objectionable on the ground that it does not state facts sufficient to constitute a cause of action, the court may have jurisdiction, and may permit amendment.

**WARRANT OF ARREST.**—Under section 107 of the code it is not necessary that all the jurisdictional facts should be recited in the warrant of arrest. If these facts appear in some anterior part of the record, it is sufficient.

**HABEAS CORPUS—JURISDICTIONAL FACTS.**—The jurisdiction of a committing magistrate may be put in issue on the return of a writ of habeas corpus.

**ARREST IN CIVIL CASES.**—The jurisdiction to issue summary process of arrest in civil cases is made to depend on the affidavit.

**IDEM.**—When no affidavit is made, or that which is made does not present a legal foundation for the issuing the writ, the writ and all proceedings under it are void.

**IDEM.**—Authority to arrest for fraud under sec. 107 of the code, is limited to the kinds or classes of fraud there designated.

**ABSCONDING DEBTOR.**—The term "absconding debtor" defined.

THE petitioner sued out a writ of *habeas corpus*. It appears from the petition, and the return to the writ, that a civil action was commenced in a justice's court, to recover \$46, upon an account stated, in which the plaintiff, Pierre Manceitt, filed an affidavit, and procured a warrant of arrest against this petitioner, who was defendant in the civil action, and caused the petitioner to be arrested. At the time the writ of *habeas corpus* was served on the sheriff, the petitioner was held in custody by the sheriff, by virtue of an order of commitment, a copy of which was annexed to the return, as follows:

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(b) The cause was appealed to the supreme court and submitted and taken under advisement at the September term, 1870, but before the next term a compromise was effected and the cause dismissed without a decision being made in the supreme court.

"In Justice's Court, Central Portland precinct, Multnomah County, Oregon.

PIERRE MANOEITT }

v.

FRED. NORMAN. }

The above named defendant having been brought before me, on a writ of arrest in the above entitled action, upon the ground that the defendant was about leaving the state, and the said defendant refusing to pay the account claimed by plaintiff, and in default thereof; it is hereby ordered that the said defendant be imprisoned in the county jail at the instance of plaintiff. To the sheriff of the said county and state. You are, therefore, in the name of the state of Oregon, commanded to receive into your custody, and safely keep the above named defendant, until otherwise legally discharged.

Portland, Oregon, April 6th, 1870.

JNO. C. WORK, J. P."

The sheriff, in his return, justified under this commitment, and no replication to the return was filed.

The petition sets out a copy of all the papers in the civil action, including the complaint, the affidavit and undertaking on which the warrant of arrest was issued, and the warrant.

The affidavit, after giving the venue the title of the court, and of the action, proceeds as follows:

"I, P. Manceitt, being first duly sworn, say, that I am the plaintiff above named, that the defendant is indebted to me in the sum of \$46, upon an account stated on or about the fifth of April, 1870, at which time defendant promised to pay said sum, \$46. Although requested, he has failed to pay said sum, or any part thereof, and the same is now due and owing plaintiff from defendant. And that defendant is about to leave the state of Oregon, with intent to delay, hinder, and defraud his creditors."

*Mason and Gardner*, for the petitioner.

The complaint in the civil action, was insufficient to give the justice jurisdiction of any subject matter.



The undertaking is not sufficient.

The affidavit is not sufficient to warrant an arrest.

By art. 1, sec. 19, of the constitution, "There shall be no imprisonment for debt, except in cases of fraud, or absconding debtors."

The commitment is insufficient.

*W. Whaley, contra.*

The imprisonment is legal. It is not necessary under the statute that the commitment recite jurisdictional facts.

The court will not on *habeas corpus* go behind the commitment.

The affidavit for the warrant of arrest shows a case of fraud, and the justice of the peace had jurisdiction to pass upon the question of fraud.

UPTON, J. I do not deem it necessary to say more in regard to the complaint and undertaking in the original cause than that they do not present defects not curable in the court where the cause is still pending. The spirit of the practice act, and the practice of courts under it, sustain the position that a complaint may be objectionable, on the ground that it does state facts constituting a cause of action, and yet the court may have jurisdiction to permit an amendment. And I think it equally in accordance with the true construction and intent of the code, that if the sureties in the undertaking are deemed insufficient, relief in that respect should be sought by application to the court where the cause is pending. If the complaint was defective, the point being raised by demurrer, the justice would have jurisdiction to pass upon it, and the question should be first raised in that court, and if the court should err, there is a remedy either by appeal or by *certiorari*.

There are grave and sound reasons why an application should not be made, on these grounds, to the circuit court in this form, before a similar application has been presented to the justice of the peace.

In a general sense, the jurisdiction upon *habeas corpus* may be said to be appellate, but it is not, strictly speaking,

a power of revision of an order or judgment previously made or rendered, because, in form, it does not undertake to affirm or reverse, although it may arrest the execution. The jurisdiction on *habeas corpus* is not necessarily referred to the powers derived from that part of sec. 9, art. 7, of the constitution, which gave the circuit courts "appellate jurisdiction and supervisory control over the county courts, and all other inferior courts, officers and tribunals;" but it is, in general, treated as an exercise of original jurisdiction. And whether the jurisdiction be considered as original or as appellate, it is inconsistent with the comity essential to the harmonious co-operation of the several functions of a body politic, that even an appellate tribunal should reverse for error, and set aside a judgment or order made by another tribunal while acting within its proper jurisdiction, for reasons or upon grounds which were never presented to the consideration of the court where the order was made. The record shows that the civil action is still pending, and it does not show that the objections to the complaint and to the undertaking have ever been made in the justice's court. When a question is pending in a court having jurisdiction to determine it, and is still undetermined, it would certainly be an extraordinary proceeding to resort to the writ of *habeas corpus* to procure a decision of the question elsewhere, before such court had been called upon to decide it. There is a marked distinction, in this respect, between questions that are within the jurisdiction, and questions upon which such court can make no binding decision. Inasmuch as the justice of the peace has power to permit amendment of the complaint and of the undertaking, it is not necessary to inquire into their sufficiency in this proceeding.

It is claimed that the petitioner should be discharged because what is here called the commitment does not show on its face that the court had jurisdiction to issue it.

On the other hand, it is as confidently asserted that the commitment being regular on its face, the petitioner can not go behind it to show that the court did not in fact have jurisdiction.

The petition and return taken together, show that a writ of arrest was issued, predicated upon the affidavit, and show what the affidavit contained. The petition also shows all the subsequent steps that have been taken. The statute of this state does not require that a warrant shall recite all the facts that confer jurisdiction, although it is still necessary that they should appear in the record and files of the court. In my judgment, the case now at bar would not be materially different if the warrant of arrest or the commitment contained a recital of all that is set forth in the petition. (Code sec. 107, sub. 5.)

What is here said is not in conflict with the well settled doctrine that an inferior jurisdiction, proceeding not according to the course of the common law, must show affirmatively upon its record all the facts necessary to give jurisdiction. On the contrary, what is here decided goes no further than to construe the code of practice to enact that these facts need not be recited in the process under which a person is held in custody. If they affirmatively appear in some anterior part of the proceedings and record, it is sufficient.

If there was nothing before us but the return, setting out this paper called a commitment, it is plain that the return would be insufficient to justify the imprisonment, because that paper is not a process recognized and declared sufficient by the statute; nor is it one which recites the facts necessary to show that the court had jurisdiction. In fact, I look upon it as no more than an order remanding the defendant into the same custody, to be held under the writ of arrest. After judgment, a further process may issue under sec. 273, but I know of no reason why the writ of arrest is not of force until the defendant is discharged, or until judgment is rendered.

It has been laid down as law, that "when the return shows a detainer on process, the existence and validity of the process are the only facts upon which issue can be taken." (8 Hill 658, note; *People v. Cassels*, 5 Hill 164.)

But this must be taken with some qualification, for in the latter case it was also said, the court or judge "may also

inquire whether the committing magistrate had jurisdiction, and this notwithstanding a recital of the necessary jurisdictional facts." Since the writ of habeas corpus is not designed as a writ of review, and does not deal with errors such as will render the proceedings voidable, but with such departures from regularity as render the proceedings void, inquiry will be confined to questions that go to the jurisdiction.

"It is a rule essential to the efficient administration of justice, that where a court is *vested with jurisdiction* over the subject matter upon which it assumes to act, and *regularly obtains jurisdiction* of the person, it becomes its right and duty to decide every question which may arise in the cause, without interference *from any other tribunal*." (*Smith v. McIver*, 9 Wheat. 532.) But "of the power to discharge from a void execution, no one ever doubted." (*Hurd on Habeas Corpus*, p. 342, 3 and 4.)

In the absence of statutory provisions to the contrary, it was formerly required that process of arrest or commitment issued by inferior courts, recite all the facts necessary to show the jurisdiction of the magistrate; since that practice is dispensed with by statute, there is not the same reason for refusing to look beyond the face of the process as formerly, because it does not now appear upon the face of the process whether or not the magistrate had jurisdiction, and yet we find the weight of authority to have been, even under the former system, that the return might be disputed by showing want of jurisdiction, notwithstanding the process set out in the return, contained sufficient recitals. (*Id.* 397.)

I cannot doubt but that it is the right of the petitioner to dispute the jurisdiction of the court and ask to have the affidavit examined in order that it may be determined whether or not the writ of arrest is void.

There is no question but that the court had jurisdiction of the action; but the question is, whether there was jurisdiction to make the arrest. "Nothing shall be intended to be out of the jurisdiction of a superior court except that which specially appears to be so; on the contrary, nothing shall be intended to be within the jurisdiction of an inferior

court unless it be so expressly alleged." (1 Sanf. 74.) And it is laid down in 1 Smith's Leading Cases, 816, in regard to courts of record: "If the court is not in the exercise of its general jurisdiction, but of some special statutory jurisdiction, it is as to such proceedings an inferior court and not aided by presumptions in favor of jurisdiction." In regard to courts of inferior jurisdiction, "if the record does not show upon its face the facts necessary to give jurisdiction, they will be presumed not to have existed;" but it is said this presumption may be rebutted and the jurisdictional facts established by extrinsic evidence. (Hurd on Habeas Corpus, 370.)

So, in this case, we may look into the affidavit, to see what was the statement on oath, that preceded the writ, although no other part of the record contains a recital of the oath.

The affidavit presents the vital question in the case, for the jurisdiction of the Court to issue the summary process, is made to depend on the affidavit.

"Where a court exercises an extraordinary power under a special statute prescribing its course, that course ought to be exactly observed." (*Thatcher v. Powell*, 6 Wheat. 119.)

"When, therefore, no affidavit is made or that which is made, does not present a legal foundation for the issuing of the writ, the writ and all proceedings under it, are *coram non judice* and void, unless the defect be waived by the act of the defendant, or is by statute amendable, and be amended." (*Smith v. Luce*, 14 Wend. 237; 18 Id. 611; 21 Ib. 672; 4 Hill 598; 7 Ib. 187.)

"If there is no statutory authority for amending an affidavit, the court has no power to allow such an amendment." (26 Georgia, 577; 28 Ib. 27.)

The constitution of this state, art. 1, sec. 19, provides, "There shall be no imprisonment for debt, except in cases of fraud or absconding debtors." Section 106 of the code, provides that a defendant may be arrested in certain cases, there specified, and section 107 provides that the plaintiff shall be entitled to a writ of arrest when he shall make and file "an affidavit, that the plaintiff has a sufficient cause of

action therein, and that the case is one of those mentioned in section 106."

Affidavits that are the basis of statutory jurisdiction, must either "follow the language of the statute," or state such facts as to show that the case is clearly within the intent and meaning of the statute. It is not contended that it would be sufficient to insert in the affidavit the language of section 107. "That the case is one of those mentioned in section 106."

The 1st, 4th and 5th subdivisions of section 106, are all that it is necessary to refer to in this connection. They provide that the defendant may be arrested:

1st. "When he is a non-resident of this state, or is about to remove therefrom."

4th. "When the defendant has been guilty of a fraud in contracting the debt," \* \* \* "or in concealing or disposing of the property," etc.

5th. "When the defendant has removed or disposed of his property, or is about to do so with intent to defraud his creditors."

The fourth and fifth subdivisions are referred to, to render it obvious that the allegations of the affidavit do not show a case within these subdivisions.

It was argued that if the affidavit did not show a case of an absconding debtor, it did show fraud. A conclusive answer to that position is that subdivisions 2, 4 and 5 specifically point out the *kinds and instances of fraud* that will justify an arrest; and there can be no pretense that the affidavit shows a case within either of those subdivisions. The constitutional provision is negative in its character, and has only a restrictive effect. It will not of its own force and without legislation, authorize an arrest in any case. The legislature having definitely provided in what cases and in what transactions the fraud shall be ground for an arrest, the authority to arrest for fraud is limited to the kinds or classes of fraud which the legislature has designated. The fraudulent intent mentioned in the affidavit does not come within any of the specifications of fraud pointed out in section 106. The remaining question is whether the affidavit

shows a case of an "*absconding* debtor" within the meaning of the constitution, and within the meaning of that part of the first subdivision of section 106, which provides that a defendant may be arrested when he "is not a resident of this state or is about to remove therefrom." The words "about to remove therefrom" are to be construed with reference to the subject matter, and with reference to the constitutional restriction. If the language will admit of a construction consistent with the constitution, such should be given, rather than a construction that would conflict with the constitution, and thus defeat the intent of the legislature by rendering their acts void.

The construction, to be consistent with the constitution, must include the idea of "*absconding*." Any "*removal*" that is neither fraudulent nor an *absconding*, could not under the constitution be made a cause of arrest. The act expressly names as cause of arrest, removal of property with intent to defraud creditors; and by omitting to mention the removal of the person with such intent, makes the conclusion unavoidable that the removal of the person with that intent is not of itself a ground of arrest, and that there must be an *absconding*, as distinguished from any other kind of fraud, to come within the provisions both of the act and of the constitution.

Bouvier defines "*abscond*:" "to go in a clandestine manner out of the jurisdiction of the courts, or to lie concealed in order to avoid their process;" and the ordinary acceptance of the term includes an idea of secrecy. We must treat subdivision 1 of section 106 as unconstitutional and void, or it must be held that the "*removal*" that authorizes an arrest is something more than a mere leaving of the state in an open and public manner, or in the ordinary course of the defendant's business as an officer or seaman on board a vessel in which he has been habitually employed. The affidavit must be couched in the very words of the statute, or it must expressly show that the case is within the true intent and meaning of the act. It is not always the case that an affidavit following the words of the statute is sufficient, and it is not before me for determination whether

that would be sufficient under subdivision 1 of section 106 of the code. The affidavit in this case does not attempt to follow the language of the statute, nor does it state facts that show that the defendant had absconded, or was about to abscond, or was an absconding debtor; nor that he was guilty of, or about to commit any one of the kinds of fraud particularly specified in the statute as cause for arrest.

Until an affidavit is filed justifying an arrest, a magistrate has no jurisdiction to make the order or issue the warrant, and the proceeding, if any be had, is not voidable, but void. It is upon this ground alone that I feel justified in passing ultimately upon the application for a discharge, when the record does not disclose that an application was first made to the magistrate whose proceedings are called in question. But in this case the affidavit is insufficient and the court had no jurisdiction to issue the warrant or commitment. The petitioner is therefore entitled to be discharged from custody.

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Circuit Court for Multnomah County, June Term, 1870.

### EDWARD KAHN v. LEWIS LOVE.

**NEGLIGENCE.**—Where an occupant of a building sues the owner for damages for an injury to the plaintiff's person, caused by the unsafe condition of the building, he must show that the unsafe condition of the building is not the fault of the plaintiff.

**LANDLORD AND TENANT—REPAIRS.**—A tenant has no remedy against a landlord for suffering premises to be out of repair, unless the landlord has agreed to repair.

THE case is presented upon demurrer to the complaint. The facts alleged are, substantially, that the defendant being owner of certain premises in the city of Portland, leased the building to the plaintiff and his two brothers; that a framed awning, attached to and part of the building, extending over a sidewalk of the public street, was badly constructed and insufficient, unsafe and dangerous to the



occupants of said building and to persons using the sidewalk; that the plaintiff, being ordered by the street commissioner to remove the snow from the awning, went upon it, without negligence or fault, and with care and caution; but from the insufficiency and defects aforesaid, it broke, causing the plaintiff to fall and to be greatly injured. The plaintiff lays his damages at \$25,000.

*Caples & Moreland*, for the plaintiff.

*Logan, Shattuck & Killan*, for the defendant.

UPTON, J. The complaint is silent as to the terms of the lease; it contains on that subject but the single allegation that the plaintiff and his two brothers "used and occupied the same as tenants of the said Lewis Love, and paid him therefor a stated sum as rent." The complaint contains the following: "By the laws and ordinances of the city of Portland it was made the duty of the defendant to make such repairs as might be necessary for the safety of travelers and persons traveling along and upon said street in front of said lot."

It is not to be presumed that the lease contained any covenants not expressly charged in the complaint. It does not clearly appear whether or not the defects in the awning existed at the time the tenants took possession, and I am not aware that it is a material point in the case.

"It is not in the power of the tenant to make repairs at the expense of his landlord unless there be a special agreement between them authorizing him to do this.

"The tenant takes the premises for better or for worse and cannot involve the landlord in expense for repairs without his consent." (*Mumford v. Brown*, 6 Cow. 475.)

A tenant has no remedy against a landlord for suffering premises to be out of repair, unless the landlord has agreed to keep it in repair. Unless there be an express agreement to that effect, the tenant, whether for life, for years, or at will, cannot compel him to repair. (*Howard v. Doolittle*, 8 Duer, 464.)

For aught that appears in the complaint, the improper condition may have been the fault of the plaintiff.

The statement in general terms that the plaintiff exercised due care and caution on that particular occasion is not sufficient. The plaintiff in an action for damages occasioned by the defendant's negligence, must so frame his complaint as not to leave an inference that he was guilty of negligence that contributed to the injury; and the facts must show affirmatively that the injury was caused by the negligence of the defendant.

The demurrer is sustained. (1)

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Circuit Court for Multnomah County, June Term, 1870.

**JACOB KAMM v. J. B. HARKER and ASA HARKER.**

**JOINDER OF PARTIES.**—In an action on the note of a partnership firm against two defendants, a plea in abatement by one of the defendants that his co-defendant never was a member of the firm, and stating the names of the members of the firm, is not demurrable, as not constituting a defense.

**IDEM—JOINT NOTE.**—One of the makers of a joint note has a right to have the other makers made parties to the action.

**PARTNERSHIP.**—A partnership firm does not have the power to sue and be sued; that power is in the individuals that compose the firm.

THE plaintiff declared against the defendants, J. B. Harker and Asa Harker, upon a promissory note for \$5,000 and interest, signed "J. B. Harker & Co.," and alleged that the defendants were partners, doing business under the firm name of J. B. Harker & Co., and as such made the note.

The defendant, J. B. Harker, demurred to the complaint as not stating facts, etc., but by leave abandoned the demurrer, and filed his separate answer, stating:

1st. That interest had been paid on the note to the amount of \$828.

2d. That Asa Harker never was a member of the firm of J. B. Harker & Co.; but that the firm was composed of J. B. Harker, B. Welman and J. M. Peck, when the note was

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1. The plaintiff amended his complaint, and the case being tried by jury, the defendant had a verdict.

made. To the second part, or defense, of this answer, the plaintiff demurred on the ground that it does not state facts constituting a defense.

*Logan & Shattuck*, for the plaintiff.

*Mitchell & Dolph*, for the defendant.

BY THE COURT, (UPTON, J.) This demurrer does not raise the question whether a plea in abatement can be plead at the same time with a plea in bar of the whole or a part of the same cause of action, nor was that objection urged on the argument. But it is claimed that, because it is alleged in the complaint that J. B. Harker, who is admitted to be a member of the firm that executed the note, "signed the firm name to the note in his own hand," and because that allegation is not denied, he is personally liable for the whole amount sued for, under any view that can be taken of the case; and that being himself personally bound, he can not set up a defense for Asa Harker. That the said J. B. Harker is the only defendant served, and the action should proceed as if he alone were sued. The allegation that the note is signed in his hand writing is not a material one. No material issue can be formed by its denial. It is merely evidence tending to prove that he is one of the makers of the note. But since he admits that he is a member of the firm that made the note, he is personally liable for its payment; and the real question presented by the demurrer is, whether one of several makers of a *joint* note, when sued alone, can compel the plaintiff to join the other makers as co-defendants. That was his right at common law.

The code provides (sec. 36): "Persons *severally* liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may all or any of them be included in the same action at the option of the plaintiff."

Doubt has been expressed whether the framers of that section did not intend to change the law in regard to bills and notes, so as to give the payee of the bill or note, where the parties were *by its terms* only *jointly* liable, an option to

proceed against one of them *severally*. But I am satisfied that the legislature has not expressed that intention by the words employed, and that such construction ought not to be given to the statute. The language used does not indicate an intention to change the rule of law in this respect, and to treat parties as if they had contracted *jointly* and *severally* when they express in their contracts that they only intend to bind themselves *jointly*.

By using the word "severally" in the statute, a purpose to follow the rule of the common law in regard to joint notes, is indicated, and not an intention to give the plaintiff the option where the makers are only *jointly* liable.

The demurrer must be overruled.

It was by leave of the court, that the defendant answered over, and the leave was obtained without an exhibition of the proposed answer. Ordinarily, after a demurrer is overruled, leave should not be granted to enable a defendant to set up a defense, that does not go to the merits of the action. The plaintiff will be allowed at his option, to amend his complaint, changing the names of the parties to correspond with what is alleged in the answer, if he desires to do so.

Asa Harker had answered separately, setting up the same facts that were answered by J. B. Harker.

The plaintiff replied to each answer; want of knowledge or information sufficient to form a belief, putting all the allegations as to the firm at issue, but not denying the payment of \$823 interest.

A jury was selected and sworn, and the plaintiff asked the court to direct the jury to find specially upon the following questions:

Was Asa Harker a member of the firm of J. B. Harker & Co., at the date of the note?

Were B. Welman and J. M. Peck members of that firm at that date?

On the trial, it was shown conclusively that Asa Harker was not a partner with J. B. Harker, at the date of the note. It was shown that at that time, there was a firm of merchants, consisting of J. B. Harker, B. Welman and J. M.

Peck, commonly called "Harker & Co.," and having that name displayed as a sign, on their business house in Portland. But it was also shown that they sometimes called the firm name "J. B. Harker & Co.," and so wrote the name in some of their business letters, addressed by Welman and Peck to J. B. Harker.

The evidence was conflicting, as to whether the business of the firm was such as to give a partner power to borrow money, in the name of the firm (the note sued upon, being given for money borrowed.) After the close of the evidence, the defendant's counsel asked that if the jury were instructed to find a special verdict, they be instructed to find "whether or not the defendants, J. B. Harker and Asa Harker, made the promissory note described in the complaint." Thereupon, the plaintiff asked leave to amend his complaint by dismissing the case as to Asa Harker.

The defendant, J. B. Harker, objected, on the ground that the complaint alleged a joint contract, and that J. B. Harker could not be sued alone upon it.

*E. D. Shattuck*, for the plaintiff. Cited sec. 36 of the code, claiming the right to proceed against J. B. Harker alone, if the jury find that Welman and Peck were not partners, and to amend so as to make them defendants, if the jury find they are parties. On the subject of amendment, he cited sections 94, 95 and 104 of the code.

*J. H. Mitchell*, for the defendants, claimed that having sued a firm, the proposed amendment would not be within sec. 90, but would "substantially change the cause of action."

BY THE COURT. There are two defenses in abatement of the action set up, namely, misjoinder and non-joinder, and the answer also alleges part payment, which is in bar, but no objection has been made to joining these defenses in the same answer. Is it expected that the verdict to be rendered will be followed by final judgment, or only a judgment in abatement?

*Judge Shattuck*, for the plaintiff. The alleged payment of \$823 is not denied, but we admit the payment as alleged. The action is against the firm, and if the jury find that Welman and Peck are members, their names can be inserted. If they are not, as it is alleged that J. B. Harker signed the firm name to the note, he is bound personally, whether any other person is bound with him or not.

BY THE COURT. We often speak of a partnership firm as being the party plaintiff or defendant; but in truth a partnership does not, like a corporation, possess the power to sue and be sued. It is the individuals who compose the firm that can sue, and they only are the persons sued. (1)

I have doubts whether it is permissible, where the complaint sets up a joint contract made by two or more, to allow the plaintiff to proceed as if upon an individual contract made by one only. In order to amend so as to include Welman and Peck, the plaintiff will be compelled to admit the truth of the plea as to Welman and Peck, in which case there will be no question for the jury. If, however, the plaintiff deems it safe to amend by striking out the name of Asa Harker, he has permission to do so, and the defendant's objection can be considered a motion for on new trial.

The plaintiff withdrew his motion and submitted to a nonsuit.

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Circuit Court for Clackamas County, at Chambers, August, 1870.

JOHN MYERS, Appellant, v. ARTHUR WARNER,  
Respondent.

CONTESTED ELECTION—SPECIAL PROCEEDINGS.—In a special proceeding, to contest an election, under sections 37 and 38 of the act relating to elections, the notice is the commencement of the proceeding, and the court acquires jurisdiction by its service and return.

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1. (*Vantine v. Crane*, 1 Wend. 524.) The contract alleged is not several, but is the joint contract of J. B. and Asa Harker. (1 Chitty Pl. 42.)

**JURISDICTION.**—The court has no jurisdiction to hear any motion in the case until the return.

**NOTICE.**—A notice that does not state a definite time for the hearing is of no avail.

**IDEM.**—When the time stated is "at the next term of the circuit court of said county, or as soon as said judge will hear the same," the indefinite words may be rejected as surplusage.

**JUDGE AT CHAMBERS.**—The purport of the words the judge "shall make all necessary orders for the trial of the case and carrying his judgment into effect," is to give the judge at chambers power to do whatever the court could do in term time.

**TIME OF HEARING.**—The plaintiff having named a day for the hearing, his motion for an earlier day was denied.

THIS is a special proceeding under the statute, to contest an election to the office of sheriff of Clackamas County. The plaintiff having fixed in his notice a time for the trial, moves for an order setting an earlier day for the hearing of the cause. The facts appear in the opinion.

*Kelly & Reed and Lansing Stout, for the plaintiff.*

*Johnson & McCown, for the respondent.*

UPTON, J. In this case the plaintiff proceeds under the statute found on page 707 of the code, to contest the election to the office of sheriff of Clackamas County. The case is brought before the circuit court, at chambers, on the plaintiff's motion for an order that the case be heard at an earlier time than that specified in the notice.

The statute by which the proceeding is authorized is as follows:

Sec. 37. "Any person wishing to contest the election of any person to any county, district or precinct office, may give notice, in writing, to the person whose election he intends to contest, that his election will be contested, stating the cause of such contest briefly, within thirty days from the time said person shall claim to have been elected."

Sec. 38. "Said notice shall be served in the same manner as a summons, ten days before any hearing upon such contest as herein provided shall take place, and shall state the time and place that such hearing shall be had; upon the return of such notice served, to the county clerk of such county, he shall thereupon enter the same upon his issue

docket as an appeal case, and the same shall be heard in its order by the court; *provided*, that if the case cannot be determined by the circuit court, in term time, within one month after the termination of such election, the judge of the circuit court may hear and determine the same at chambers, as soon thereafter as may be practicable, and shall make all necessary orders for the trial of the case and carrying his judgment into effect; *provided*, this section shall not apply to precinct officers."

The notice by which this proceeding was commenced states the time and place of hearing, as follows:

"You are also notified that the above matter in contest will be heard before Hon. W. W. Upton, at the court house, in Oregon City, in said Clackamas County, at the next term of the circuit court for said county, or as soon as said judge will hear the same, as provided by law in such cases.

"Dated June 17, 1870."

The defendant being required to show cause why the motion should not be granted, claims:

First, that the notice is defective and void, because it states the time of the hearing in the alternative.

And secondly, that the defendant cannot be required to appear and try the cause at a time earlier than that specified in the notice.

The notice is the commencement of the proceeding. It is in the nature of original process, and the court acquires jurisdiction by its services and return.

This being a special proceeding in which the court acquires jurisdiction in a mode specially pointed out by the statute, and not by the ordinary process of the court, the mode so prescribed must of course be strictly pursued, or the proceeding is void.

Hence, a notice that does not state a definite time for the hearing is of no avail, it being one of the requisites of the notice that it should "state the time and place."

If a notice of proceeding of this kind should state that the contest would be heard upon one or the other of two designated days, the notice would be fatally defective. But where a definite day is named, and an indefinite alternative



is also referred to, for instance, by adding "or as soon thereafter as the same can be heard," the indefinite words are often rejected as surplusage.

If in this notice the indefinite words are rejected as surplusage, the time stated is "at the next term of the circuit court for said county," and may be construed to mean the next term appointed by statute. If the notice is so construed, the time is named with sufficient certainty and the first objection is obviated.

But the second objection presents a more serious obstacle to the proposed order.

It was argued that the language of the statute which gives the judge at chambers power to "make all necessary orders for the trial of the cause and carrying its judgment into effect," is sufficiently comprehensive to include this order.

I am satisfied that the purpose of that clause is to give to the judge at chambers power to do whatever the court could do in term time. By the terms of this clause power is conferred on the judge and not on the court. It authorizes only orders necessary for the trial of the cause, or for carrying the judgment into effect. That is, such orders as the court could make if in session, because a court having power to try a cause may make all orders necessary for the trial. The context also indicates this purpose.

It would be a forced construction to hold that the legislature intended, by this language, to confer on the judge power to do what it would not be proper for the court to do if in session.

The real question is whether the court, or the judge acting in place of the court, can require the defendant to appear and try the cause at a time earlier than that stated in the notice.

I am not aware of any case under the statute in which a similar question has arisen.

Reference has been made to the cases tried in Clackamas County in 1868, but this question did not arise in either of those cases.

In one or more of those cases, and also in this case, application was made before any notice was served, to the

circuit judge, to have a time set for the hearing. Both in the cases tried in 1868 and in this case, the judge declined to make any order before the notice was served, on the ground that the court has no jurisdiction of the cause, and the judge has no power to make any order in such a case until the time of the hearing is appointed by the plaintiff, and stated in the notice and the notice served. In this case, and in those cases also, the judge expressed to the counsel for the plaintiff making the application, that he was willing to attend at Clackamas County and hear the cause as soon as the jury cases then pending at the June term of the court in Multnomah County should be disposed of.

In the cases tried in 1868, the plaintiffs named the 6th of July for the hearing, but the jury cases in Multnomah not being concluded at that time, the hearing was continued until the 16th of July, at which time the trial was brought on.

The case differs from those above referred to in this particular; in those cases each of the plaintiffs, in his notice, named an early day for the hearing, and the time of the hearing was postponed; in this case, the plaintiff, in his notice, named, as the time for the hearing, the next term of the court (that being the fourth Monday in October), and it is now proposed to take the case up for trial at an earlier day.

It was a first impression that this difficulty might be obviated by calling a special term, inasmuch as the notice named "the next term" as the time for the hearing; but it is a fatal objection to that solution, that unless the notice is construed to name a known and certain time, the notice will be void for uncertainty. It must be construed as referring to the term already appointed, or it is insufficient as a notice.

One of the controverted points in this connection is the construction of the word "thereafter" in the proviso above quoted. If it refers to the period, one month after the election, as is claimed by the plaintiff, it does not follow that if the plaintiff names a day of hearing later than that moved for, the case can be taken up before the time appointed by himself. If that is the proper construction of the statute, I

think the act of appointing a later day is a waiver of any claim to an earlier hearing. It is not very clear whether the statute is to be construed to mean, after that period, or after the time stated for the hearing, or after a term of the court. Under either construction, to order an earlier day would be inconsistent with that part of the statute which requires the original notice to state the time. It would of course necessitate a new notice of the time, and yet it is necessary to the jurisdiction, that the time of the hearing should be stated in the original notice. This is a different proposition from that of continuing a cause.

The language of the proviso is sufficient, I think, to authorize the judge, if the case cannot be heard in term time within a month, to hear it as well after the day named in the notice as on that day. But it is at least very doubtful whether the court or judge is authorized to compel the defendant to appear before the time stated in the notice.

No authority was cited on the argument presenting a case where such an order has been made, and, after considerable search, I am unable to find a case where a defendant has been required to appear at an earlier day than that named in the original process or notice served upon him.

The notice is in the nature of a summons. The plaintiff need not return it or file it with the clerk until the day named for the hearing, and the court has no jurisdiction of the case for any purpose until it is filed with the clerk.

I cannot think that the statute is intended to authorize a party to name the day of hearing, and afterwards have an exclusive right to move for an earlier day. Until the plaintiff chooses to return the notice, the defendant cannot be heard on such a motion, for the court has no jurisdiction to hear any motion in the case until the return.

It seems to me an unreasonable construction, and one not warranted by the language of the statute, to hold that the party who is required to name the time of the hearing in his original notice can, without any new cause shown, have an order naming another and earlier time.

The motion should be denied.

Circuit Court for Clackamas County.—At Chambers, August, 1870.

ARTHUR WARNER, Petitioner, v. JOHN MYERS, Respondent.

**MANDAMUS.**—The office of a writ of mandamus was the same at common law as it is now declared by the code, and it cannot be used as a means to determine ultimate right to an office.

**IDEM.**—An answer denying the legality of the election of the petitioner to an office which he holds will not abate the writ.

**CERTIFICATE OF ELECTION.**—The certificate of a board of canvassers of election returns is the record of what was decided, and it is the legitimate evidence of the decision.

**DECISIONS—WHEN BINDING.**—When a tribunal or board, no matter how inferior its jurisdiction or limited its power, proceeds within its jurisdiction, and determines a matter which it is authorized by law to decide, its decision, even if erroneous, is binding until it is reversed.

**APPEAL—ITS EFFECT ON THE DECISION.**—The fact that an appeal has been taken does not affect the conclusive nature of the decision while it remains unreversed.

**IDEM—PLEADING.**—The petitioner having plead the decision of the canvassers in his favor, and that he was in possession of the office, an answer declaring that a majority of the legal votes were cast for the defendant, was struck out on motion.

**PLEADING.**—An answer declaring that a contest was pending to determine the legality of the election was also struck out.

**SHERIFF.**—When a former sheriff is served with a certificate, in pursuance of section 983 of the code, his powers cease, and a contest pending does not stay the effect of serving the certificate.

*Johnson & McCown, for the petitioner.*

*Lansing Stout and S. Huelat, for the respondent.*

UPON filing the petition for a mandamus in this case, it was ordered that the defendant show cause why a writ should not issue. At the time appointed, the parties appeared before the judge at chambers, and the defendant filed an answer to the petition. The judge being of opinion that the petition should specifically state what property and prisoners were withheld or retained by the defendant, the petition was amended in that particular, and the defendant filed his answer as before. After argument, an alternative writ was allowed.

The facts alleged in the petition and writ are substantially: That Arthur Warner, the petitioner, was duly elected sheriff of the county of Clackamas, on the sixth day of June, 1870; that prior to the thirtieth day of June, 1870, he was qualified as such sheriff, and has since entered upon the duties of said office. That the defendant, John Myers, was the acting sheriff of said county, prior to the election and qualification of said petitioner. That said petitioner having been elected as aforesaid, and having qualified as such sheriff, the county clerk of said county of Clackamas, on the second day of June, 1870, made and gave to said petitioner a certificate of that fact, and that both on said second, and on the fifth of July, 1870, he served said certificate on said defendant; that more than one day had elapsed since such service, and that the defendant had refused and still refuses to deliver to said petitioner the jail of the county, its appurtenances, and the property of the county therein, the prisoners confined therein, and the process designated in the petition. The petition then proceeds to enumerate the property, prisoners and process retained by the defendant.

The defendant's answer, which was first made to the petition, and was afterwards by consent used as an answer to the writ, omitting the formal parts, is as follows:

The said defendant for answer to the petition of Arthur Warner, plaintiff, denies that on the sixth day of June, 1870, said Warner was duly and legally elected sheriff of Clackamas County. But on the contrary, this defendant avers that on the sixth day of June, 1870, a majority of all the legal votes cast at the general election held in said county of Clackamas, were given for him, the said defendant, for the said office of sheriff and he was then duly and lawfully elected such sheriff.

Defendant denies that said plaintiff, since the election and prior to the thirtieth of June, 1870, was duly qualified, and that he has since then legally entered upon the discharge of his duties as sheriff as aforesaid. And for a further answer to the petition of plaintiff, the defendant says that there is now pending in the said circuit court a proceeding wherein

this defendant contests the right of the said plaintiff, Arthur Warner, to hold the said office of Sheriff of Clackamas County.

The petitioner moved to strike from the answer the parts relating to the defendant's receiving a majority of the legal votes and being lawfully elected, and that in relation to a contest pending.

The motion was granted, and the plaintiff offered in evidence the certificate of election issued to him upon the canvass of the votes; his oath of office endorsed on the certificate and the endorsement thereon, his official undertaking, with affidavits of justification of sureties, and its endorsement of approval and of the filing; and the certificate of the clerk of the county of his having qualified after his election. He also proved by his own oath that he had been acting in the capacity of sheriff of the county from the fifth of July to the present time, and rested his case. The defendant proved that he (the defendant) had been in possession of the county jail continuously during the year past, and rested.

*Johnson & McCown*, for the petitioner.

*Kelly & Reed* and *Lansing Stout*, for the defendant.

UPRON, J. The petitioner's right to a peremptory mandamus in this case, depends upon the question of law whether an incumbent of the sheriff's office can prolong his term, or entitle himself to hold over beyond the two years fixed by law, by giving a notice, as provided on page 707 of the general laws, that the election will be contested.

This question is clearly settled by legislative acts, which will be referred to hereafter.

It may be well before examining the provisions of statute that define the rights and duties of these parties, to consider what is the office of the writ of mandamus, and to notice the question of practice presented by the motion to strike out part of the answer.

The office of this writ at common law was precisely what it is now declared to be by our code. (3 Black. Com. 110; 1 Tiff. 114; 6 Ba. Ab. 418; *et seq.*) It is "to compel the per-

formance of an act which the law specially enjoins as a duty resulting from an office, trust or station." (Code, sec. 583, p. 297.)

That this proceeding cannot be used as a means of determining the ultimate right to the office, is settled by authority and is conceded to be law, by both the petitioner and the defendant.

In proceedings by writ of mandamus, it is often necessary to determine as a question of fact whether or not a particular person is in the actual possession of an office, or in other words, whether he is exercising its functions; but this is a matter entirely different from determining whether such person is entitled to the office.

So too it may, be and frequently is necessary to determine whether or not a particular person is an officer *de facto*; trying that question is not a trial of the right to the office in any sense that makes it necessary to resort to *quo warranto*.

After a person has been declared elected by a competent tribunal, it may still be necessary, upon mandamus, to determine as a preliminary or collateral question whether he has been so declared. His right to sue may depend upon it. In such case, admitting proof of the fact is not such a trial of the right to the office as would compel a proceeding in the nature of *quo warranto*. The decision declaring him elected, then offered in evidence, may have been made in a proceeding in the nature of *quo warranto*, previously tried and determined. It would be absurd to hold that in every future proceeding where the petitioner alleges that he holds the office and the allegation is denied, the issue presented is such that it cannot be tried except by a similar proceeding by *quo warranto*.

Those parts of the answer included in the motion are not pleadable in this case, unless a defendant can by setting up error in the decision of the canvassing officers, or by pleading that there is a contest pending to try the title to the office, either change the character of this proceeding from *mandamus* to a proceeding in the nature of *quo warranto*, or abate this proceeding until it shall be determined who is rightfully entitled to the office.

If the petitioner is entitled to this writ it is because there is now a duty to be performed which the law has enjoined, and not because of any duties that may hereafter arise.

If one who has a good cause for contest can prolong his hold on the office by giving the notice, one who has not ground of contest can do the same thing. It can never be treated as a thing known, whether or not he has good grounds for contest, until the contest is terminated. The mode of conducting the contest must be the same where there is not sufficient grounds, as where the claim of the party giving the notice is meritorious.

It will be seen by provisions of statute hereafter quoted, that the act or duty sought to be enforced by this proceeding does not depend upon the ultimate rights involved in the answer.

It will not be contended that a defendant can, by filing such a pleading, change the character of this proceeding to a proceeding in the nature of *quo warranto*; and no authority has been produced, and it is believed none can be found for the position that upon filing such an answer, the writ should be abated or dismissed.

It might upon the same reasoning be claimed that in an action of forcible entry and detainer, in which the title to real estate can not be a material issue to be tried, the action must be dismissed whenever the defendant pleads title to the premises where the force was used. The law and the reason for the rule of practice are the same in that case as in the case under consideration. The plea is irrelevant because neither the wrong of the alleged injury, or the remedy, is dependent on the ultimate right of either party to the office or to the land in question.

The argument in favor of retaining that part of the answer, when distinctly stated, amounts to this: The decision of the board of canvassers is subject to review; until it is reviewed, it is impossible to know whether it is correct; until it is known to be correct, no court has power to compel the former incumbent of the office of sheriff, to deliver to the present incumbent, the jail and other property of the county. The argument overlooks the fact that it was the



duty of the board of canvassers to decide whether or not the petitioner was duly elected. That was a question for that board to decide, according to its judgment, and it is not in the power of the circuit court to direct such a board what decisions it shall make, or to question the correctness of its decision in a proceeding by mandamus. (2 Denio 192; 20 Wend. 658.)

A reference to the various statutory provisions touching the merits of the case, will also show conclusively that the matters included in the motion are not material, and do not constitute a defense in this proceeding.

The statute concerning elections, (Sec. 31, Gen. Laws, p. 705), makes it the duty of the county clerk, when the votes are canvassed, "to make out a certificate of election to each of the persons having the highest number of votes for members of the Legislative Assembly, county and precinct officers respectively, and deliver such certificate to the person entitled to it."

By section 9, general laws, p. 828, the sheriff "must qualify by filing with the county clerk of the county wherein he is elected, his certificate of election, with an oath of office endorsed thereon." \* \* \* "and also give and file the undertaking hereinafter provided."

By section 983, p. 393, "When a new sheriff is elected or appointed, and has qualified, the county clerk shall give him a *certificate of that fact* under his seal of office."

"Whenever *thereafter*, the new sheriff is authorized by statute to enter upon the duties of the office, he shall serve such certificate upon the former sheriff, from which time his powers cease, except when otherwise specially provided." By section 984, "within one day after the service of the certificate upon the former sheriff, he shall deliver to his successor the jail of the county, with its appurtenances, and the property of the county therein."

It cannot be maintained that unless the decision of the board of canvassers is free from error, its decision is no decision, or that it may be disregarded before it is reviewed and reversed by a competent tribunal.

When a tribunal or board, no matter how inferior its

jurisdiction, or limited its power, proceeds within its jurisdiction, and determines a matter which it is authorized by law to decide, its decision, even if erroneous, is binding until it is reversed. (*Van Wormer v. Aldermen of the City of Albany*, 15 Wend. 262; *Morewood v. Corporation of New York*, 6 How. Pr., 386; 32 N. Y. 281; 29 How. Pr. 281; 11 Abbott Pr. 9; 35 Barb. 308; 6 Barb. 479; 37 Barb. 520.)

If the board or the tribunal is required by law to decide, and acting within its jurisdiction, it proceeds to make the decision, that decision is binding until reversed, although the board or court erred as to the law or mistook the facts, or misjudged as to the weight of evidence. (*Lawrence v. Houghton*, 5 John, 128; 6 Hill, 114; 4 Kern, 329; 4 Seld. 137; 32 N. Y. 281; 44 Barb. 321.)

"The fact that an appeal has been taken does not affect the conclusive nature of the decision while it remains unreversed. (*Sage v. Harpending*, 49 Barb. 166; 34 How. Pr. 1.)

The certificate required to be made at the time of the canvass is the record of what was then decided, and it is the legitimate evidence of the decision.

When afterwards the clerk was called upon to certify to the fact that the new sheriff had qualified, if he had the proofs before him, the act of certifying was a duty specially enjoined by law. He was acting within the scope of his jurisdiction. He had before him the decision of the board of canvassers, and whatever else material to the question there was on file in his office, and his duty required him to proceed on the evidence before him. It cannot be maintained that his certificate was no certificate in case there had been error in canvassing the vote.

The law creates a board of canvassers, with full power to decide upon the questions presented. The county clerk is required to make the record of their decision by certifying the result. This certificate, when endorsed with the oath of office, is required to be filed with the county clerk, and becomes a part of the files of that office. The law above quoted specially defines what is "qualification," and declares what acts shall constitute the qualification of a sheriff.

When the county clerk has made the certificate of the fact of qualification which the law compels him to make, and when the preceding term has expired, there remains but one thing to be done to cause the general powers of the former sheriff to cease. That is, to serve the certificate upon him.

Special provisions are made by which he retains power to do certain acts; for instance, to finish the execution of process partially executed, but otherwise his powers end by operation of law. By force of the statute, when such a certificate is served in pursuance of the statute, a legal effect is produced in the very act of service.

It will not alter the fact, should the same man who was the former sheriff, afterwards by action or by special proceeding in pursuance of the statute, attack the decision of the canvassers in the proper tribunal and show that it ought to have been rendered in his favor, and thus obtain a decision in his favor that he ought to have been declared elected. He will thereupon be placed in office; but the proceedings of the person who acted in the interim as sheriff under the erroneous certificate will be valid and binding. The powers which the reinstated sheriff will thereafter exercise are not those that ceased on presentation of the certificate, but they are the powers with which he becomes vested by virtue of his re-election and qualification.

By operation of law the powers of the one person ceased, and another person became sheriff *de facto*. If he is afterwards ousted by the judgment of the court, his opponent takes by virtue of the election, and not by his right to hold over.

To sustain the defendant's position it is necessary to disregard these provisions of statute; to treat the certificate of election as false before it is reviewed, and to hold in the face of, and in opposition to, the decision of the board created by law, to decide the question, that the defendant's successor is not elected as certified.

Who is to determine that the certificate is false, without a trial of the question?

It is evident from the language of these statutes, that the

legislature had in contemplation the confusion which would arise if the former sheriff could upon any pretext disregard the decision of the board of canvassers, and remain in office during a pendency of a contest for the right of the office.

It was to avoid any pretense that a sheriff could hold over beyond his term on a claim that the votes were not correctly canvassed by the constituted authority, that it is provided that upon the service of the certificate his powers cease. It is not enacted that his powers shall cease if the election is in all respects legal, or if the votes are correctly canvassed, or if no appeal be taken, or after the appeal is determined; but it shall cease when the certificate is served.

The explicit language of the act is well chosen to express in the most positive manner that there shall be no stay of proceedings, but that the transfer shall be immediately made.

It does not alter the case that the former sheriff and the one who proposes to contest is one and the same person.

The defendant does not claim, in this case, as his own successor. He does not allege that he has qualified. He bases his right solely on being the prior incumbent. If he had received a majority of the votes, and obtained the certificate of election, that would add nothing to his right in the office until he qualified. It is then immaterial to the present right of possession whether he or some third person is the contestant. He has no higher right of possession or of holding over, then he would have if some other person had given notice of a contest. If the defendant can hold over, under the facts here presented, it is because the petitioner was not elected, and not because the defendant was elected. He could with the same reason hold over if some other person was the contestant.

The same reasoning that will justify this defendant in holding over, will justify the former sheriff in holding over in all cases where there is a contest, until it shall be settled by final judgment of either the circuit or supreme court which of the contestants is entitled. And this whether the former sheriff is a party to the contest or not.

It is difficult to imagine what more decisive language the

legislature could have employed to express the intent that the former incumbent should not hold over because of a contest.

The answer in this case does not deny that the certificate mentioned in the writ was issued by the clerk, and it does not deny its service upon the defendant. It contains nothing from which it can be concluded that the canvassers or clerk lacked jurisdiction to perform the acts devolved upon them. The denials of the answer are a denial "that the plaintiff was *duly and legally* elected sheriff" of, etc., and a denial that the plaintiff "was *duly* qualified, and that he has *legally* entered upon the discharge of his duties as sheriff aforesaid."

If these are to be treated as presenting issues of fact, the first issue is determined by the certificate of the board of canvassers, a certified copy of which was produced. That he was duly qualified was shown not only by the certificate of the clerk, but by the production of the certificate of election, and the petitioner's oath of office endorsed thereon, with its filings and endorsements and his official undertaking with its indorsements. And it was proved that the petitioner was, and for some time had been, the acting sheriff of the county. If, then, the certificate of election issued under section 31, p. 705, of the code, can be read in evidence in a court of justice, it is proved that the petitioner was elected as alleged.

This certificate, until the decision it records is reversed, is as clearly the proper evidence of the decision, as is the certificate the clerk is required to make under section 41 of the same act.

No provision of statute has been referred to, that directly or by implication indicates that the certificate of election is inoperative or to be held in abeyance in case of a contest. Yet it is a general feature of our statutes that whenever a stay of proceedings is deemed proper, special provision is made in each particular case pointing out a mode to obtain such stay. On the other hand, the special provisions to the contrary of a stay of proceedings above quoted, are made with particular reference to the sheriff's office only.

If the statute was less clear on this point, the following considerations would be of great force to indicate that the law should be as the legislature has already seen cause to declare it. The petitioner, being an officer *de facto*, cannot proceed by *quo warranto* against the defendant. (Code, sec. 354.) He, and through him the public, are therefore without a remedy if he cannot proceed by *mandamus*.

If he is obliged to wait for his contestant to proceed by action under section 354, the contestant can choose his own time for commencing the action. If the proceeding is to be by the special statute for contesting elections, found on page 707 of the code, the holder of the certificate cannot reasonably commence it, because the decision is already rendered in his favor. If it is to be commenced by another, that other may commence it by simply serving a notice, without any oath, or affidavit of merits, and the contestant serving the notice may fix his own time for the hearing putting it early or late to suit his own convenience. After the trial in the circuit court, an appeal lies to the supreme court.

If such a contest stays proceedings and renders the certificate of election of no effect pending the contest, it will have that effect when the contest is without merits, as well as when the contestant is in the right, and, as is above shown, as well when a third party contests as when the former incumbent is the contestant. Such a system would enable the former incumbent, by serving a notice that the election would be contested, or by procuring another to serve such notice, to exclude his successor from whatever of the office he could retain in his possession or personally control, to the embarrassment, if not to the preventing of the execution of the law, and to the subversion of order.

Such a construction of the statute would enable the former incumbent, by instituting a contest, whether in person or through the means of some other person who had received votes, to prolong his hold upon the office far into, if not through, the term of his successor. A rule which would to so great an extent subject the substantial rights of the public and of individuals to the caprices or honest errors of

one person, would present an anomaly in jurisprudence; and it is contrary to the express provisions of the statutes enacted to define the rights and duties of the outgoing and incoming sheriff.

A peremptory *mandamus* should be allowed.\*

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In the Circuit Court for Wasco County.—At Chambers, July, 1870.

JOHN DARRAGH, Plaintiff, v. JAMES M. BIRD, Defendant.†

**ELECTION CONTEST—PRECINCT.**—An elector should vote for county officers only in the precinct where he resides.

**PARDON.**—A pardon by the executive does not restore to a person convicted of felony the rights of an elector.‡

**RESIDENCE.**—Every person must have some fixed place of residence, or must labor under a disability that neither the law nor the courts can relieve. The mere passing in and out of a precinct will not establish a residence, although the person's occupation may be such as to make it inconvenient to vote at any other place, or if he has no fixed place of residence.

**CHALLENGE.**—Whenever a person is challenged by a legal voter, unless such challenge is withdrawn, he has no right, unsworn, to vote; nor can the judges receive such vote.

**CLOSING POLLS.**—After the hour for closing the polls, they cannot be opened again.

**RESIDENCE.**—An intention to remove immediately after the election does not amount to a change or loss of residence; there must be a union of act and intention.

**BURDEN OF PROOF.**—A party attacking a voter who has voted must show that he is disqualified.

**EMPLOYEES OF THE GOVERNMENT.**—Although residence cannot be gained or lost by reason of the person's presence or absence, while employed in the service of the United States, yet one so employed may change his residence.

**REJECTED VOTES.**—All rejected votes should appear on the poll book in the manner prescribed in sec. 18, p. 701, of the compiled laws.

**NATURALIZATION.**—One who has obtained his final citizen papers, becomes a voter at the time of being naturalized.

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\* Affirmed at the September term of 1870.

† By stipulation the cases of *Woods v. Fitzgerald and Wingate*; *Mays v. Fitzgerald and Wingate*, and *McFarland v. Holland*, were submitted on the same evidence.

‡ Reversed. See *Wood v. Fitzgerald et al. post*.

**CHALLENGE—PROOFS.**—Judges of election have no right to reject votes without any evidence that they are illegal, the voter not being challenged, or having taken the prescribed oath. If they desire other proofs beyond the voter's sworn statement, the evidence must be produced at the time he votes.

**ELECTION CONTEST—WILL OF MAJORITY.**—In a contest, the will of a majority of the legal voters, as expressed by their votes, must be carried into effect.

The facts appear in the opinion filed.

WHITTEN, J. This is an action brought to contest the election of the defendant to the office of sheriff of Wasco County, Oregon; to which office defendant claims to have been elected at a general election, held in said county on the sixth day of June, A. D. 1870. Plaintiff claims that he received a greater number of the legal votes at said election, for said office, than did the defendant, and is therefore entitled to said office. Plaintiff alleges that J. B. Blanpied, J. Liddy, L. Manning, T. H. Williams, W. C. Smith, J. S. Becky, and divers other persons, whose names are mentioned in plaintiff's complaint, voted at such election for the defendant for the office of sheriff in said county, and that such votes were illegal, and should not have been counted for the defendant; that said persons were not, at the date of their voting, *bona fide* residents of Wasco County or the precincts therein. Plaintiff further alleges that at the time and place of holding said election in said county, Peter Runey, R. Graham, Wm. McKay, and divers other persons whose names are set forth in the complaint of plaintiff, were qualified electors of Wasco County, and legally entitled to vote; that said persons did appear at the polls and offer their votes for this plaintiff for said office, and were prevented from voting at such election for this plaintiff, through the illegal acts of the judges of said election. Plaintiff claims that said illegal votes as received, recorded and counted for the defendant, should not have been counted for him, and that the votes which were offered for plaintiff, and by the judges of election rejected, should be counted for plaintiff; and that if the illegal votes which were received were deducted from the whole number of votes which de-



defendant received for said office, and the votes which said judges really rejected were added to plaintiff's vote for said office, it would entitle plaintiff to said office. Plaintiff claims that there is one more vote counted for defendant than should have been counted, and there is one vote which should have been counted for plaintiff that was not counted for him.

The defendant, for answer, denies that plaintiff is entitled to said office, or that he received a greater number of the legal votes at said election for such office than did the defendant. Defendant admits that J. B. Blanpied, J. Liddy, T. H. Williams and others voted at said election in said county for him for said office, but denies that said votes were illegal—denies that Peter Runey, William McKay and others were on said day of election prevented from voting for plaintiff through the illegal acts of the judges of said election; denies that such persons were at said date *bona fide* residents of Wasco County, or that they were legally entitled to vote; denies that said votes so offered should have been recorded and counted for the plaintiff. Defendant admits that there was one more vote counted for him than should have been, but denies that there was one less counted for plaintiff than should have been counted; and, for a further defense, defendant alleges that on the day of said election in said county, Jesse Snooks, E. Kinney, Wm. Kelly, Gustave Hines, and divers other persons named in defendant's answer, voted for plaintiff for said office, and that said persons were not, at the date of their so voting, *bona fide* residents of Wasco County, and the precincts therein, and that such votes were illegal and should not have been counted for the plaintiff. Defendant then sets up some votes which were rejected, and claims that such votes would have been thrown for defendant had they not been rejected, and that they should be counted for defendant. To this, plaintiff replies, making a complete denial of all the affirmative allegations set up in the answer.

Having thus briefly stated the issues in this case, they will be considered in the following order:

1st. The names of R. Henderson, E. Kinney and M.

Meng—Kinney voting for plaintiff, the other two for defendant—are submitted on an agreed statement. Henderson, it is admitted, was a resident of East Dalles precinct on the day of election, and that he voted in Sutton's precinct. Sec. 17 of Article II. of the constitution of Oregon, declares that "all qualified electors shall vote in the election precinct in the county where they may reside, for county officers," etc. Henderson's residence being admitted to be in East Dalles precinct on the sixth day of June, that being the day on which the election was held, he could not have legally voted in any other precinct for county officers, and there being no controversy as to where he did vote on that day, his vote for the office of sheriff, that being a county office, was illegal and should not be counted for the defendant. E. Kinney voted for plaintiff in East Dalles precinct and had declared his intentions to become a citizen of the United States less than one year immediately preceding the election. By reference to sec. 2, Art. II, of the constitution, it will be seen that to entitle a person of foreign birth to vote at an election, he must have declared his intention to become a citizen of the United States one year immediately preceding such election, conformably to the naturalization law. Kinney's case does not come within this provision, and he had no right to vote. M. Meng, who voted for defendant in East Dalles precinct, is a person, as appears by the agreed statement, who had been convicted of the crime of arson, and had been an inmate of the penitentiary of this state, and had been pardoned out before the expiration of his sentence. Sec. 14, Article V, of the constitution, gives to the governor of the state the power to grant pardons for offenses of this character. There can be but little doubt that the framers of the constitution, in giving this power to the governor of the state, were inclined to be as merciful toward the offender as would be consistent with public policy and public good. I cannot conceive it was the intention of those men to ever restore a person who had become so degenerate as to permit his passion to influence him to the commission of a crime involving both his civil and political condition to all the rights and privileges

he previously held when an upright man. It is an act of mercy, of which no one complains, that the constitution empowers the executive to pardon, to blot out the offense for which one is imprisoned and restore him to his civil rights; but in order to prevent those who had any pride in their political rights from the commission of crime, they are made to know and understand that if they do so far lose their self-respect and the respect of others, there is no power in our constitution, our laws, or in the governor of the state, that can restore them to their political rights. Meng was, on election day, politically dead and had no right to vote.

2d. G. H. Kimberlin, G. Masterson, Z. Smith, Wm. Bramlette, J. McMullin, W. A. Scroggins, A. A. Straw, L. Manning, F. Bird, T. H. Williams, J. Liddy, T. Brannan, T. Penny, W. C. Smith and J. S. Becky are the names of persons who voted at said election, and that said votes were recorded and counted for the defendant. It is claimed by the plaintiff that some of those persons voted out of the precinct in which they resided; that others are not residents of the county, as will appear as they are taken up in their order. Defendant claims for them, that, as they have no fixed residence, and as the constitution does not require a person to be a resident of the precinct any particular time, they have a right to say that the precinct in which they may chance to be on the day for election is their residence for the time being, and that they can vote.

In passing upon the right of these persons to vote, I lay this down as the law, that every person must have some fixed place of residence—must have a domicile, or else he must labor under a disability that neither the law nor the courts can relieve. Residence is a matter of intention and act—it may be gained and retained without expense or trouble; it cannot be lost by mere temporary absence. It is claimed that these are persons whose occupations are such that they cannot make it convenient to be at a certain place on the day of an election. Suppose they cannot, then they must content themselves by voting for just such officers as the law entitles them to do, and for none other. It is

true that irregularities without number have been permitted, or rather indulged in, and it is time they were corrected; and it makes no difference whether persons have voted ignorantly or willfully. If ignorantly, it is time they knew better; if willfully, it is time they were taught to obey and respect the law. For a person to claim that he has a right to vote wherever he may chance to be on election day, and that, if in a precinct other than the one he was in, he could claim the former as his residence, is not only contrary to law, but to common sense. All general laws are intended to confer the greatest good upon the greatest number, and to attempt by specialty to legislate, so as to meet individual wants and circumstances, would be preposterous. Apply these principles to the facts of the case, of those above mentioned, and what will be the legal conclusion? Kimberlin voted in Sutton's precinct. From the evidence, it is my opinion that Kimberlin had no such residence in Sutton's precinct, as would entitle him to vote for county officers—Kimberlin admitting that if he had been in the Dalles, or elsewhere on the day of election, he would have claimed that other place as his residence. The mere passing in and out of a precinct, will not establish a residence—it is nothing more than an occupancy; the person for the time being simply an inhabitant. George Masterson voted in Sutton's precinct, and his condition is very similar to that of Kimberlin, and the evidence about the same. His residence, if he had one at all, in my opinion, was in Antelope precinct—and he had no right to vote for county officers in the precinct in which he did. Z. Smith voted in Antelope precinct. The evidence shows that Smith came into Wasco County in February last, and then declared that he intended to vote in this county, and make this county his residence. This, I think, was sufficient to entitle Smith to vote, though he might have been temporarily absent afterwards, and that his vote was properly received and counted for defendant. William Bramlette voted in Sutton's precinct, and swore in his vote. This, of itself, is sufficient to entitle him to vote, until the contrary is shown. There is evidence of his having left some of his effects in said pre-

cinct, and that he had a contract in said precinct partially finished.

The evidence also shows that he had left the precinct, and only returned on the morning of the election, and then voted and again left. There is nothing in the evidence to show that he did not intend to return when he left the first time, and the presumption corroborated by the act of his coming back, is strong in his favor that he intended to come back, and his vote was rightly counted. J. McMullin voted in Fifteen Mile precinct; that the dividing line between Fifteen Mile and Tygh precincts is the dividing ridge between Fifteen Mile and Tygh creeks; that McMullin lives on waters of a stream that runs into Tygh creek, but that it is some distance north of the divide, Fifteen Mile creek being north of Tygh creek. The evidence shows that the stream on which McMullin lives runs through a gap in the divide between Fifteen Mile and Tygh, thus breaking the ridge which is the natural boundary between said precincts. I think the true rule in determining the boundary line between the two precincts where it is broken by a gap, as shown from the evidence, would be to draw a line from one point of the ridge to the other across the gap. To do this would leave McMullin north of the ridge, and consequently in Fifteen Mile precinct. From the facts here shown, McMullin's vote was properly received and counted in that precinct for defendant. W. A. Scroggins, L. Manning and A. A. Straw voted in John Day precinct. There is no doubt in my mind but that Scroggins, Manning and Straw were, at the date of their voting, residents in Antelope precinct, and that they had no legal right to vote in any other precinct for county officers, and such votes should not be counted for defendant. From the evidence, I have no doubt that Frank Bird was, at the time he voted, a resident in John Day precinct, and that his vote was properly recorded for defendant. T. H. Williams, a boatman, with no fixed residence, voted in Mosier's precinct—a case in every way similar to Kimberlin's. J. Liddy voted in West Dalles precinct; had removed to Portland with his family in last March, leaving no traces of residence whatever behind him;

came to West Dalles in the afternoon of day of election, voted and returned to Portland next day. I cannot think that Liddy had any residence in Wasco County on the day of election; certainly he had none in law, and if not, he had no legal right to vote, nor should it be counted for the defendant. T. Brannan and T. Penny voted in West Dalles precinct. The evidence as to their residence is somewhat unsatisfactory. Their votes are attacked by plaintiff, and it devolves upon him to show affirmatives that they had no right to vote. There is doubt in my mind whether they were *bona fide* residents of Wasco County on the sixth of June; and I think there is sufficient reason to warrant me in rejecting them. W. C. Smith and J. S. Becky voted in the West Dalles precinct. From the evidence, there is no doubt but at the date of their voting they were residing in Grant County, and were here temporarily purchasing goods for transportation. It is my opinion they had no right to vote. J. B. Blanpied voted in East Dalles precinct. Whether Blanpied had resided in the state six months next preceding the sixth day of June last, or not, will make no difference in determining his right to vote, as other facts plainly settle this question. But were this the only evidence upon which to determine it, I should, from Blanpied's own statement, have no hesitancy in deciding the case. When Blanpied offered his vote, he was challenged by a legal voter. That challenge was insisted on, and never withdrawn, Blanpied positively declaring he would not be sworn, and the judges as positively refusing to swear him. Under these circumstances he voted. The law so plainly settles this question, that to say anything further than that Blanpied had no right whatever to vote would be superfluous. (Code, p. 700, sec. 13)—Whenever a person is challenged by a legal voter, unless such challenge be withdrawn, he has no right, unsworn, to vote; nor can the judges, without disregarding the law and their own obligation, receive such vote. The law then gives no discretion in the matter—they must reject it.

R. Myers voted in West Dalles precinct. There is no question raised as to Myer's qualifications as a voter. It is claimed that he voted after the polls had been closed. The

law fixes the time for opening and closing the polls. (Code, p. 699, sec. 11.) Myers knew what time the polls closed, and if for any cause he stayed away until they were closed, it was his own fault. The polls could not be opened again for his accommodation. In this case the evidence is somewhat conflicting as to whether the polls had been ordered closed at the time Myers voted, or not. After a careful examination of the testimony, it is my opinion that the polls were closed before Myers voted—the evidence greatly preponderates in favor of this opinion, and comes from witnesses who are least liable to be influenced by their prejudices.

For the defense it is claimed that H. Gulick, C. Cruver, C. Dunlap, George and Isaac Chapman, G. Hines, C. Fales, Wm. Murphy, T. Shelly, J. Cunningham, A. Strong and J. M. Thompson have not resided in the state or county the necessary length of time prior to the election to entitle them to vote. It is my opinion that, from the acts and declarations of the parties, except Thompson, as shown by the evidence, they were on the day of election *bona fide* residents of this state and county, and as such were entitled to vote—G. Hines is here in the capacity of a minister of the Gospel, and as such had been here about eight months prior to the day of election. I will make no comment in his case. There can be no doubt but that he had a right to make the Dalles his place of residence, and to vote there, if he chose to do so. C. Fales—there is but little objection made as to him. He no doubt had a right to vote. Murphy had been temporarily absent for his health. He swears he intended to return when he went away; and the fact that he did return is the very best evidence of his intention to do so. His residence was not affected by his temporary absence. He had a right to vote. T. Shelly came here as a teacher; came from one of the counties west of the Cascades. Soon after his arrival he declared his intention to make this his residence—so declares it now—was in the county more than ninety days prior to the day of election, and was clearly entitled to vote. Cunningham had been in the state and county about two years. It is said that because he had a family

in New York he could not gain a residence here. This position is not correct. Suppose a man leaves his family in California and comes to Oregon, seeking for a place to which to remove his family. He is here six months, has made arrangements for the removal of his family hither. An election is held, his family has not arrived, may never arrive. Circumstances that he could not foresee have changed his intentions; he sees a plan where he can better his condition—may have made up his mind to remove thither. In the meantime an election is held. Would the fact that he had made up his mind to remove to some other place deny him the right to vote? Certainly not. Such circumstances may cause any of us to change our residence, for we will all do so when we think we can better our condition, and without affecting our right to vote. Strong stands on his own evidence; he voted, and the presumption is that he had a right to vote. He swears this was his residence. This, with the fact that the party attacking the legality of his vote, has failed to show anything to the contrary, is satisfactory to my mind that he had a right to vote. Gulick, Dunlap, the Chapmans and Cruver, it is said, removed from Washington Territory, or at least that the two Chapmans and Dunlap did, and have not been in the state the required time to entitle them to vote. I think the evidence shows satisfactorily that they have resided in the state more than six months prior to the sixth day of June last, and were entitled to their votes. As to Gulick, Cruver and Thompson, it is claimed that on the day of election they were residents of Washington territory, and therefore had no right to vote. As to the two first, I have no hesitancy in declaring the legality of their votes. I have serious doubts whether it was Thompson's intention, when he moved across the river, into Washington territory, to any longer claim Oregon as his residence, and the evidence being unsatisfactory, I shall, for the purpose of this action, refuse to count it for plaintiff.

I. L. Curry, J. Snooks, F. Zeller, A. J. Brown and C. Sergeant, it is claimed, are persons who voted out of the precinct in which they resided. There is very little difficulty in deciding as to Snooks, Zeller, Sergeant and Curry.



Sergeant voted in East Dalles precinct. The evidence shows that on the sixth day of June, the day of election, he resided in that precinct, and his vote should stand.

Snooks and Zeller both voted in East Dalles. The evidence shows their residence on that day to be in West Dalles. Their votes should not have been recorded for any of the county officers. Curry voted in Antelope precinct. I think from the evidence his residence is in Sutton's precinct, where he should have voted. Brown is one of those cases where a person slept in one precinct and boarded in another; but, in giving his testimony as to his residence, he says "I think where Thomas Smith lives is my residence." Smith lives in West Dalles; Brown voted in East Dalles. If Brown was in doubt as to which precinct he resided in, he should have informed himself in time—it is too late now. I think from Brown's own evidence he should have voted in West Dalles precinct. The rule which I have applied to the case of Strong and others—that the party attacking a voter must show in what respect he is disqualified, or the vote must remain undisturbed, will apply to the case of M. Cain, who voted in Fifteen Mile precinct, and to C. Gonzales, who voted in Tygh precinct, and to La Fraties and Hansel and Huerta, who voted in East Dalles precinct. B. P. Cardwell, Jacob Fritz, and others of like circumstances, it is claimed, are disqualified from voting, for the reason that they are in government employ. Many have fallen into this error for the reason that they make no distinction between an employee of the government and a soldier, seaman or marine. Sec. 4 of article II. of the constitution says: "For the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States or of this state." Sec. 5 of the same article says: "No soldier, etc., shall be deemed to have acquired a residence in the state in consequence of having been stationed within the same, nor shall he have the right to vote." The question of residence being one of act and intention, the framers of the constitution left the matter entirely to the discretion of the parties themselves. They say we will

neither enlarge or restrict the right of persons in this respect, but leave it with them to elect as to where they will claim their residence. The difference between sections 4 and 5 is this: In the 4th the language is "for the purpose of voting," etc., evidently intending that the person himself should make the place of his choice his residence. Sec. 5 is: "No soldier," etc., "shall be deemed," etc., giving to him no discretion in the matter. *People ex rel. E. R. Budá v. W. Holman* (28 Cal. 123) is a case in point, and very similar. Suppose that a person residing in Wasco County were to go to Salem, in Marion County, to work on a state building, and were to remain there two or three years, would it be contended that he had acquired no residence in that county, because he had been an employee of the state. The fact that he is such employee does not deprive him of his right to elect whether he will retain residence in Wasco County, or whether he will abandon it and adopt another, and the principle is precisely the same whether he be an employee of the state or of the United States. B. P. Cardwell and Jacob Fritz had as much right to vote the state and county ticket on the 6th day of June for state and county offices as the oldest residents of Wasco County had. Another question arises, which may as well be settled here as elsewhere. Code, p. 700, sec. 14, says: "If any person so offering to vote shall take such oath, his vote shall be received, unless it shall be proved by evidence, satisfactory to a majority of the judges, that he does not possess the qualifications of an elector, in which case a majority of said judges are authorized to reject such vote." The only point to be determined here is, must a person, whose vote is rejected for any cause, be entered on the poll books as such? There are some grounds for the opinion, that a rejected vote need only be entered on the poll book, with the names of the persons for whom he wishes to vote, when he is challenged for disloyalty, as will be seen by reference to Code, p. 701, sec. 16, viz: that if a person's vote is challenged for the cause mentioned in sec. 13, and he takes the oath required, and is then rejected, that his vote need not be recorded, etc. I think that, for the protection of the voter,

as well as the person for whom he wishes to vote, the better opinion is, that all rejected votes should appear on the poll book in the manner prescribed in sec. 18, p. 701 of the Code of Oregon. Any other rule than this would give to the judges of election the power of electing to office any person they might prefer, by rejecting the votes of all those who were opposed to the candidate of their choice. Unless some record be made of rejected votes, they would be entirely lost to the person for whom they were intended, as will appear from an examination of that class which is claimed in this action as legal voters and were prevented from voting through the misconduct and illegal acts of the judges. In passing upon this point, now raised, I cannot, from the law as understood; and to which I shall refer, consider those rejected votes in a manner that will change the result of said election; and it makes no difference whether they were properly or improperly rejected. The only relief I can afford is to carry into effect the express will of a majority of the legal voters, as indicated by their votes. (Code, p. 707, sec. 41.) In a contest, the only thing that can be considered by a court or judge is the illegal votes. There is nothing which authorizes a court or judge to open up the polls, and count, for one of the contestants, votes that have been rejected and left unrecorded by the judges of election. *Webster v. Brynes* (84 Cal. 273) is a case in point. Courts and judges are powerless in a case of this kind, yet I deem it but justice to those who were improperly rejected, for there can be no question but that some of those offering to vote had a legal right to vote, to refer to some plain provisions of law, that the legal voters may in future be protected from both ignorance and fraud—for it is a lamentable fact that our elections are becoming corrupt, and the proud boast of the *right of suffrage* of American citizens an empty sound. Our elections should be conducted honestly, openly and fairly. It is the foundation of a republican government, and should be kept pure—and yet men dare to tamper with this sacred right with impunity. All good men desire that this right should be kept inviolate. The code, page 696-707 (inclusive), declares in unmistakable language,

the manner of holding and conducting elections, and the legal rights of electors. Under the provisions of sec. 13, if a man, who has solemnly sworn to carry into effect such provision, can quiet his conscience by saying he did not intend to declare to a person, who offered to vote and was challenged, the qualifications of an elector, unless asked to do so by such voter, he should not be allowed to sit on an election board in any capacity.

H. Crellish, E. Bernard, E. A. Willis and P. McLaughlin, submitted, on agreed statement, voted for Darragh for sheriff, and their votes afterwards rejected all persons of foreign birth, no question as to the time they had resided in Wasco County. McLaughlin declared his intentions to become a citizen of the United States in 1851. Section 2 of Art. II of the constitution is sufficient as to his case; his vote should be counted. Crellish, Bernard and Willis obtained their final citizen papers less than six months prior to the election. I cannot see why a person of foreign birth, having proper residence, upon obtaining his final citizen papers, is not as much entitled to vote the day after he has obtained them, as the natural-born subject would be who attains his majority one day before an election. Their votes should be counted. R. Graham, D. L. Reynolds, J. S. Morgan, P. Runey, J. Bamford, A. Biddle, J. Sullivan, J. G. Paddleford, W. Tarrant, and others. It is unnecessary to discuss this class further, as reference has already been made to them, it appearing so palpable that no one need be mistaken unless he desired it. There is not a shadow of a doubt of the right of those persons to vote.

Wm. McKay, Battise, the Delords, Russi, and others of mixed blood, of whose legal right to vote I have some doubts, I will not decide (since it does not affect the result in this case) as to whether their votes were properly or improperly excluded.

Having thus carefully considered this case, I find:

That the judges of the election had no right to record votes upon the poll books and then refuse to count them, there being no evidence that they were illegal.

That if judges of the election desire other proof of the

competency of a voter, beyond his sworn statements, the evidence must be produced at the time he votes. An elector must have some precinct as a residence in preference to all others, to enable him to vote for county officers, and he must vote in such precinct. A person refusing to be sworn, when challenged by a legal voter, has no right to vote.

A person offering to vote, and being ready to take the oath prescribed by law, his vote should be received, unless it appears that he does not possess the qualification of a voter, and even then must be recorded as a rejected vote.

A person of foreign birth is entitled to vote from and after the date of his final citizen papers, having proper residence.

An employee of the government may, if he choose to do so, acquire a residence the same as any other citizen, and when so acquired, has a right to vote.

That in a contest the will of a majority of the legal voters must be carried into effect, as expressed by their votes. That, of the legal votes for the office of sheriff—John Darragh, 296—the votes of H. Crellish, McLaughlin, Willis, Bernard and Fritz, rejected by the judges, are now counted for said Darragh, and the votes of A. J. Brown, J. Snooks, F. Zeller, J. L. Curry and E. Kinney, having been counted by the judges for him, are here rejected. J. M. Bird received for said office 313 legal votes. The votes of J. Liddy, G. H. Kimberlin, G. Masterson, W. A. Scroggins, L. Manning, H. A. Straw, T. H. Williams, T. Brannan, T. Penny, W. C. Smith, J. L. Becky, M. Meng, J. B. Blanpied and R. Myers, counted for said Bird, are here rejected. Bird having received a greater number of legal votes for said office than did Darragh, it is hereby ordered and adjudged that he have and hold said office, and that he have judgment against the plaintiff for his costs and disbursements.

It is further ordered and declared that the costs and disbursements in this case be taxed at one fifth of the whole amount in all the five contested cases submitted. That in the case of *C. McFarland v. M. Holland*, contest for the county clerk, submitted on stipulation that the filings and

proofs in the case of *Darragh v. Bird*, stand for the pleadings and proofs in this case. Of the legal votes, C. McFarland received for said office, 303; H. Crellish, E. Bernard, E. A. Willis, J. Fritz and P. McLaughlin, votes which the judges of election refused to count for plaintiff, are here counted, and the votes of A. J. Brown, E. Kinney, J. Snooks, F. Zeller and J. L. Curry, counted for plaintiff, are here rejected. That of the legal votes cast, A. Holland receives for said office, 304; the votes of R. Henderson, G. Masterson, G. H. Kimberlin, W. A. Scroggins, L. Manning, A. A. Straw, T. H. Williams, J. Liddy, T. Brannan, T. Penney, W. C. Smith, J. S. Becky, M. Meng, J. B. Blanpied and R. Myers, were counted for defendant, and are here rejected. That Holland having received a greater number of the legal votes for said office than did McFarland, it is therefore ordered and adjudged that he have and hold the same, and that he have judgment against plaintiff for his costs and disbursements. It is further ordered and decreed that the costs and disbursements in this case to be taxed, shall be the one fifth of all the costs and disbursements in all the five contested cases submitted.

That in the case of *R. Grant v. Geo. Ruch*, contest for the office of county treasurer of Wasco County, Oregon; stipulations the same as in the case of *McFarland v. Holland*, of the legal votes cast, Grant received 296; that the votes of R. Henderson, G. Kimberlin, G. Masterson, W. A. Scroggins, L. Manning, A. A. Straw, T. H. Williams, J. Liddy, T. Brannan, T. Penney, W. C. Smith, J. S. Becky, M. Meng, J. B. Blanpied and R. Myers, were counted by the judges of election for plaintiff, and are here rejected; and that George Ruch received for said office of the legal votes, 311; the votes of H. Crellish, E. Bernard, E. A. Willis, P. M. McLaughlin and J. Fritz, were rejected by the judges, and are here counted for Ruch, and the votes of A. J. Brown, J. L. Curry, J. Snooks, F. Zeller and L. Kinney, counted for defendant, are here rejected. Ruch having received a greater number of legal votes for said office than did Grant, it is ordered and adjudged that he have and hold said office, and that he have judgment against said plaintiff

for his costs and disbursements. It is further ordered and decreed that the costs and disbursements to be taxed in this case, be one fifth of all the costs and disbursements in the five contested cases submitted.

In the case of *E. Wood v. Fitzgerald and Wingate*, contest for the office of county commissioner—stipulations the same as in the case of *McFarland and Holland*. Wood received of the legal votes for the said office, 311—the votes of H. Crellish, E. Bernard, E. A. Willis, J. Fritz and P. McLaughlin, not counted for Wood by the judge of election, are here counted for him, and the votes of A. J. Brown, J. L. Curry, J. Snooks, F. Zeller and E. Kinney, counted for him, are here rejected. That of the legal votes for said office, E. P. Fitzgerald received 301, and E. Wingate, 298—the votes of R. Henderson, G. H. Kimberlin, G. Masterson, W. A. Scroggins, L. Manning, A. A. Straw, T. H. Williams, J. Liddy, T. Brannan, T. Penney, W. C. Smith, J. S. Beck, M. Meng, J. B. Blanpied and R. Myers, counted for defendants for said office, by the judges of election, are here rejected. Wood having received a greater number of votes for said office than Fitzgerald or Wingate, and being duly elected to said office, it is therefore ordered and adjudged that he have and hold said office, and that the clerk of Wasco County issue to the said E. Wood a certificate of his election within ten days from the filing hereof, and that the certificates of election to said office heretofore issued to E. P. Fitzgerald and E. Wingate be each declared null and void as against the right of said Wood to said office, and that he have and recover from said defendants his costs and disbursements herein, and that the same be adjudged to be one fifth of all costs and disbursements in the five contested cases submitted.

In the case of *R. Mays v. E. P. Fitzgerald and E. Wingate*, contest for the office of county commissioner—stipulations the same as in the case of *McFarland v. Holland*, of the legal voters for the said office, Robert Mays received 303—the votes of H. Crellish, E. Barnard, E. A. Willis, J. Fritz and P. McLaughlin, not counted for plaintiff for said office, are here counted; and the votes of J. Snooks, F. Zellter, J.

L. Curry, E. Kinney and A. J. Brown, counted by the judges for plaintiff, are here rejected—that E. P. Fitzgerald received of the legal votes for said office 301, and E. Wingate received 298—the votes of R. Henderson, G. H. Kimberlin, G. Masterson, W. A. Scroggins, D. Manning, A. A. Straw, T. H. Williams, J. Liddy, T. Brannan, T. Penny, W. C. Smith, J. S. Becky, M. Meng, J. B. Blanpied and R. Myers, counted for Fitzgerald and Wingate, for said office, are here rejected. Mays having received a greater number of the legal votes than did Fitzgerald or Wingate, was duly elected to said office. It is therefore ordered and adjudged that he have and hold said office of commissioner, and that the clerk of said county of Wasco issue a certificate of election to the said Mays within ten days from the filing hereof—and that the certificates of election to said office heretofore issued to E. P. Fitzgerald and E. Wingate be each declared null and void as against the rights of said Mays to said office—and that he have and recover from said defendants his costs and disbursements herein, and that the same be adjudged to be one fifth of all the costs and disbursements in the five contested cases submitted.

*Wilson*, for plaintiffs.

*Hummason & Gates*, for defendants.\*

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Circuit Court for the County of Baker.—Vacation after October Term, 1870.

PAUL L. SHUMWAY AND BRO., Petitioners, v. THE  
COUNTY OF BAKER, Respondent.

**ASSESSMENT—COUNTY COURT.**—The county court has no jurisdiction or authority to correct errors made by the assessor in the valuation of property.

**NOTE.**—The proper tribunal by which such corrections are made is composed of the assessor and county clerk.

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\* This case was taken to the supreme court on appeal. See *Wood v. Fitzgerald et al. post.*



DURING the regular October term of this court for the year 1870, "Paul L. Shumway and Bro." submitted their verified petition, praying for a writ of review to the county court of Baker County, to correct alleged errors of said court in refusing, upon motion and affidavits of petitioners, to correct the assessment of their taxable property, made by the county assessor in August last. The prayer of said petition was granted, and a writ issued in due form to said court, which writ was duly returned, with transcript of the proceedings and record properly certified. Thereupon a motion was made by defendant's counsel to quash and dismiss the writ. The motion was resisted, and after argument, the cause was taken under advisement, etc.

*W. B. Lasswell*, district attorney, and *I. D. Haines*, for the motion.

*D. M. McKinney, contra.*

MCArTHUR, J. From the record certified up to this court the following facts appear: That on August 7, 1870, the assessor of Baker County, in the discharge of the duties of his office, required one of the copartners of the firm of Paul L. Shumway & Bro. to furnish him with a verified list of all the real and personal property of said firm subject to taxation in said county; that on August 9, said list was furnished by Paul L. Shumway & Bro., with their own estimate of the value of their property. It appears therefrom that the property returned was valued at \$6,160.00, and that their indebtedness was \$5,954.70, leaving \$270.30 as the amount of their taxable property; that on August 12, the assessor assessed said firm in the sum of \$10,270.30, and his reasons for so doing appear in marginal notes upon the statement returned by the petitioners: that on September 6, at a regular term of the county court of Baker county, the petitioners appearing by counsel, moved the said court, sitting as commissioners, to correct said assessment by reducing the same ten thousand dollars, the said motion being based on affidavits; that counsel appeared for the county, and resisted said motion, and after hearing the arguments of

counsel, the court dismissed the motion, and all proceedings in said matter, for the reason that it had no jurisdiction to hear and determine the same, and this judgment of the county court the petitioners charge as error.

For the purposes of this case, it is unnecessary to consider the contents of the affidavits accompanying the said motion, or the statement of the assessor, written upon the schedule of petitioners' property.

Two points are raised in that portion of the petition which may be regarded as the assignment of errors:

*First.* That the county court erred in holding that it had no jurisdiction of the subject matter of the application of the petitioners, and in dismissing the same; and

*Second.* That the county court erred in not striking from the assessment roll ten thousand dollars charged to the petitioners by the assessor, in addition to the amount of their taxable property as claimed and returned by them.

As the second is embraced within the first they will be considered conjointly. Since the decision of the supreme court of this state in the case of *The Oregon Steam Navigation Company v. Wasco County*, 2 Or. 206 *et seq.*, there has been but little room left for controversy upon the propositions of law arising in cases of the nature of the one now under consideration. In that case it was held that "in section 24, chapter 53, page 900, of the code, the legislature gave the county court its authority over the assessment roll. Change in valuation is not hinted at. The court has power to correct the roll; that does not include the power to change assessments, for the words change and correct are not equivalent in meaning. It may change descriptions of property, and may make any other alterations or corrections in such roll as it shall deem necessary to make the same conform to the requirements of this chapter (53)." What does chapter 53 authorize or require? Title 1, declares what property is taxable; title 2, where and to whom such property is assessable; title 3, manner of making assessments; and in section 15 of that title, is the only reference to appraisal, and then it requires the assessor 'to appraise it (the taxable property) according to the provisions of the

statutes relating thereto,' evidently referring to some other statute where such manner was indicated, and to none other than chapter 2, page 628, of the code. That valuation was an act fixed elsewhere, it was not one of the requirements of chapter 53, but was one of chapter 2 alone. When made, it is final, unless provision is expressly made somewhere for its revision." The law has provided a time, a place and a tribunal for the revision of assessments, and the correction of errors in the valuation of property. Section 4, chapter 2, pages 628-9, of the code, provides that "each assessor shall give three weeks public notice in some newspaper, printed in his respective county; if there be no such newspaper, then in some newspaper in general circulation in his county, or by posting up notices in six conspicuous places in his county, setting forth that, on the last Monday of August, the assessor will attend at the office of the county clerk of his county, and with the assistance of said clerk will publicly examine the assessment rolls, and correct all errors in *valuations*, descriptions or qualities of lands, lots or other property, and it shall be the duty of persons interested, to appear at the time and place appointed, and if it shall appear during such examination that there are any lands, lots, or other property assessed twice, or assessed beyond their actual value, or assessed in the name of a person not the owner thereof, or any lands, lots, or other property not assessed, the county clerk and assessor shall make the proper corrections." In view of this provision of the code the supreme court, in the case above cited, expressly declared that "the only authority for revision in *valuation* we deem is vested in the assessor and clerk, on the last Monday in August, at the clerk's office." Then and there any one feeling aggrieved by the acts of the assessor in the appraisal or valuation of his or her property, must be and appear, and take such steps as may lead to a correction of all errors of that character. If the aggrieved party fails to appear before this tribunal,—for it is a tribunal, and the only one known to the law as having original jurisdiction and authority to correct errors made by the assessor in the valuation of property, and declared to be such in *Rhea v. Umatilla County*, 2 Or. 300,—

then he or she must suffer the penalty of his or her own neglect, and be obliged to acquiesce in the statement of the valuation of his or her property as returned by the assessor. Errors committed by the clerk and assessor in revising the assessment rolls may be reviewed by this court, as was also held in *Rhea v. Umatilla County*.

From the facts presented by the record, and the law as enacted by the legislature and interpreted by the supreme court, the only conclusion I can reach is, that the county court has no jurisdiction or authority to correct errors made by the assessor in the valuation of property. Hence the county court of Baker county, in so deciding, and in dismissing from its consideration the proceedings instituted by petitioners, did not err. It follows that defendant's motion should prevail and the writ be dismissed with costs.

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Circuit Court for the County of Union—Vacation after November Term, 1870.

JAMES M. GRAYDON, Plaintiff, v. DOUGLAS THOMAS and CASWELL LAXTON, Defendants.

**DEFAULT—ENTRY OF JUDGMENT BY THE CLERK.**—In cases falling within the provisions of sec. 246 of the code, the clerk has power to enter judgments upon defaults, without judicial direction or intervention.

**IDEM.**—In so doing he exercises ministerial and not judicial functions.

**IDEM—INFORMALITIES.**—Judgments when so entered, will not be opened up, set aside, or disregarded because of slight informalities.

**THE** complaint filed October 18, 1870, alleges that defendants are partners, that as such they purchased from plaintiff one wagon on May 3, 1870; that they agreed to pay plaintiff therefor one hundred and sixty dollars (\$160), and that they failed to do so. Summons and copy of complaint were duly served by proper officer October 19, 1870, in Union County, Oregon, upon defendant Laxton. On November 1, 1870, the clerk of the circuit court, upon application of plaintiff's attorney, entered a default against defendant, he having

failed to answer, and thereupon entered a judgment in favor of the plaintiff for \$160 and costs, and ordered that execution issue therefor against the joint property of both the defendants, and the separate property of the defendant Laxton. November 7, and during term time defendants appeared by counsel and filed motion to open up said judgment, for the reason that the clerk had no authority to enter the same.

*Baker & Lichtenhaler, for the motion.*

*J. H. Slater, contra.*

MCARTHUR, J. In the argument upon the motion, the defendants' counsel urged *generally*, that the clerk had no legal authority to enter a judgment upon a default, for that in so doing he usurped the function of the court or judge, and particularly, that if he had such authority, he erred in entering a judgment herein, for the reason, that as the complaint alleged a joint and not a several liability on the part of the defendants, and the record disclosed the fact that one only of the defendants had been served with summons, a judgment entered upon default against the party served only is void. In deciding upon the first point raised I have carefully considered the premises, and am of opinion that the rule laid down in the case of *The Providence Tool Co. v. Prader*, (32 Cal. 634) should prevail. In that case, upon a statute similar to our own, it was held that the clerk, in entering default, exercises no judicial functions, but acts merely in a ministerial capacity. This ruling affirmed the decision in *Kelly v. Van Austin* (17 Cal. 565), and also that in *Wilson v. Cleveland* (30 Cal. 198). In pronouncing the opinion in the case first cited, the chief justice used the following language, the legal and logical force of which will not, at least after due reflection, be denied: "It is sometimes difficult to determine whether an act is judicial or ministerial. Judging, and thereupon determining in a particular way is, in a general sense, the exercise of a faculty that is of a judicial quality; and, in the largest sense of the term, all determinations that are the result of judgment

are judicial. But the term, when applied to proceedings pertaining to a court of justice, is limited within a less extended scope, and those acts are denominated judicial which properly pertain to the judge alone in the exercise of his office. If the defendants fail to answer within the time required by the statute (and expressed in the summons) the clerk, upon application of the plaintiff, is required to enter the defendant's default, and thereupon enter a judgment against him for the amount specified in the summons." In such cases the clerk must ascertain from the complaint that the action is one specified in sec. 246 of the code of civil procedure—for money or damages only—and further, he must ascertain when and where the summons was served, and whether the defendant be in default. The laws of this state have invested in the clerk the authority to determine these matters, as the necessity of a determination of them is a condition precedent to the exercise of the further power reposed in him by law to enter the default, and thereupon to enter a final judgment for the amount prayed for in the complaint, and specifically demanded in the summons. These duties of the clerk falling within the letter and spirit of the law, have generally been denominated ministerial in their nature, as contradistinguished from judicial. (Vide cases above cited and also *Wallace v. Eldredge*, 27 Cal. 497; *Glidden v. Packard*, 28 Cal. 654; and *Bond v. Pacheco*, 30 Cal. 533.) When a party is served with a summons and complaint and makes default (which by his own act he could have prevented), he virtually although not technically, makes confession of judgment. Especially is this the case in actions for the recovery of damages or money only. The clerk being the arm of the court, and an officer in whom the law reposes certain defined powers, in entering a default and a judgment thereon, acts simply as the agent of the law in placing upon the records of the court a judgment already declared to be such by statute. Hence the conclusion arrived at upon the first point presented is, that in cases falling within the statute (vide civil code, sec. 246) the clerk, as such, has power to enter a judgment upon a default

without judicial direction or intervention, and that in so doing he exercises ministerial and not judicial functions.

As to the other point raised in the argument, I am of opinion, that, inasmuch as the record discloses the fact that the defendants are jointly, and not severally liable, the proper course for the court or the clerk, acting in consonance with, and obedience to sec. 59, subdivision 1, of the code of civil procedure, was to enter such a judgment as could be enforced against the joint property of both the defendants, and the separate property of the defendant served. It matters very little as to the precise language used by the clerk in making the journal entry of a judgment, provided the various steps taken in a case clearly appear, and provided also that so much of the judgment entry as authorizes the issuance of an execution, or other process, is clearly and distinctly set forth without ambiguity or doubt. In such cases, though slight informalities appear in other parts of the judgment entry, it should not be opened up, set aside, or disregarded. The entry in this case comes within this rule, and is conformable to the statutes. It follows that the motion should be denied.

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Circuit Court for Multnomah County, November Term, 1870.

**B. WELLMAN and J. M. PECK v. J. B. HARKER.**

**APPOINTMENT OF A RECEIVER.**—The court refused to appoint a receiver, where it was not shown that there was danger that the partnership property will be ultimately lost.

**INJUNCTION.**—Where a motion for an injunction is submitted on complaint and answer, and the answer denies all the equities of the bill, the injunction should not be granted.

The allegations of the complaint are, that about February 1st, 1867, the plaintiffs and the defendant entered into a partnership, under the name and style of "Harker & Co.," in a general mercantile business at Portland, Oregon, for a period of one year. That they carried on said business for the said year, when, by a further agreement, they continued the time of the duration of the partnership, until the end of

1868, at which time the regular business of said firm ceased, by mutual consent of parties. The terms of the partnership were, that the plaintiffs were to furnish and own one half of the capital stock, and the defendant the other half, and the profits and losses were to be shared in the same proportion. The plaintiffs put into the firm \$14,493.22, and the defendant about the same amount. The defendant was the agent of the firm, and managed the business at Portland, made sales, received the money, and kept the books.

The defendant drew out of the firm, and appropriated to his own use, \$8,377.40. The firm is indebted to third parties to about \$12,000.

"The defendant has pretended to control the books, accounts, assets, and property of the firm, and has collected, and still is collecting, large sums of money due to the firm. And though often requested by the plaintiffs to *settle and adjust the matters of said firm*, as between the members thereof, and to pay back to these plaintiffs the capital they put into it, or allow them the use of their share of the property belonging to it, yet the said J. B. Harker has refused to settle and adjust said partnership accounts, and *refused to collect* from the firms and establishments in which he has an interest, outside of the firm of Harker & Co., the large amount of money due to said firm of Harker & Co., and refuses to pay back the large sums he has drawn out of said firm and applied to his own use."

That there are large sums due to the firm. That the defendant is using money belonging to the firm in outside speculations attended with great risk, to-wit: among other things, in a mill. That the defendant is indebted to plaintiffs \$16,000.

It is also stated in the complaint, that the defendant is interested in other firms named, and that he "wrongfully drew out large sums from the firm" for the use of other firms in which the defendant was interested, and allowed said firms to become indebted to Harker & Co., to-wit: Bushbee, Livermore & Co. to \$16,207.04; Snodgrass & Co., \$8,610.64; Excelsior Mills, \$1,631.88.



The plaintiffs pray for an injunction, the appointment of a receiver, the appointment of a referee, and for general relief.

An answer is filed, which directly meets and denies the allegation that defendant has received and appropriated to his own use money of the firm; denies that the defendant has control of the books and the accounts of the firm, and denies that the defendant has refused to account and settle. And avers that the credit given to the various firms mentioned in the complaint was given with the plaintiffs' knowledge and consent.

The plaintiffs demur to the answer, on the ground that it does not state facts to constitute a defense. On this state of the pleadings, the case came on to be heard on the motion of the plaintiffs for an injunction and for the appointment of a receiver.

*Logan, Shattuck & Killen, for the plaintiffs.*

*Mitchell & Dolph, for the defendant.*

UPRON, J., announced the following decision:

It does not appear from the complaint whether the plaintiffs have made any effort to have the demands due to the firm of Harker & Co. collected; nor that the defendant has neglected any duty in that respect. There is therefore no foundation laid for appointing a receiver in order to expedite the collections. To justify appointing a receiver or granting an injunction, because of the funds charged to be in the defendant's hands, it should appear that there is danger that the money will be ultimately lost to the plaintiffs. It is not alleged that the defendant is insolvent, nor does it appear affirmatively by the complaint that there is any danger of ultimate loss to the plaintiff. The answer denies that the defendant "has applied to his own use any sums drawn out of said firm," and alleges that the crediting the other firms mentioned, was done with the knowledge and consent of the plaintiffs.

I think there is not good reason shown for an injunction or for the appointment of a receiver. Where the motion is

submitted on complaint and answer, and the answer denies all the equities of the bill, an injunction should not be granted.

The answer I think denies all the equities attempted to be set up in the complaint, unless it be the charge that the defendant had allowed certain firms in which he is interested to become indebted to the firm of Harker & Co. In regard to that matter, it does not appear that those firms are insolvent, nor that this defendant has been requested to collect the money from them; and the answer avers that the credit was given to them with the plaintiffs' approval. I do not think a sufficient cause is shown, either for appointing a receiver or granting an injunction.

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Circuit Court for Multnomah County, November Term, 1870.

HENRY LUDWICK v. JOSEPH WATSON.

**PROMISE TO PAY THE DEBT OF ANOTHER.**—Where a promise to pay a debt is founded on a new and original consideration of benefit to the promisor, the subsisting liability of the original debtor is no objection to the recovery.

The plaintiff alleges that he had become an accommodation endorser for one Huguinin, on a note of \$100, which he paid under compulsion and was about to commence an action against Huguinin, and to sue out an attachment against his goods to recover the amount. And was about to attach a certain restaurant which the defendant, Watson, and said Huguinin owned and claimed. "That thereupon, in consideration that said plaintiff would forbear to attach said restaurant, said Watson promised and agreed to pay said sum. That thereupon said plaintiff gave up all claim against said Huguinin, and has looked to said Watson alone for payment."

He alleges a demand and failure to pay.

The answer, under information and belief, denies the allegations in regard to the note, denies that the defendant

was interested in the restaurant, and in the same manner denies that the plaintiff was about to attach the property. The defendant also "denies that he has agreed to pay to the said plaintiff the sum of \$100, or any other sum for said Huguinin."

The case was tried before a jury, and the proofs sustained the allegations of the complaint and tended to show that, at the time of the threatened attachment, the defendant and the said Huguinin were keeping the said restaurant as partners.

The defendant moved for a non-suit.

*J. W. Whalley*, for the defendant.

The rule as laid down by Chancellor Kent in *Leonard v. Vreden*, 8th John. 29, is not of universal application, and is not the true rule. (*Williams v. Boyington*, 3 Mtcf. 396; 11 Mass. 365; 5 Oush. 488; 8 N. Y. 207).

The new consideration must be such as to shift the actual indebtedness to the new promisor; so that as between him and the original debtor, he is bound to pay the debt as his own; the latter standing in the relation of surety to him. (*Kingsley v. Balcom*, 4 Barb. 131).

*Caples & Moreland*, for the plaintiff, cite *Edwards* on Bills and Notes, p. 223-224; *Parsons on Contracts*, 387.

BY THE COURT, UPTON, J. This question was very fully argued, and the subject carefully examined, in the case of *Hedges v. Strong, Adm'r*. In that case this court held the rule to be as stated in *Leonard v. Vreden*, and I see nothing in the cases cited by the defendant in conflict with the doctrine there laid down, except the ruling in *Kingsley v. Balcom*, 4 Barb. 131. In that case Judge Sill cites *Farley v. Cleveland*, 4 Cow. 432, as supporting his opinion. The latter case purports to be a review of the leading cases on this subject, and refers to some case in which it has been said to be a material question whether, "the original debt was still subsisting," but the case does not seem to support the view expressed in *Kingsley v. Balcom*; on the contrary, *Savage, C. J.*, says: "In all these cases, founded upon a

new and original consideration of benefit to the defendant, or harm to the plaintiff, moving to the party making the promise, either from the plaintiff or the original debtor, *the subsisting liability of the original debtor* is no objection to the recovery." The motion for non-suit must be overruled.

The defendant offered some evidence tending to show that there was no consideration moving to the defendant. The charge to the jury was the same as was given on this point in the case of *Hedges v. Strong, Adm'r.*

The plaintiff had a verdict for \$109.

Circuit Court for Multnomah County, November Term, 1870.

### NELSON NORTROP v. THE CITY OF PORTLAND.

**CONTRACT—CONSTRUCTION.**—Where an estimate had been previously made, and the defendant contracted for removing earth, in the words, "For grading as per estimate on file, thirty cents per cubic yard," *Held*, that *prima facie* the estimate must be taken as correct, and the burden of proof is on the plaintiff to show that there is a mistake in the estimate.

*Caples & Moreland*, for the plaintiff.

*C. A. Dolph*, City Attorney, for the defendant.

The plaintiff contracted to do "all the grading required by a plank roadway sixteen feet in width in front of the block abutting on Second street, between Madison and Harrison streets," in the city of Portland; for which the city agreed to pay him "as follows, to-wit: for grading as per estimate on file, thirty cents per cubic yard."

At the making of the contract, there was on file a written estimate, made by the city surveyor, stating the grading at a given number of yards. This was set forth in the complaint, and it was alleged that the estimate was erroneous and incorrect. And the complaint specified a greater number of yards actually included in the grading and necessarily removed by the plaintiff. The action is for compensation

for the number of yards which the earth alleged to have been removed exceeds the estimate.

The defendant demurred that the facts stated did not constitute a cause of action, and the demurrer was overruled.

The defendant answered, denying the alleged error in the estimate, and setting up certain city ordinances, and certain usages in regard to such kinds of work in the city, and averring an agreement to pay according to the estimate only.

On the trial it was shown that the plaintiff had frequently done work for the city under contracts containing similar provision in regard to the mode of estimating the work; that it was the customary method of letting contracts, to first cause the amount of earth to be estimated by the city surveyor, and to place the written estimate on file before making the contract; and that in his previous transactions the plaintiff had settled with the defendant upon the basis of the estimates so filed, without any subsequent or other measurement of the work.

The following instruction asked by the defendant, the court declined to give to the jury:

"If you find that by the agreement the amount of compensation was to be calculated and determined by the estimate then on file, the verdict must be for the defendant."

Upon the principal points in the case the court instructed as follows:

If you find that it was an established usage known to the plaintiff at the time of making the contract, to contract with reference to an estimate previously made and filed, showing the number of yards of grading, and to rely upon such estimate, and to settle the compensation by it without any further measurement or computation, you will take the written estimate offered in evidence as fixing the plaintiff's compensation; unless you are satisfied that the city surveyor made a mistake in making that estimate. In that case the burden of proof is on the plaintiff to show the mistake.

By the terms of the contract the parties must be presumed to have bargained under the belief that a correct estimate had been made; and with an intention that the compensation would be made in pursuance of the estimate.

It was the intent of the parties that the plaintiff should be paid for all the earth required to be removed, and it was their intent that no further measurement should be necessary to ascertain the amount. *Prima facie*, the estimate must be taken as correct, because the parties so intended and so in substance bargained, and for this reason the plaintiff, who asserts that it is incorrect, has the burden of proving his assertion.

The defendant had a verdict.

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Circuit Court for Clackamas County, November Term, 1870.

### STATE OF OREGON v. CHARLES CUTTING.

**SELLING LIQUOR WITHOUT LICENSE—TIME.**—On an indictment for selling liquor without a license, where there is no question as to the statute of limitations, the time when the liquor was sold is not material. But where the name of the person to whom the sale was made is stated in the indictment, the proof must show that a sale was made to the person named.

**BURDEN OF PROOF.**—The burden is on the defendant, to show that he is licensed.

**PAYMENT.**—If one sells liquor, it is not material whether it is paid for.

**IDEM.**—It would not be a violation of the statute for one to give away liquor without any expectation of compensation.

**SUBTERFUGE.**—But if there is an understanding, express or implied, that the party who obtains the liquor will pay for it, or will purchase something else because of it, the act is disposing of the liquor within the meaning of the statute.

THE defendant was indicted under the statute which makes it a criminal offense for any person to "barter, sell or dispose of" spirituous liquors without a license. On the first trial the jury failed to agree, and the case coming on a second time, the defendant's counsel requested that the instructions be given in writing.

The evidence tended to show that the defendant kept a small grocery and variety store, and that it was his practice to give away liquor to those who made purchases from him, and that he frequently sold a stick of candy for 12 1-2 cents and gave the purchaser a drink of liquor.

*A. C. Gibbs*, district attorney.

*Charles Warren & M. F. Mulkey*, for the defendant.

URTON, J. The following instructions were given to the jury:

Gentlemen of the jury: In a case of this kind, if the defendant claims to be licensed, it is his duty to prove that he has been licensed, and if he fails to do so, the jury must hold that he is not licensed.

In this case it is necessary for the prosecution to show that the defendant sold or disposed of spirituous liquors in less quantity than one quart; and to make out a case, the prosecution should show that liquor was disposed of by the defendant to Woodcock, the person named in the indictment; but the time when the liquor was disposed of is not material, as there is no question of the statute of limitations in the case; and it is not material, under this indictment whether the liquor was whisky or some other kind of spirituous liquor. If the defendant has disposed of whisky by selling candy for more than the ordinary price and giving away the liquor, with an intent to evade the law which requires a license, he committed the offense created by this statute. If the prosecution has proved beyond a reasonable doubt that the defendant has so disposed of whisky to Wilson Woodcock, in less quantity than one quart, it is your duty to render a verdict of guilty.

A defendant is to be presumed innocent, in a criminal case, unless and until the proof establishes his guilt beyond a reasonable doubt.

But if the evidence satisfies your minds beyond a reasonable doubt that the defendant sold or disposed of spirituous liquor, to the party named in the indictment, in less quantity than one quart the presumption of innocence is destroyed. It is sufficient if the prosecution has proved such sale on any one occasion, and it is immaterial on what day the sale took place.

If the defendant gave a drink of liquor and a stick of candy for 12 1-2 cents, for the purpose of evading the law, it

is immaterial whether the defendant took up the money from the counter or not. Nor is it essential that the liquor should be actually paid for to complete the offense. The object of this trial is to ascertain whether the defendant disposed of the liquor in violation of the law. It would not be a violation of this law for one to give away to another spirituous liquor without any hope or expectation of compensation; but if there is an understanding, express or implied, that the party who gets the liquor will in some manner pay for it, or purchase something else because of it, the act is disposing of the liquor within the meaning of the statute.

If the defendant did dispose of the liquor, it is of no consequence whether the motives of the prosecuting witness are good or bad; or whether the witnesses are actuated by public spiritedness, or by purely selfish motives. If you are in doubt as to whether the witness testifies fairly and truly, the motives may be material on that point, but if there is no doubt about the facts, the motives of the witnesses are wholly immaterial.

Some effort has been made to discredit the witness, Woodcock. If you should doubt the reliability of Mr. Woodcock's memory, or his correctness, it will be necessary to consider whether the defendant's witness, Stone, told the truth. If Stone saw Woodcock get the whisky and the candy and lay down a piece of money, it is proper to consider whether he corroborates the testimony of Mr. Woodcock, and to what extent. If the defendant let Woodcock have the whisky and the candy, at his request, with the expectation that he would lay down money, it is immaterial whether the defendant afterwards took up the money or not.

If the defendant has not disposed of liquor contrary to law, he ought to be acquitted. But it is as fair for one man to pay his share of the taxes as for another to pay; and if it is clearly established that the defendant endeavors to evade the law by selling spirituous liquors without obtaining the license that others are compelled to obtain, there is nothing in the case or its circumstances, tending to extenuate or excuse such a course.

You should not be drawn into the error of supposing that



this case is a mere controversy between the prosecuting witness and the defendant. It is not a material question in this case which of those two is the best man, or which is the worst man. But the important question in this case is whether or not the law, requiring license to be obtained, has been violated.

If the best man in the community intentionally violated this law, he should be held to an account as strictly as another.

The jury returned a verdict against the defendant.

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Circuit Court for Multnomah County, November Term, 1870.

**J. P. KENNARD and WIFE v. PETER SAX.**

**COVERTURE—PLEADING.**—In an action against the wife alone, coverture at the time of making the contract should be plead in bar. When the objection does not go to the liability, but the fact is merely that the party has married since making the contract, the marriage is pleadable in abatement.

**BILL OF REVIEW.**—A suit in the nature of a bill of review, to set aside or modify a judgment or decree, is entertained by virtue of the original and not the appellate jurisdiction of the court.

**ERROR OF FACT.**—Errors of fact are such facts as affect the regularly and validity of the proceedings on the record, and still do not appear on it, and they may be put in issue in proceedings by writ of error or on certiorari.

**MARRIED WOMAN—SEPARATE PROPERTY OF.**—In order to charge the separate property of a married woman, in a judgment rendered against her upon a contract made during coverture, the record should show that the debt was contracted for the benefit of the separate estate, or for her own benefit on the credit of the separate estate.

**AFFIRMATIVE RELIEF—DEFENSE.**—It is not always the case that facts which would constitute a perfect defense, will afford grounds for affirmative equitable relief.

**ERROR THAT DOES NOT PREJUDICE.**—Where a judgment has been erroneously entered, without fraud, but the case shows that the amount is justly due from the party complaining, and that payment is withheld, equity will not interfere.

THE defendant had recovered a judgment for \$79.25 against the plaintiff, Angeline Kennard, in a justice's court,

in an action for work done and material furnished in painting a house, and had sued out an execution, J. P. Kennard, the husband of Angeline, not being made a party to the action. In that action the defendant did not plead her coverture, but appeared and answered to the merits.

This is a suit to restrain this defendant from levying the execution on the property of the said Angeline. The plaintiffs allege that they were husband and wife *at the time of the alleged contract* for work and material, and still are such; "that the said Angeline has property in her own name," and that unless restrained, the defendant will cause the execution to be levied upon it; that neither of the said plaintiffs were indebted to the said Sax in said sum for which judgment was obtained, nor in any sum greater than \$16; and that the said Angeline had tendered \$16 for said work and material, which sum they allege was more than the value thereof. The proceeding upon execution had been stayed by a preliminary injunction.

The answer denies information or knowledge as to the plaintiffs being husband and wife. Avers that the said Angeline appeared by counsel in said justice's court and answered to the merits, failing to plead coverture, and that she was then justly indebted for the work and material in said sum of \$79.25. That at the time of the contract and of doing the work, and at the time of the action, the said Angeline was living apart from her alleged husband. That the work was done at her request, on a house held in her own name and right, and that she, in making the contract, represented herself as a *feme sole* trader. The replication denies that she lived apart from her husband and denies making the alleged representations.

The defendant admitted the marriage of the plaintiffs, and without further evidence, the cause was argued and submitted, as upon final hearing.

W. W. Thayer, for the plaintiffs.

A judgment obtained against a *femme covert* cannot be enforced by execution. (*Watkins v. Abrahams*, 24 N. Y. 72; *Coon v. Brook*, 21 Barb. 546; *Williams v. Carrol*, 2 Hilton 438.)

A general debt made by a married woman is not chargeable against her separate estate. (*Curtis v. Engle*, 2 Sandf. 288.)

The general appellate jurisdiction conferred by the constitution on the circuit court is broader than appears by the express terms of the statute in regard to appeals and writs of review. This court can review the proceedings of a justice of the peace for *errors of fact* as well as of law, and where a writ of review will not lie, the remedy is by suit. (*Adsit v. Wilson*, 7 How. Pr. 64; *Valarino v. Thompson*, 7 N. Y. 576.)

*Kelly & Reed*, for the defendant.

Coverture must be pleaded in abatement. (Gould's Pl. ch. 5, ss. 85, 88; 2 Duer 679.)

If the wife represents herself as *sole* in making the contract, equity will not relieve. Nor if the amount claimed is justly due.

UPRON, J. The first question I purpose to consider is the effect of the failure to set up the coverture in the justice's court.

It is said in Gould on pleading, p. 263, sec. 88: "Where a *femme covert* is sued alone she can plead her coverture *only* in abatement," \* \* \* and "if she omits to plead it as a dilatory plea, she waives it, *so far as regards her own privilege*, and tacitly admits she is liable to be sued alone." But I think the author has in view the subject of coverture at the time of the action merely; and not coverture at the time of making the contract.

It is said, in 1st Chitty's Pl. 449: "Coverture at the *time* when the supposed *contract* was entered into, must be plead in bar," though formerly it might be given in evidence under the general issue; "but where the objection does not go to the *liability of the femme*, but is merely that the husband ought to have been sued jointly with her, as where, since entering into the contract, or committing the tort, she has married, she must, when sued alone, plead her coverture in abatement, and aver that her husband is living."

In this case the work was done on a house, the property of the wife, occupied as a residence of the family, during a temporary absence of the husband.

The pleadings are not conclusive as to whether or not she acted as the agent of her husband in contracting for the work. If she was merely the agent of the husband her coverture could have been plead in bar.

Formerly the husband might "at any time come in and plead the coverture in bar," and it was said, that, "if both of them omit to plead it and judgment is given against her, the judgment may be reversed by a writ of error." (Gould's Pl., ch. 5, sec. 89.) This authority points to proceedings at law as distinguished from equity; and it would seem that the coverture might formerly be set up after judgment, either in the court where the cause was tried, or by writ of error.

But our statute in regard to appeals declares: "A judgment or decree may be reviewed as provided in this chapter, and not otherwise." Appeals from justices' courts are also limited by a similar enactment; and the statute does not authorize the court to hear a case on appeal or to exercise appellate jurisdiction, unless the case is brought into the appellate court by the prescribed mode for taking an appeal, or by writ of review. But I cannot see in this restriction, an invasion of the constitutional powers of the court, as is assumed in argument by the plaintiff, nor do I think the plaintiff has occasion to invoke the appellate jurisdiction of the court in this case. If he is entitled to relief from a judgment, and the relief cannot be obtained by appeal or by writ of review in the modes prescribed by statute; that is a sufficient ground for an original suit. I do not base this conclusion on the idea that the record made by a justice of the peace, cannot be disputed, on the writ of review. It has been held, that on certiorari, facts that do not appear in the record, such as infancy, coverture, or the death of a party, may be alleged as error. An *error of fact* is defined to be "such facts as effect the regularity and validity of the proceedings on the record, and still do not appear on it. (*Adsit v. Wilson*, 7 How. Pr. 68.) And it is held that in

proceedings by writ of error, or on certiorari, such facts may be put in issue, although they are not disclosed by the record. (*Harvey v. Rickett*, 15 John. 87; *Williams v. Albany Mayor's Court*, 12 Wend. 266; *Post v. Block*, 5 Denio, 66.)

Whether that practice is proper, under the writ of review prescribed in the code, it is not necessary to decide; but I see nothing in the code that directly prohibits it, and I think it would be assuming far less, to hold that such questions can be brought before the court on petition for a writ of review, than to hold that the constitution has clothed the circuit court with an appellate jurisdiction that has never been recognized by the legislature. I therefore conclude on this point, that the legislature has provided for the exercise of all the appellate power with which art. 7, sec. 9, of the constitution, has clothed the circuit court.

There can be no doubt of the power of the legislature to prescribe a reasonable limit to the time in which application for relief must be presented; and if the plaintiffs had no other remedy than by means of appellate jurisdiction, it is now too late for them to be relieved.

But the plaintiff, J. P. Kennard, was not a party to the action, and is not within the statutes in relation to appeals or the writ of review; he has not waived any right by failure to appeal.

As to the wife, the judgment in the justice's court cannot be enforced against her personally, and in order to bind her separate estate, the record of that case should show that the debt was contracted either for the benefit of her separate estate, or for her own benefit on the credit of the separate estate. (*Curtis v. Engel*, 2 Sandf. 288.) The code, sec. 30, requires the husband to be joined, unless the action concerns her separate property. And I am no way confident that she waived any rights by failing to allege her coverture, or by failing to appeal. The general doctrine of the disabilities of married women is against the position that she waived either her own or her husband's rights by pleading to the merits in the justice's court, in an action not there shown to be one affecting her separate estate.

If these plaintiffs are entitled to relief, equity must afford

it; and I think they are entitled, if the amount of the judgment was not justly payable by either of them.

It was a material allegation in this complaint in this suit, that the judgment was for a greater amount than was due; this was material, because it is not always the case that facts which would constitute a perfect defense, afford grounds for affirmative equitable relief. The plaintiffs ask affirmative relief, and for that reason it devolves on them to show, not only that the judgment is technically defective in law, but that it is against equity. And I think the burden of proof devolved on them to show that this allegation is true, notwithstanding its negative form, it being alleged in the complaint.

For ought that is shown, the amount of the judgment may be justly due from one of the plaintiffs; and as the work was done on a house belonging to the wife, it may have been an equitable lien on her separate estate. (*Yale v. Dederer*, 18 N. Y. 265; *Story's Eq. Pl.*, secs. 625 and 1397 to 1400. Where, without fraud, a judgment has been erroneously entered, but the case shows that the amount is justly due from the party complaining, and that payment is withheld, equity will not interfere.

Whether it was originally a debt of the husband, or a charge on the separate estate of the wife, in either case it would be contrary to the course of equity practice, to interfere, to afford affirmative relief by setting aside the judgment, unless the plaintiffs show that nothing is due; or first pay, or offer to pay, the amount that is equitably due. I am not confident but that it would be the better practice to dismiss this bill, because the plaintiffs have failed to introduce proof on that subject. But as I cannot see that the judgment in the justice's court can be made available to this defendant, except by enforcing it in this proceeding if he shall be successful; and as it is evident from the course taken in the argument, that the omission of the proof arose from misapprehension, there are some reasons in favor of letting it in; and I think it is to the interest of all parties, that the controversy be terminated in this suit. If a trial of the issue of fact be ordered, the amount of the

demand can be determined as well in this cause as elsewhere. I shall therefore direct that that issue be set down for trial by a jury, and if the defendant thinks his claim is a charge on the wife's separate estate, he can set forth in this answer a description of the property on which he claims the lien.

The issue was tried by a jury, and a verdict returned, finding in favor of this defendant something less than the \$16 that had been tendered to him. The amount being paid into court, a decree was entered setting aside the judgment in the justice's court, and refusing to decree costs in favor of either party.

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Circuit Court for Multnomah County, November Term, 1870.

**JOSEPH KNOTT v. JAMES B. STEPHENS.**

**JOINDER OF REPRESENTATIVE OF DECEASED PARTNER.**—Where two persons, who were partners in the business of fishing and selling fish, bargained for a block of land, gave their note to the defendant for the price, and took the defendant's bond for a deed on payment of the note, and paid one year's interest before the note fell due; and one of the partners having died, the other claiming to act as surviving partner, assigned the bond and the land to the plaintiff two years after the note fell due, no administration being had, and it being a disputed question whether the land was purchased for partnership purposes. In a suit by the assignee for specific performance, it was held that the question of fact whether the land was purchased for partnership purposes could not be ultimately settled, so as to bind the heirs of the deceased partner, in a suit where neither the heirs or the representatives of the deceased partner were made parties.

**SPECIFIC PERFORMANCE—CERTAINTY.**—If the representatives were parties, the question of fact might be determined in this suit, and all risk of that question removed by the decree. Fair dealing does not require the defendant to convey to the assignee of the survivor unless he had reasonable grounds of certainty on that question.

**INCREASE IN VALUE.**—Where no attempt is made to pay the purchase price, and obtain a deed until a considerable change has occurred in the value, and the defendant has made improvements, this has been held a sufficient ground for refusing relief.

**THIS is a suit for the specific performance of a contract**

for the sale of a block of land in the town of East Portland.

In March, 1866, Joseph Long and Wm. Foster bargained with the defendant, Stephens, for the land; paid him one hundred dollars and gave their promissory note for five hundred dollars, payable, with interest, two years from its date; and Stephens and his wife executed a bond in the sum of five hundred dollars, conditioned for the conveyance of the land on the payment of the note.

Long and Foster were then partners engaged in fishing and selling fish at Oregon City, and the evidence tends to show that they contemplated carrying on that business at some future time at East Portland, and that they intended to use the land in question in their business. On the twelfth of March, 1867, Long paid one year's interest, sixty dollars, on the note, and in the fall of 1867, Long died, and it does not appear that any steps have been taken toward administering upon the estate of Long. On the twenty-eighth of June, 1870, said Foster, claiming to act both for himself and as surviving partner, assigned and transferred the land to this plaintiff for value. Joseph Long, or some one in his name, paid the taxes for the years 1866, 1867 and 1868 on the land, amounting to \$8.50. The last payment being made in January, 1869. The note fell due March 10, 1868.

After Long's death, and before the note fell due, the defendant, Stephens, asked Foster what he intended about paying the note and taking the land. Foster replied that he did not know.

The defendant, Stephens, testifies that when the note fell due he called on Foster and asked him to pay the note; that Foster declined, saying that he had not the money. That a few weeks later he asked Foster again about the matter, and Foster said he did not care much about getting the land. That a year or more after that, he, Stephens, went to improving the land by driving piles. That the land was worth, when the bond was executed, about \$600; about \$1,200 when Stephens went to improving it; and is worth now, with the improvements, about \$3,000.



Mr. Foster testified that the note was never presented to him for payment. He did not deny but that payment had been requested, but denied having said that he did not care much about getting the land.

The evidence tends to show that no offer to pay the note was made until after the plaintiff took the assignment, and after the work of driving piles was in progress, and that the plaintiff who tendered payment acquired his interest after the defendant had made a large part of the improvements.

*W. W. Thayer*, for the plaintiff.

If there is a defect of parties, it has been waived by not demurring or setting it up by answer. (Code, page 156, sec. 70.)

Foster had a complete right to assign the entire interest in the land.

At common law the surviving partner had the legal right to the partnership effects, including real estate; though courts of equity regarded him as a trustee. (1 Paige Ch. 393; 3 *Ib.* 167; 6 Cowen, 441; Story on Part., sec. 344.)

Real estate acquired with partnership funds for partnership purposes, is treated in equity as personal property. (2 Sandf. Ch. 366; 24 N. Y. 505.)

The surviving partner may sell. (2 Sandf. Ch. 366.)

The bond was a chose in action. (1 Abbott Pr. 82; 2 Robt. 26.)

A partner has power to transfer. (25 N. Y. 315.)

Foster was the only party liable in an action on the note; he had a right to make this arrangement to satisfy the note. (5 Denio, 577.)

The heirs of Long could not be joined with Foster as defendants. (17 N. Y. 354.)

They should not be joined as plaintiffs.

Section 1,071 of the code, should not be construed to take away rights which the surviving partner had at common law. (1st Kent's Com. 464; 3 Hill, 272.)

*Stout & Burmister*, for the defendant.

The penalty is \$500; is not this a case where the plaintiff has a remedy at law? (11 Paige, 352.)

1. Could Foster, as surviving partner, assign? Not having sought to administer or applied to the probate court. (Code, sec. 1,070, p. 417.)

2. This land never having been used in the partnership business, and it being doubtful whether the partners ever intended to so use it, the interest of Long's heirs cannot be disposed of in this suit.

3. Although it is not expressly shown on the face of the bond that time is of the essence of the contract, the circumstances show it. And the evidence not only shows unexplained delay and negligence, but leaves an unavoidable impression that Foster abandoned the contract, or at least waited for speculative purposes, and only came forward by his assignee after the land had risen in value, and had been improved at the cost of the defendant. (Story Eq. Jr. 771, 776; 6 Cal. 571; 14 Pet. 462; 10 Cal. 322; 1 John. Ch. 370.)

4. It is not a case of part performance. The plaintiff's assignor was never in possession.

The case was submitted on the pleadings and evidence for final decree.

UPRON, J. This case presents several difficult and perplexing questions. It is in many respects similar to cases where specific performance has been decreed; and yet it is very difficult, if not impossible, to come to the conclusion that the plaintiff is in a position to demand equitable relief. After a careful examination of the case I am constrained to say that I think there has never been a time since the making of the contract that it was clearly and unquestionably the duty of the defendant to execute a deed of the premises in question.

I shall not now undertake to pass upon the construction or effect of sections 1,069 to 1,074 of the statute relating to the estates of deceased persons. The circumstance that no steps were taken to administer upon the estate of Long, deceased, leaves an uncertainty in regard to the assignment to which it will be necessary to allude; an uncertainty which I think sufficient to render it doubtful whether it was safe

for the defendant to transfer the entire premises to the plaintiff. It is said the defendant knew the law and was bound to take notice of it at his peril. But if we assume (what the courts of this state have not yet decided), that the true construction of the statute is, that a surviving partner may at private sale transfer real estate or an interest in real estate purchased for partnership purposes, without an order of the probate court, and without giving the bond provided in the sections above mentioned; yet there is a question of fact included in the proposition. It is not shown that the defendant had any reason to suppose the land was intended for partnership purposes, or that any assurance or even notice had been given him that such was the case or that Foster had power to act for the heirs or representatives of Long. Nor does it appear now that there is certainty in regard to the land being purchased for partnership purposes, or in regard to Foster's having power to sell.

In this proceeding we must look upon the bond, not merely as an obligation to pay a given sum of money, but as an agreement for the sale of land; otherwise specific performance could not be decreed under any circumstances, but the plaintiff would be driven to his action to recover the money. The evidence shows that the condition of the bond had not been broken by the defendant when the assignment was made. It was not simply a *chose in action* to be transferred as personal property, but the object of the assignment was to transfer an interest in land.

If it should be decided in this case that the land was bargained for or held as partnership property, the heirs of Long, not being parties to this proceeding, would not be barred by the decree in this case from showing hereafter that it was not so held, or from showing that their interest was not subject to be transferred by the surviving partner, under this statute or at common law. The evidence that the land was bargained for or held for partnership purposes, is meager and far from conclusive. It is not shown that that point is or can be rendered certain, except by a judgment or decree.

Unquestionably the plaintiff is not entitled to a decree for specific performance, unless at the time of the demand, it was the duty of the defendant to execute to the plaintiff a deed of the entire premises as demanded; nor do I think that fair dealing would have required the defendant to convey unless he had reasonable grounds of certainty that he was dealing with the real parties in interest; and I do not think that a court ought to enforce specific performance, if that would place upon the defendant an unreasonable risk.

If the representatives of Long were parties in this proceeding, the question of fact might be finally determined in this suit, and that source of uncertainty would thus be removed. But as the case now stands, the sufficiency of the assignment must remain an open question, because the heirs of Long are not parties to this suit.

It appears to me that this is not a mere question of practice as to the non-joinder of parties; but a failure to establish one of the material facts upon which the plaintiff founds his claim to equitable relief. That is, a failure to show with that degree of certainty which equity requires before decreeing specific performance, that the parcel of land was purchased and held for partnership purposes.

It appears that no attempt was made to pay the purchase price and obtain a deed, until a considerable change had occurred in the value of the property, and the defendant had made improvements of some value. This has been held a sufficient ground for refusing relief. (Story's Eq. Jr., ss. 771, 776.)

I do not feel called upon to decide the disputed question of fact, as to whether or not Foster expressly abandoned the idea of obtaining the land before making the assignment.

Upon the other grounds above stated, I think it would not be proper to decree specific performance, and that the bill should be dismissed.

Circuit Court for the County of Baker; Vacation after May Term, 1871.

GEORGE COGGAN and GEORGE COGGAN, Administrator of the Estate of R. H. Mallory, deceased, Plaintiffs, v. S. B. REEVES, S. ALBERSON and A. MOORE & BROS., partners, etc., Defendants.

**MECHANIC'S LIEN—FORECLOSURE.**—Material-men must commence proceedings to foreclose their liens within a year from the date of filing their lien notices.

**IDEM.**—They must commence by filing a complaint.

**IDEM.**—The fact of a lien-holder being made a party defendant by a plaintiff, because his lien is subsequent to the one sought to be foreclosed, does not release him from the duty of strictly pursuing his statutory remedy.

THIS case came on to be heard upon a demurrer to the answer of certain of the defendants. The facts are sufficiently alluded to in the opinion.

*Wilson, Pierce & Lasswell*, for the demurrer.

*L. O. Sterns, contra.*

**McARTHUR, J.** This is a suit to foreclose a mortgage executed by defendant, S. B. Reeves, to R. H. Mallory, deceased, and George Coggan; and Anthony, Amasia and Albert Moore, being subsequent lien-holders, were made defendants on motion of the plaintiff. S. Alberson, having some interest in the event of the suit, was also made a defendant. The liens of A. Moore & Brothers are what are known as material-men's liens. They are three in number and were filed in the following order: the first for \$503.27, on May 17, 1869; the second for \$41.60, on December 3, 1869, and the third for \$188.07, on April 30, 1870. They are thus set forth in the answer of A. Moore & Brothers to the original complaint, which answer was filed on May 16, 1870. The plaintiffs and one of the defendants, to wit: Albertson, filed their demurrer to the said complaint on seventeenth of May, 1871, by permission and without objection.

The question raised by the demurrer and presented for judicial determination, is: Have these liens any present vitality? That is, are they valid existing liens, or have they become null and void by the non-compliance of the holders thereof with the law for the foreclosure of such liens?

I am of opinion that these liens have all expired. By the statute, liens of this character cease to exist at the expiration of one year from the time of filing the notice thereof, unless the party filing such lien-notice within that time *commences* an action, or suit, rather, to enforce the same in the circuit court of the proper county.

Section 50, p. 150, of the code of civil procedure, provides that "actions at law shall be commenced by filing a complaint," etc., and the provisions of the section apply and govern the mode of proceeding in suits as well as in actions.

The fact of a lien-holder being made a party defendant by the plaintiff, because his (defendant's) lien is subsequent to the one sought to be foreclosed, does not, in my opinion, release him from the obligation of strictly pursuing his statutory remedy.

In *Noyes v. Benton*, 17 Howard, 449, a case analogous to the one under consideration, it was held that a lien of like character ceased after a year, "because he (the lien-holder) has not done what the statute declares necessary to continue the lien in force after that period. During the year this court could continue the property or keep its proceeds in court, subject to the lien, if proper proceedings were taken to enforce it, and might perhaps obtain jurisdiction so far over the subject matter as to order the lien to be discharged by payments, if it were brought to a close within the year, or if proceedings were still pending for that purpose;" that is, for the purpose of foreclosing the lien by an independent suit.

I cannot look upon the answer of Moore & Brothers as an original complaint for the purpose of foreclosing their liens. Their answer simply advised the court of the fact that they had some interest in the mortgaged premises, which required

the interposition of a court of equity to secure or preserve. Had the original suit been disposed of within a year from the date of their lien-notices, then their interest in the mortgaged premises might have been ascertained and fully adjudicated, but when they saw the time limited to them by statute rapidly passing away without any probability of a final decree being entered in the original foreclosure suit, it was their duty to have *commenced* their suit to foreclose the liens in the manner and form provided by the statute. The demurrer should therefore be sustained.

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Suit Court for the County of Union; Vacation after May Term, 1871.

ANDERSON, Appellant, v. MARY E. LAUGHERY,  
Respondent.

REGISTER OF STATE LANDS.—The register of state lands for the La Grande District acts within said district simply as the agent or sub-commissioner of the board of school land commissioners.

—He cannot render such a decision, judgment or decree as can be appealed from to the circuit courts.

THIS is an appeal from the decision of the register of state lands for the La Grande District. The record, which is meagre, exhibits the following facts: That on the second day of March, 1871, the register issued two summonses, one to S. Anderson and the other to, Mary E. Laughery, commanding said parties to appear before him on the fifth of March, 1871, to offer testimony in support of their respective rights to purchase from the state of Oregon  $\frac{1}{2}$  of S. E.  $\frac{1}{4}$  S. 21, T. 1. S. R. 39 E. The tract of land described is situate in Union County, Oregon, and contains eighty acres. The said summonses were duly served upon each of said parties. Subpoenas were also served upon several persons, to compel their attendance as witnesses. The certified copy of the register's journal entry, accompanying the record, shows that the said register or-

dered and adjudged, after hearing the proofs and argument of counsel, that the said Mary E. Laughery was equitably entitled to the right to purchase and possess said tract of land. From this decision, Anderson appeals to this court, and this appeal Laughery insists should be dismissed, and therefore files motion to dismiss the same.

*Ellsworth and Wilson, for the motion.*

*Baker and Lichtenthaler, contra.*

MOARTHUR, J. Section 13 of the act to create the office of register of state lands for the La Grande District, and to provide for the disposition and sale of state lands, approved October 26, 1868, provides, among other things, that "appeals in all contested cases shall be allowed from the decision of the register to the district court of the county in which the land is situate, in the same manner as appeals from the courts of justices of the peace." The phrasology of the entire section, and particularly of the part quoted, is very peculiar and singularly inapt, as will plainly appear by reference to Article VII, section 1, of the state constitution. That section enumerates all the courts known to the judicial department of the state and makes no allusion to any such tribunal as the "district court." It is urged that the legislature intended that appeals should lie to the circuit courts. However correct this assumption may be in point of fact I do not feel myself at liberty so to decide. If there was any, the slightest, ambiguity in the language used, I might, all things considered, be strongly inclined to so hold; but there is no ambiguity whatever about the expression; it is very clear, though as before remarked, very peculiar. It is an unfortunate misnomer of the tribunal intended, *resulting probably from the too hasty preparation and passage of the act*, and one which I think cannot be corrected by judicial construction. Taking it for granted, however, that the intention of the legislature was that appeals should lie to the circuit courts, another part of this section first above cited erects an insurmountable barrier in the path of legal administration of justice under this legislative enact-



, for it is provided that "the issue of the trial in the circuit court shall be the same as before the register." This provision limits the action and the power of the appellate courts and binds them to affirm the decision of the register, for it emphatically declares that "the issue of the trial" that is to say, the close, the end, the result, the termination of the cause in the appellate court "*shall be the same as before the register.*"

It assuming that section 18 of the act of the legislature referred to, fully and clearly provided that appeals should be taken to the circuit courts, and that when appealed, all cases should be tried upon substantially the same issues presented before the register, there are other and more cogent reasons which appear to me to fully warrant the court in sustaining this motion. Section 525 of the code of civil procedure provides that "a judgment or decree may be reviewed as prescribed in this title and not otherwise. An appeal affecting a substantial right, and which in effect denies the action, suit or proceeding, so as to prevent a judgment or decree therein, or a final order affecting a substantial right and made in a proceeding after judgment or decree for the purpose of being reviewed shall be deemed reviewable." The question, therefore, presents itself: Does the decision of the register in effect determine the action or suit (if the proceeding before him can be so determined) so as to prevent a judgment or decree? Clearly not, for the following reasons: By examination of sections 7, 11, 12 and 17, of the act to create the office of register of state lands for the La Grande District, etc., it conclusively appears that the said register is nothing more nor less than the agent or sub-commissioner of the board of land commissioners created by act of the legislature, passed October 22, 1864. By the sections referred to, it is enacted that all applications for the purchase of lands in the La Grande District are to be made in duplicate and are to be filed, the one with the register, the other with the board of commissioners. The said board acting for the register and not the register, makes and executes the deeds to the applicants, the register simply delivering them. It is

also made the duty of the register to make out, on the last of every month, full reports of all his official actions, and forward the same to the board of commissioners, and when there are adverse claimants, although it is incumbent upon the register to take the testimony of witnesses "and hear and determine from the testimony presented, the rights of the respective parties," yet it is especially enacted that "all contested claims shall be transmitted to the board of commissioners in a special communication with a brief statement of the decision rendered by the register and his reason therefor." From this provision of the law I am satisfied that before the decision (so called) of the register can be carried into effect, it must meet with the sanction and approval of the board of commissioners, and such being the fact, I cannot see how a conclusion upon the testimony arrived at by him can be what is known to the law as a *decision*, much less a final judgment or decree from which an appeal would lie. In this same connection it must be borne in mind that the board of commissioners is empowered to make rules and regulations for the government of the register's office, and all his acts must conform to such rules.

In view of these provisions of the law I am of opinion that the register cannot render such a decision, judgment or decree as would answer the requirements of section 525 of the code. I can reach no other conclusion than that he acts simply as the agent of sub-commissioner of the board of school commissioners, and his acts being controlled by the rules and regulations of the said board, and his decisions (so called) being returned to the said board for its official approval or disapproval, are not such as can be appealed from to this court. They in nowise determine the action, suit or proceeding so as to prevent a judgment, decree or order therein, for, before a *final* order affecting a substantial right of either of the claimants can be made, the power of the board of commissioners must be invoked. It has been clearly pointed out that the register is required to submit all contested cases to the board, and by reference to section 11 of the act of the legislature, approved October 22, 1864

al Laws, p. 886), it will be found that it is further ed "that the commissioners may make rules for the tion of business under this act, and shall decide all ns about priority of settlement and other disputes a applicants, and all their acts and decisions shall l," etc. The board, then, being a tribunal whose ns are final in cases arising under the land law, ex- greater power than can be exercised by the circuit for their decisions are not final. For the conven- f argument let us assume that section 18 of the act ed October 26, 1868, is in all respects perfect, and y provides that appeals shall lie from the register to uit courts, what weight can possibly attach to the ns of those tribunals? Can they bind the board of ssioners? I think not. For example, suppose A.

are contesting before the register the right to pur- certain parcel of state land, and that the decision of ister is adverse to B.; B. appeals to the circuit court e decision of the register is reversed, it being ad- that B., and not A., has the right to make the pur- In the meantime the register, in accordance with , forwards his findings and reasons therefor to the of commissioners, who approve the decision and final order in the case affirming the right of A. to se, and on that order a deed is executed to A. Which e decisions prevails? Most certainly that of the

It is not required to defer to the decision of the court, nor indeed is it obliged to conform its acts sions to any other rules or regulations than those own adoption. The judgment of the circuit court, re, carries with it no force whatever, and although it ar and determine a case on appeal, it is absolutely ss to enforce any judgment it may render. It most ly could not set aside the deed and enforce the rights n a proceeding of this nature. Further, there does ear to be any issue of fact or law presented by the to be tried in this court. There are no verified gs to guide the court in passing upon whatever ques- may be presented; even the applications of the re-

spective parties do not accompany the record, and it would be a very anomalous proceeding in a court of record, to proceed with the trial and investigation of a cause without something in the nature of a pleading to limit the extent of its inquiries and guide it in entering a judgment or decree.

From the foregoing, it follows that the motion to dismiss should prevail. It is, therefore, so ordered.

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Circuit Court for the County of Wasco; Vacation after June Term, 1871.

**JAMES M. BIRD, Petitioner, v. THE COUNTY OF WASCO, Respondent.**

**FEES OF OFFICERS.**—The act of the legislature approved October 21, 1864, in relation to the fees and compensation of officers, etc., in the counties lying east of the Cascade range of mountains, is an original, independent act, and not merely an amendment to a pre-existing law..

**ENACTMENT AND REPEAL.**—When the legislature seeks to repeal an act or to limit its territorial application, it is not necessary to set forth the entire act or section, as in cases of revision or amendment.

**LEGISLATIVE POWER.**—Except in special cases, where the constitution prohibits it, the legislature may control the unearned emoluments of office.

THE petitioner, the sheriff of Wasco County, deeming himself entitled to additional compensation for certain services, and his claim therefor being denied by the county court of Wasco County, obtained a writ of review to correct the judgment of the said court. The writ was issued and duly returned with the record in the case. In this court the respondent demurred specially, and all the questions of law involved were raised by said demurrer.

*N. H. Gates*, for petitioner.

*W. B. Lasswell*, District Attorney, and *J. G. Wilson*, for respondent.

**MCARTHUR, J.** The first question presented in this case is, does section 1 of the act approved October 21, 1864,

to increase the fees and compensation prescribed by the act approved October 24, 1864, or was its operation limited to the act approved January 19, 1855, which was in force at the time of its passage and approval? On investigation it will be found that section 31, of chapter 18, page 10, of the general laws of Oregon, is the first section of the act approved October 21, 1864. It provides that the fees and compensation of certain officers, including sheriff, of counties east of the Cascade range of mountains, be increased thirty-three and one third per centum in addition to the fees allowed by law. The act regulating the fees and compensation of officers then in force, was approved January 19, 1855. That act was directly repealed by the general law of October 17, 1862, which took effect by special proclamation from and after May 1, 1865. On October 24, 1864, an act to prescribe the fees of certain officers and their compensation was approved, and by constitutional operation took effect January 22, 1865. The act of January 19, 1855, of October 24, 1864, being repugnant, the former is void as to the latter, and hence the act of January 19, 1855, is doubly repealed. Keeping in view these facts, we recur to the question. The solution thereof will depend entirely upon the character of the act of October 24, 1864. If it be construed to be an amendment to the act of January 19, 1855, then its provisions must be construed as confined to that act alone, and the conclusion that its operation ceased with the repeal of the act to which it was an amendment, seems irresistible. Such construction, however, I do not think can reasonably be placed upon it.

There is nothing in the title, the preamble, or the provisions of the act, which, in my opinion, warrants the conclusion that it was intended merely as an amendment to the act of January 19, 1855. I am of opinion that it is an independent act, and this opinion, I think, is fully supported by the fact that its provisions are made applicable to counties organized, or to be organized, in that portion of the state lying east of the Cascade range of mountains. And the further fact, that the general repealing act, of October 17, 1862, provided for the repeal of the act of January 19,

1855, had been passed nearly two years previous. It is true that it had not taken effect, and was not to take effect until May 1, 1865, but it seems to me that in the passage of the act of October 21, 1864, the legislature, under the circumstances, could not have intended it as an amendment to an act the repeal of which had recently been provided for. If viewed as an amendment *merely*, it does not conform to section 22, article 4 of the state constitution, and it must therefore fall. The only construction that can be put upon it, to give it force and effect, is to consider it an original, independent act. It is a very well settled rule in the construction of statutes, that when an act of the legislature is ambiguous upon its face, and susceptible of different constructions, such construction as would declare it unconstitutional should be avoided, when it can be fairly done. (*French v. Teschemaker et al.*, 24 Cal. 518.) It can be fairly done in this case.

It being determined that the act of October 21, 1864, is an independent act, and not a mere amendment, is it repealed by implication, by the act of October 24, 1864? It is a maxim of law that subsequent laws repeal prior conflicting ones, and keeping this in view, let us examine the two acts. The one provides that the fees and compensation of officers, in certain counties organized or to be organized in that portion of the state lying east of the Cascade range of mountains, shall be increased thirty-three and one third per centum. It is from its nature a special law, though not such an one as is prohibited by section 23 of Article IV of the state constitution. The other is a general law regulating the fees and compensation of officers, etc. They are in *pari materia*, and are to be taken as if they were one law. (Smith's Com. 751, sec. 736; *Rexford v. Knight*, 15 Barbour 627.) There is no repugnancy between them. Nothing in either which negatives the provisions of the other. They are both affirmative, and the substance such that both may stand together. Such being the case, the rule is that the latter does not repeal the former, but they shall both have a concurrent efficiency. (1 Blackstone's Com. 90.) The next question is: What effect has the act of the legislature

October 20, 1870 (session laws 1870, p. 12), section 31 of chapter 18 of the general laws, heretofore. This act provides, that the said section, "so far as it applies to the counties of Wasco and Umatilla, be the same is hereby repealed." It is contended by the petitioner that this act is unconstitutional, for that it is with section 22 of Article IV of the state constitution which declares, "that no act shall ever be revised or amended by mere reference to its title, but the act revised or amended shall be set forth and published at full length."

If the act attempted to amend or revise the law passed before same was approved, the objection would be founded, and under the rule laid down in the *City of Portland v. Stock*, (2 Or. 69), it would be fatally defective. The rule in that case, however, does not apply. It is not a revision or an amendment, but a repeal of so much of section 31 as applies to Umatilla and Wasco counties. When the legislature seeks to repeal an existing act or to restrict its territorial application, it is not necessary to set forth the entire act with the repealing clause, or with the conditions and restrictions affixed thereto. The repeal of an act can be legally effected by an act properly referring to the act sought to be repealed, and restrictions and limitations can be placed upon an existing law by an act of the legislature properly designating the one sought to be repealed and limited, and at the same time clearly setting forth the restrictions and limitations. Hence the act referred to does not contravene the constitutional provision, and is valid. It repeals section 31 of chapter 18 of the session laws, so far as it applies to Umatilla and Wasco counties, and limits and restricts the application thereof to counties lying east of the Cascade range of mountains. The question, whether the legislature could, under such circumstances, legally pass an act decreasing or diminishing the fees and compensation of an officer during his term of office, was mooted in this case. It was urged that the petitioner took the office of sheriff, he entered into an agreement with the county of Wasco to serve in that capacity for a term of his office for the fees and compensation as

then provided by law, and it was contended that an act passed diminishing the same contravenes public policy and impairs the obligation of the contract. An extended discussion of this question is unnecessary. That the legislature had the power to pass the act of October 20, 1870, I have no doubt, for the authorities abundantly establish the principle, that except in the special cases where the constitution prohibits, the legislature may control the unearned emoluments of office. (*Connor v. The Mayor, etc., of New York*. 1 Selden 285 and authorities therein cited.)

It follows, therefore, that the demurrer should be sustained, with costs against the petitioner.

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Circuit Court for Multnomah County, January Term, 1871.

**S. E. FLEMING and P. NEVIL, Petitioners, v. CINCIN-  
NATUS BILLS, Sheriff.**

**HABEAS CORPUS.**—On *habeas corpus* to discharge from an order holding to bail, a rehearing of the evidence is not a matter of course.

**PROCESS.**—Informality in the commitment will not justify a discharge when it is in the power of the petitioner to produce the record, and he fails to produce it.

**CERTIORARI AS AUXILIARY TO HABEAS CORPUS.**—A writ of review as auxiliary to the writ of *habeas corpus* being granted, the court refused to rehear the witnesses who were examined before the committing magistrate.

**LOTTERY.**—A lottery is a game of hazard in which small sums are ventured for the chance of obtaining greater. Payment of prizes in money is not essential.

**PROCESS.**—An order of commitment made by a court having jurisdiction, is not void because of error of fact or of law.

A WRIT of *habeas corpus* having been served on C. Bills, sheriff of Multnomah County, he returned the writ, stating that the petitioners were held by virtue of a commitment issued by D. C. Lewis, Police Judge and *ex-officio* Justice of the Peace. The return sets out a copy of the commitment, which purports to follow section 403 of the criminal code; but in designating the crime it uses the words "carrying on



"The statute, in defining the offense, uses the  
 "If any person shall promote or set up any lottery  
 or other valuable thing—"  
 petition stated that the imprisonment was illegal, in

The complaint does not contain facts sufficient to con-  
 e offense charged.

The facts stated in the complaint do not constitute an

There was no evidence produced before the afore-  
 ice to establish the offense charged.

g Stout and Theodore Burmister, for the peti-  
 aid:

being willing to waive the informality of the commit-  
 the case can be heard on what we deem its merits.  
 once before the magistrate proved a raffle, but had  
 cy to prove the existence of a lottery.  
 ve for subpoenas, and for the privilege of submit-  
 same evidence that was submitted to the jus-

Abbs, District Attorney, objected.

tion was denied.

held, that a rehearing is not a matter of course on  
 pus to discharge from an order holding to bail,  
 a discharge cannot be granted on a *habeas corpus*,  
 that the decision is against the *weight* of evidence.  
 e circuit court or judge should undertake to re-  
 ne witnesses on such ground, it would not be exer-  
 appellate or supervisory jurisdiction, but simply  
 g the labor of the committing magistrate a second  
 e the proof may be very different to-day from  
 s on the examination.

itioner's counsel moved for a discharge for defects  
 mitment: Held, That informality in the commit-  
 not justify a discharge where it is in the power of  
 ner to produce the record and he fails to produce  
 on Habeas Corpus, 355 *et seq.*)

itioners then produced a certified copy of the

justices' docket, as a foundation for leave to introduce evidence.

The district attorney objected that if the purpose was a review, the proceedings should be regularly brought up, that the judge might have jurisdiction to remand the case to the justice if error should be found.

The objection was sustained. (*Id.* 358.)

The petitioners then asked and obtained time to apply for a writ of review, as auxiliary to the writ of *habeas corpus*.

Upon return of the writ of review, the docket entries disclosed an order reciting a complaint, and reciting that an examination was had, witnesses of both parties being examined and a statement waived, and that an order of commitment was entered in regular form.

The petitioners' counsel renewed the motion for leave to examine the witnesses *de novo*, claiming that since the repeal of the law requiring the evidence to be written there was no other mode of review.

The district attorney claimed that the repeal was for the purpose of preventing any re-examination of the evidence. *Held*, That the proposition to re-examine the witnesses is subject to the objection that it would not be a review of what had been done by the justice; that there is no issue as to what can be proved at the present; and that the material point relates to what was done on the examination.

The parties consented to proceed according to the rule adopted, in cases of alleged *error of fact*, by the circuit court of the District of Columbia. The rule is found in Hurd on Habeas Corpus, page 354. Under that rule the committing magistrate made a statement of what occurred on the examination. (The oath was waived.)

It appeared from the statement of the police judge that the proofs before him were to the effect that the petitioners were conducting a scheme or game operated by means of dice and a box containing prizes. The box was divided into compartments; these compartments were numbered from eight to forty-eight inclusive. Some of these compartments contained prizes; others were empty or blank. The game

ayed by means of eight dice thrown by the person ose to pay the specified sum for the chance of win- prize. If such person threw a number correspond- h the number of a compartment containing a prize, he entitled to a prize contained in that compartment, se he received nothing.

rence was also made by the police judge to some e of experts touching the meaning of the word 7."

case was argued at length; Mr. Burmister claiming e game in question is a raffle and not a lottery, and trict attorney arguing that it is a lottery.

ON, J. filed the following opinion:

constitution of the state prohibited lotteries and the lottery tickets, and the statute makes a violation of use of the constitution punishable as a felony; other of chance forbidden by statute are declared misde- s. The importance to the petitioners of this distinc- obvious.

recent inauguration of lotteries in a neighboring a a scale of such magnitude and under such specious ance of morality and even benefaction, as to include te within the circle of its influence and make it part theatre of its practical operations, adds to the pre- erest and importance of every question of penal law subject.

se considerations have led me to make a careful ex- ion of all the authorities presented by counsel, and others as are accessible, touching what is treated principal question in the case; that is, whether the n question is one that is forbidden by the constitu- nd made punishable by imprisonment in the peniten-

following definitions of the word "lottery" have been own by the law writers:

game of hazard in which small sums are ventured for unce of obtaining greater." (*Bell v. State*, 5 Sneed,

"A scheme for the distribution of prizes by chance." Bouv. Law Dic. (Webster also uses the same words.)

"A game wherein a person paying money becomes entitled to money, or some other thing of value, on contingencies, to be determined by lot cast by the managers of the game." 2 Bishop Cr. L. s. 946. Mr. Bishop says: "This definition has not been laid down in words by the tribunals."

"Payment of prizes in money is not essential to a lottery." (3 Seld. 287.) "The art union scheme is a lottery." (*Id.* 289.)

Bouvier, in his dictionary, under the title "Gaming," says: "There are some games which depend altogether upon skill, others upon chance, and some others are of a mixed nature. Billiards is an example of the first, lottery of the second, and backgammon of the last."

The petitioners claim that the game or scheme here presented differs from, and lacks the essentials of a lottery in these particulars: First, in this game the person paying the money casts the lot; Second, a scheme or game is not a lottery, unless all the ticket holders, or all the persons paying money, taken collectively, have a certainty that some one or more of their number will gain the prize or prizes hazarded. They rely particularly on the definition given by Bishop.

I have examined most of the authorities cited by Bishop, and I do not find it laid down that the lot must be *actually* cast or drawn *by the managers of the game*, or that a personal participation by the party paying, such as drawing a number with his own hand, would so change the character of the scheme that it would not be a lottery.

These citations are (3 Seld. 228 and 240; 13 Barb. 577; 2 Denio, 88; 2 Mill, 128; 3 Zab. 465; 5 Rand. 652, and 715.)

There is some reason drawn from the definitions cited to think that, if throwing the dice is an exhibition of skill on the part of the person who pays for the chance, the circumstance is material—for it seems essential to constitute a lottery that the scheme should not be a game of skill. But is the throwing of the dice in an honest manner an exhibi-

skill? I think that mode is selected on the theory the result of a fair throw of the dice is wholly a matter of chance. Nor do I find any adjudication to the effect the scheme is not a lottery, unless each holder of a ticket, or all of them collectively, has a certainty that a certain number of prizes will be gained by some one of their number. It is claimed that the word "distribution," used by Blackstone and Webster, tends to such an inference, it is certainly not a necessary deduction from the language of their definition.

A scheme for the distribution of prizes by chance" may be for distributing them all at one time or at several times, absolutely to one set of persons or conditionally to one person or class. It may allow one person to exhaust all his chances, before other persons accept a chance, and still the scheme is within that definition.

No adjudication has been found directly in opposition to the decision of the police judge, that decision should be reversed, unless some sound reason is found elsewhere indicating that he is in error.

American Cyclopaedia thus defines lottery: "A game or contract, by which, for a valuable consideration, one person in favor of the lot obtain a prize of a value superior to the amount or value of that which he risks." The writer adds: "In its best and most frequent application, the word lottery is those schemes of this nature which are conducted under the supervision and guarantees of government."

The same work continues: "Two kinds of lottery may be distinguished. The Genoese or Numerical, and the Dutch or Class lottery." This work describes the former as a lottery by which, out of ninety consecutive numbers, five numbers are selected or drawn by lot. "The players fixed upon numbers, wagering that one, two or more of them would be drawn among the five, or that they would appear in a certain order."

In describing the Dutch or Class lottery the author says: "In this lottery the number and value of the prizes are regularly determined, and all the ticket holders are interested at once in the result, and chance determines whether a prize or a blank is drawn to a given number."

The position taken by the petitioner's counsel is, substantially, that no scheme is a lottery unless it comes within the last definition.

What is called the Genoese lottery certainly does not come nearer to what is claimed by the defendant's counsel as indispensable, than does the scheme presented in this case. In the Genoese lottery it is not essential that there should be tickets or ticket-holders, or that a given number of chances should be taken, nor that the holders of chances should have a certainty that a prize, or anything of value, would be gained by one or more of their number, or that there should be more than one person at the time betting, or venturing money against the managers of the game.

From my examination of the case I am not prepared to say that the committing magistrate erred in holding the game in question to be a lottery. I cannot, therefore, upon the writ of review, reverse his decision. The record discloses sufficient to cure the alleged defect of form in the commitment. (Hurd on Habeas Corpus, 353.)

When the charge was duly presented, and the defendants were brought before the magistrate, the magistrate had jurisdiction to proceed with the examination, and to decide every question of fact or law that was presented, including making the order of commitment. Such an order, made by a court having jurisdiction, is not void, even though it may be voidable, because of error of fact, or of law, but the imprisonment is legal until the order is set aside, consequently the petitioner is not entitled to be discharged solely for informality in the commitment.

If I was satisfied that the order was erroneously made, it would be my duty to reverse it. But I am not satisfied that such is the case, and must deny the petition.

recuit Court for Multnomah County, January Term, 1871.

re Matter of the Petition of T. J. CARTER, to take  
testimony *de bene esse*.

NY DE BENE ESSE—NOTICE.—The petition in a proceeding to  
perpetuate testimony, is addressed to the discretion of the court or  
judge; and under peculiar circumstances, notice to the adverse  
party was required.

This proceeding should not be resorted to merely to ascertain  
that an adverse witness will testify.

In being a proceeding to perpetuate testimony, the peti-  
tioner presented the following statement:

That the testimony of Green C. Davidson, and of a per-  
jured Joseph Thomas, who reside at Fairfield, in Mar-  
ion County, Oregon, is and will be material to the defense  
of the petitioner in said action. That the question in-  
volved in said action is, and will be, whether or not said  
Joseph Thomas, so called, is the heir-at-law of one Finice  
Thomas, called Finice Caruthers, late of Multnomah Coun-  
ty, Oregon, deceased.

That the facts expected to be proved by Green C.  
Davidson are, that the man called Joseph Thomas is not an  
heir-at-law of Finice Thomas, commonly called Finice Ca-

That he is not the father of said Finice, and that  
Joseph Thomas is an assumed name, and not his real name;  
with other facts and circumstances tending to prove  
the facts expected to be established.

That the fact expected to be proved by said Joseph  
Davidson, so called, is that he is not an heir-at-law of Finice  
Thomas, commonly called Finice Caruthers; also, that he  
never married to Elizabeth Caruthers, and that he is  
not the father of Finice Thomas aforesaid, nor the person he  
is represented to be; also, to prove by him the place of his  
birth and who were his father and mother, and the place  
of residence, and his acquaintances, or some of them,  
at said places, together with other facts and circum-  
stances tending to show the main facts, expected to be es-  
tablished as above stated.

That the persons claiming the said lands adversely to your petitioner, and who will be adverse parties in said action, are George Pease, W. C. Johnson and F. O. McCown, who reside in Clackamas County, Oregon.

That said Davidson is between fifty and sixty years of age, and resides out of the jurisdiction of this court; and Joseph Thomas, so called, is over sixty years of age, and resides out of the jurisdiction of this court, and is very infirm, and is likely to die at any time.

Wherefore your petitioner prays for an order allowing the examination of said witnesses at as early a day as your honor may deem proper, to the end that the testimony of said witnesses may be perpetuated, and, as in duty bound, your petitioner will ever pray.

W. C. Johnson, Geo. A. Pease and F. O. McCown opposed the petition, and filed an affidavit to the effect that the said two lots are a part of the estate of Finice Thomas, deceased, commonly known as Finice Caruthers, and is of the value of about \$200. That D. B. Hannah, Charles M. Carter, and others who are named, claim the whole of said estate, basing their claim on the allegation that Joseph Thomas, the father of said Finice, died before the death of his said son, and that the parties last aforesaid have been and still are in possession of the lands belonging to the said estate. That said Johnson, Pease and McCown claim to be owners of the whole of said estate, under the allegation that Joseph Thomas survived his said son, and has conveyed the said lands of said estate to them.

The affidavit proceeds with a statement of facts tending to show that said two lots were conveyed to said T. J. Carter, to enable him to make this application, and that the real object of the petitioner is not to perpetuate testimony, but to ascertain what the witnesses will testify, in order to prepare for the trial of a cause now pending in this court, in relation to the title to all the lands constituting said estate, in which cause said D. B. Hannah, Charles M. Carter, and others aforesaid are plaintiffs, and said Johnson, Pease and McCown are defendants; and to compel the grantor of said Johnson, Pease and McCown to disclose their defense in



id suit, and to disclose the facts within his knowledge, at his will and in advance of taking his testimony in the suit mentioned.

The petitioner also filed affidavits showing that the failure of proceedings upon two orders previously made in favor of this petitioner on the same subject; was not occasioned by his fault or neglect, and stating that the petitioner had no part of, or interest in the tract of land mentioned in the counter affidavit, except the two lots mentioned in the petition; and that the other persons mentioned in said affidavit were not owners of any interest in said two lots. The adverse parties had control of the witness, Thomas, and could not allow petitioners to see him. A deed was also executed conveying the two lots to the petitioner for a consideration of \$200.

*C. Gibbs*, for the petitioner, urged that a petitioner who complies with the statute is entitled to the order as a matter of right. That the discretion mentioned in the statute relates to designating the person who shall act, and the time and place, and the notice. That if the adverse parties are correct in holding that granting the order is stationary, the truth will not harm them, and if the said Thomas is an imposter, it is the greatest injustice that the petitioner should be debarred from seeing him, or from coming to him to communicate the truth as to the place of his alleged marriage, and his history generally. That if the judge is to exercise a discretion, it is within the knowledge of the court that the adverse party claim that said Thomas is the father of Finice Caruthers, *alias* Finice Thomas, and the petitioner is entitled to know the nature of the testimony, in order to know how to meet the evidence that is adduced against the petitioner. That the anticipated overreach is not sham, but is real.

*H. Mitchell and S. Huelat, contra.*

The material statements of the affidavits of W. C. Johnson are not denied. It is evident that this proceeding is for the purpose of compelling a disclosure of evidence material to another case. The order rests in the discre-

tion of the judge, and it should not be granted unless the judge is satisfied that the real purpose of the petitioner is to perpetuate testimony.

UPTON, J. filed the following opinion, denying the order.

Where a statute provides that a court under given circumstances *may* make a specified order, it sometimes imports an absolute duty to make the order. In such cases it is said "may" is construed to mean "shall." Where the intention is not only that the court may make the order, but also that the suitor may of right demand it, the right of the suitor implies a duty of the court. Where a matter becomes a right of a suitor it is no longer within the discretion of the court.

Upon the previous applications, I was under the impression that the statute for taking evidence *de bene esse* was of that character; my attention not being called to the peculiar wording of the last clause of section 849.

It is there unequivocally shown that the court or judge is called upon to exercise a discretion; although the words of the first clause of the same section, if that clause stood alone, would import that a petitioner filing the prescribed verified petition could claim the order as a right. It was my impression at the time of making the previous orders, that the discretion of the judge was limited to the question whether the facts enumerated in the statute, appeared from an inspection of a duly verified petition.

But the statute provides that, where these facts do appear, "the judge may thereupon *in his discretion* make an order allowing the examination, prescribing the place thereof, and how long before the examination the order and notice of the time and place thereof shall be served."

This language does not import a discretion as to the time, place and notice only. But the judge may, in his discretion, make or deny the order. This is not an arbitrary power to grant or refuse, as may be most pleasing to the judge, but it is a judicial discretion to be exercised according to the principles of equity for the benefit and protection of parties interested.

not called upon to decide whether, upon a first application, an adverse party would be entitled to file affidavits in opposition to the petition, or whether a notice to the adverse party on a first application could properly be ordered. I regard the making of a third application a sufficient reason for requiring the notice and permitting counter affidavits. Although the petitioner has exonerated himself from a charge of negligence in regard to the former proceedings, I think I am called upon by the present condition of the case to look into the counter affidavits.

In view of the positions assumed, and some of the statements made by the petitioners' counsel in the argument, observe the necessity of passing upon questions of fact in regard to the objects for which the petition is presented.

The petitioner charges that the witness Thomas, upon whose perjury the title of a vast estate of which these two lots in part, has conveyed his interest to, and is under the legal influence and control of the parties adverse to the petitioner, and that they persistently deprive the petitioner of the right to the witness. That it would be hazardous for the court in the equity suit to take said Thomas's deposition and make him their witness in the important matter, without first knowing the nature of his testimony. And he argues from these facts that justice requires that this order should be made to enable the petitioner to discover, or rather compel a discovery of, the facts within the knowledge of the witness Thomas.

I think it sufficiently appears from these admissions and papers on file, that the leading object of this proceeding is to ascertain what the witness Thomas will testify, with a view to prepare to meet and controvert his statements, rather than for the purpose of *perpetuating* the evidence he deposes.

The object of the statute is to enable a party to *perpetuate* testimony, and it would be an abuse of the discretion vested in me if I should knowingly pervert the object of the statute, and make it subserve a purpose the legislature never intended.

If I am correct in these conclusions of fact, the effect of granting the prayer of the petition would be to make the order operate as a *habeas corpus* to bring a person before a tribunal without such a showing as would authorize that writ, and to compel the party to appear, under an assumption that the object is to perpetuate testimony, when the real object is quite different. Such a proceeding is not contemplated by this statute, and it would be a violation of those personal rights that should be protected by the law.

If I thought this proceeding was had for the purpose of perpetuating testimony essential to the protection of the petitioner in regard to the two lots, and that that was the leading motive in making the application, I would feel bound to grant the order without regard to the effect it might have upon other parties or in another case. But under the circumstances disclosed, I am satisfied the order should be denied.

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Circuit Court for Multnomah County, February Term, 1871.

H. C. DRAY v. C. CRICH.

**SPECIAL VERDICT.**—A special verdict is that by which the jury find the facts only.

**IDEM—EFFECT OF.**—Where the verdict was such as to show that the jury did not intend to find a general verdict, and the court in rendering judgment treated it as a general verdict, the judgment was set aside.

**JUDGMENT—CERTAINTY.**—When a judgment is rendered, the record should show unequivocally what matters have been adjudicated.

THE facts are stated in the opinion filed in the cause.

O. P. Mason, for the petitioner.

Caples & Moreland, for the respondent.

UPTON, J. A writ of review was issued on petition of the plaintiff directed to the defendant, who is a justice of the

e, for the purpose of reviewing proceedings had before in an action entitled *Irwin Burke v. H. C. Dray*.

1 that action the plaintiff, Burke, sued to recover possession of a tract of land. The answer, among other things, set up in substance that the defendant had leased the premises from the plaintiff for one year, to be farmed or worked by him for a share of the crops. That after the expiration of the year, he had continued in possession with the consent of the plaintiff, Burke, for some months, during which time he had sown crops thereon, with like consent, which crops were then growing; the defendant claiming that the lease was still in force, and that he was still tenant of the premises from year to year, and had a right to remain in possession.

The cause was tried before a jury, who rendered the following verdict:

"We, the jurors, give verdict for plaintiff, claiming the defendant's right to have free access to the premises now in dispute, to harvest or gather any crops or produce of the soil sown or planted or sowed or planted by said defendant before service of notice on the said premises now in dispute; that said defendant quietly deliver up to said plaintiff the possession of the premises without delay."

Whereupon the court rendered a judgment for the restitution of the premises to the plaintiff, and for costs.

Several errors are assigned, but the only assignment necessary to be now considered, presents the question whether the error in receiving the verdict and rendering judgment is prejudicial.

It is claimed in favor of this proceeding:

1. That this is substantially a special verdict which was proper in the province of the jury to render.

2. That if an error was committed, no substantial right of the defendant has been disregarded or prejudiced.

3. That there is sufficient in the verdict to warrant a judgment of restitution, and that all other parts may be regarded as surplusage.

That the jury had presented conclusions of fact, such as a court could act upon in determining the law of the case,

their verdict might be treated as a special verdict. But here there is nothing of that kind except that part which might be construed as a general verdict. All else is conclusion of law, or of law and fact. "A special verdict is that by which the jury find the facts only, leaving the judgment to the court." There is no part of the special finding that is of this character.

There is, probably, that in the finding which, if standing alone, the court might treat as a general verdict. But it is obvious that the jury did not intend to render a general verdict for the plaintiff, without restriction or limitation. On the contrary, if this finding be compared with the pleadings, it will be seen that the jury considered the defendant rightfully in possession when the crop was sown; that is, after the termination of the first year of the tenancy.

If error exists, it is one that affects a substantial right; the judgment is the same that would have been rendered on a general verdict for the plaintiff, and it is impossible to construe the language employed by the jury as expressing an intention to find for the plaintiff generally; we cannot deduce from the case that the jurors would have agreed to a verdict for the plaintiff containing no such reservations as they have attempted to make.

Another reason against allowing the judgment to stand is, that the verdict is not sufficiently certain to stand as a final decision of the special matters with which the verdict deals. It leaves it to be determined hereafter what crops were "sown before service of notice," and it attempts to pass upon matters not in issue. It is of the gravest importance that, when a final judgment is rendered, the record shall be definite and certain, and show unequivocally what matters have been adjudicated, and that the decision shall be a finality in regard to the matters in issue.

Any attempt to sustain such a departure from the rule as is here presented, could scarcely fail to involve the parties in greater uncertainty and difficulty than existed at the commencement of the action.

Let the judgment be reversed and the cause remanded for a new trial in the justice's court.

Circuit Court for Multnomah County, February Term, 1871.

GEO. A. PEASE v. DOLPHUS B. HANNAH.

**EJECTMENT—PLEADING.**—In an action for the recovery of the possession of real property, it is not necessary for the plaintiff to set out his muniments of title.

**IDEM.**—Where a defendant set up a title in himself to an undivided interest, he was required to specify what interest or share he owns.

**REDUNDANCY.**—On motion, redundant matter was stricken out.

*Mitchell & Dolph*, for the plaintiff.

*Wait & Gibbs*, for the defendant.

THE plaintiff brings his action to recover an undivided half of the premises in question, known as the Caruthers estate. He alleges "that he is the owner in fee simple of the undivided half" of the premises; (describing the land); and adds that he "has been such owner since the fifteenth day of September, 1870, by the following chain of title," and proceeds to set out, according to their legal effect, the muniments of his title. He alleges that "the remaining one-half of said real property is owned by W. C. Johnson and F. O. McCown, who are tenants in common with the plaintiff in the whole of said real property;" that he is entitled to the possession thereof, and that the defendant is wrongfully in possession and wrongfully withholds the same.

The defendant moved to strike out that portion of the complaint relating to the plaintiff's chain of title, and the motion was granted.

The defendants filed an answer denying the allegations of the complaint, and for further answer stating: "That the defendant is rightfully in possession of the land specified in the said complaint, and that he is the owner in fee simple absolute of an undivided interest therein *of the value* of ten thousand dollars and upwards;" that certain other parties, whom he names, are owners of an undivided interest therein, and that the heirs-at-law of Finice Thomas, deceased, "are the other owners of undivided interests of the real property specified in said complaint."

This further answer the plaintiff objects to, and moves that it be made more specific as the quantity and amount for which the defendant defends, and as to the nature of his estate.

The answer also set out the following:

"The claim of the said plaintiff to an undivided half of the land specified in said complaint is wrongful and fraudulent in whole, and in part in this, that the said plaintiff pretends that the person through whom alone he, the said plaintiff, so claims, is the father and heir-at-law of the said Finice, deceased, when in truth and in fact such person is an imposter, and is not the father or heir-at-law of said Finice, deceased, and never had any interest in any of the land specified in said complaint."

This the plaintiff moved to strike out, as sham and irrelevant.

The motion to make more specific, and the motion to strike out, were granted.

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Circuit Court for Multnomah County, November Term, 1871.

F. O. McCOWN et al. v. D. B. HANNAH et al.

**JOINDER OF COTENANTS.**—In an action for the possession of land the defendant claimed for himself and others, his cotenants; alleging that he was owner of an undivided fifth of the parcel, and claiming to be entitled to the possession of one fifth in his own right, and to the four fifths as cotenant with his said tenants in common: *Held*, that the answer was defective in not giving the names of the alleged tenants in common.

**NEW PARTIES.**—The names of the alleged tenants in common of the defendant being set out in the amended answer, leave was granted to amend the complaint and to make them defendants. The motion of one of those cotenants, that the action be dismissed as to her, without prejudice, was overruled.

**CONTINUANCE.**—An issue of fact being joined as to some of the defendants, but as to others the cause not being at issue on a question of fact, the plaintiff submitted a motion to continue for the term because of the absence of witnesses, no motion being yet made to set the case down for trial; *Held*, that the motion was premature.



*Mitchell & Dolph, Johnson & McCown, for the plaintiffs.*

*Aaron E. Wait, A. C. Gibbs and Hill, Thayer & Williams, for the defendants, D. B. Hannah et al.*

*Wm. Strong, for the defendants, Caroline Worth et al.*

THIS is an action for an undivided fourth of the tract of land known as the Caruthers tract. The parcel was originally six hundred and forty acres; a portion of it has been sold at administrator's sale as city lots, and the action is for the residue. The plaintiff alleges that he is owner in fee of one undivided fourth of the premises, that W. C. Johnson and James Moore are owners in fee of three fourths, and tenants in common with him of the whole premises, that said Johnson so owns an undivided fourth and said Moore and others an undivided half thereof. That the plaintiff is entitled to the possession thereof, "and that the defendant, D. B. Hannah, wrongfully withholds the same from him, the said plaintiff, to his damage in the sum of \$500."

The defendant, D. B. Hannah, answered, alleging that he and certain persons other than those mentioned in the complaint were tenants in common of the said premises and owners thereof in fee. That the said Hannah was owner in fee of one undivided fifth of said premises, and that his said cotenants were owners in fee of the other four fifths of the said premises. And that as such owner and cotenant he was lawfully in possession of the said premises, and that he defended for the whole thereof. The defendant demurred to the answer, as not stating sufficient facts to constitute a defense.

*It was held*, that to enable the defendant to defend for the whole of the premises, including the undivided interests of the cotenants, with or under whom he claims, the defendant should disclose the names of his cotenants or state in his answer why the names are not set out. An amended answer was filed setting out the names of divers persons as cotenants with the defendant, and specifying the share claimed by each in the premises, and also referring to other persons who are not named, and declaring them to be

owners of an undivided interest in said premises in fee, and cotenants with the defendants, and declaring that their names are unknown to the defendant. The defendant moved for leave to amend his complaint, to include as defendants the persons so designated in the defendant's answer.

*Messrs. Wait & Gibbs*, for the defendant, Hannah, in opposition to the motion, cite section 314 of the code, to the effect that "a defendant who is in actual possession may for answer plead that he is in possession only as tenant of another, naming him and his place of residence," and if the landlord do not apply to be made defendant, "he shall be made defendant, if the plaintiff require it."

The court expressed the opinion that this case is within the intent and meaning of that section, that as to the four fifths, the defendant was seeking to establish a right to the possession as cotenant of others, and his possession is virtually the possession of those, as the possession of a tenant in the ordinary sense of that word is the possession of the landlord; that virtually the defendant is claiming the four fifths as tenants of the persons designated, that if he succeeds in establishing his defense his success will inure to their benefit, and that there is the same reason for making them parties, in order that they may be bound by the judgment if it proves to be against their claims, that there is in case of an ordinary tenancy, for bringing in the landlord. It was accordingly *held*, that leave to amend should be granted.

Caroline Worth, one of the defendants, thus made a party, being served, moved that the action be dismissed as to her, without prejudice to her rights in a future action or suit.

*Wm. Strong, Esq.*, for the defendant, Caroline Worth, urged in support of the motion: That, aside from the provisions of statute, ejectment afforded a summary mode of obtaining the possession, and that the action affected the possession only. That if the plaintiff claims to proceed under the statute to obtain a right, the statute must be construed strictly. That the plaintiff is not within the statute, because the defendant, Hannah, does not plead "that he is in possession *only* as the tenant of another," but also claims in his own right.

BY THE COURT, UPTON, J. Formerly the action of ejectment afforded a means of obtaining possession, but was not decisive of ultimate rights of the parties. The evident intent of the code is to change the character of the action in this respect, and to so change the action as to enable the parties by one action to obtain the possession and a judgment that shall determine all questions relating to the title, and which shall be a bar to any future proceeding in relation to that matter. This is not a statute conferring a right, but one dealing with the remedy for an injury to, or an invasion of, a right. The plaintiff does not come into court with a purpose to create a right by aid of the statute, hence it is not a case where a right is created by statute and where the statute must for that reason be construed strictly. It is a statute that changes the mode of obtaining a remedy, and being a remedial statute, it must be so construed as to carry out the intention of the legislature according to the spirit and meaning of the act, to be ascertained by the ordinary rules of construction.

It is true there is one fifth interest for which the defendant, Hannah, defends in his own right, and as to that interest he does not defend as tenant of another. But since a tenant in common in possession, is rightfully in possession of the whole, and may hold the whole, because he is tenant in common, Hannah has a right to defend for the four fifths as well as for the one fifth, and yet he does not own in his own right the fee in all that he has a right to possess. He owns but one fifth, and but for the tenancy he could possess in his own exclusive right only one fifth. It is only through his relation to his cotenants that he may possess the whole, or defend for more than one fifth. As to the four fifths I think he defends as tenant *only* within the meaning of section 314 of the code, and I think it is unreasonable to suppose that the legislature intended to make such case an exception, leaving it unprovided for, and thus compel a plaintiff to litigate for the whole premises successively, in one action after another, with several tenants in common. The motion to dismiss as to Caroline Worth, without prejudice, was overruled.

On the first day of the present term the plaintiff filed a motion and an affidavit for a continuance. On the sixth day of the term he brought the motion on for argument. The motion was opposed by Hannah and such other defendants as had answered, Caroline Worth and two other defendants were still entitled to time in which to answer, and they did not appear to the motion. *It was held*, that the motion was premature.

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Circuit Court for Multnomah County, February Term, 1871.

DAVID TAGGART v. ORVILLE RISLEY et al.

**WARRANTY.**—One who is bound by a covenant of general warranty can not set up an after acquired title.

**AVOIDANCE.**—An answer that seeks to avoid the force of an alleged covenant of warranty, by a statement that the covenantor did not undertake to convey any greater interest in the premises than one fifth, does not allege material fact.

THE complaint, after alleging that the land in question had been conveyed by W. W. Chapman to the defendant, Orville Risley, states that the said Orville Risley and his wife for a valuable consideration conveyed the said lot to Charles Goodnough, (the plaintiff's grantor), by their deed duly executed and delivered. And that the said Orville Risley and his said wife in and by their said deed covenanted as follows: "And the said parties of the first part for themselves and their heirs, the said premises in the quiet and peaceable possession of the said party of the second part his heirs and assigns, against the said parties of the first part and their heirs, lawfully claiming or to claim the same, shall and will warrant and by these presents forever defend."

The answer sets up that before the time of making the said deed to Goodnough, in December, 1860, the said defendant, Orville Risley, had acquired but an undivided one fifth part of the said lot. That the said W. W. Chapman,

at the time of executing his said deed, owned but one fifth part thereof. And that the said Risley was the successor in interest to the said Chapman, and that by his said deed to said Goodnough he "did not undertake to convey any greater interest" than the said undivided one fifth part of the said lot 7.

It appears by the complaint that Daniel H. Lownsdale conveyed the same lot to the defendant Risley, by a deed executed May 30, 1861. Upon this last deed the defendant Risley relies, as an after acquired title, to four undivided fifths of the premises. The plaintiff demurred to the answer.

*Mitchell & Dolph*, for the plaintiff.

*W. Lair Hill*, for the defendant.

BY THE COURT, UPTON, J. The assertion that the defendant "did not undertake to convey any greater interest" than one fifth, is not a denial of a material allegation of the complaint; nor is it a statement of new matter in avoidance, upon which an issue of fact can be taken. The answer admits that the defendant Risley made the covenant set up in the complaint. The covenant differs from a covenant of general warranty only in limiting the persons against whose claims the grantor covenants; and he especially includes himself.

The case is clearly within the rule that prohibits one who is bound by a covenant of general warranty, from setting up an after acquired title. The phrase "the said premises," as ordinarily used in deeds of conveyance, is construed to mean the lands previously described in the instrument; and when there are no limiting words in the instrument, tending to show that the contract was for less than the whole of the parcel described, a defendant who admits the execution of the covenant, does not raise a material issue of fact by stating that he did not undertake to convey any greater interest than one fifth. The demurrer to the answer should be sustained.

their verdict might be treated as a special verdict. But here there is nothing of that kind except that part which might be construed as a general verdict. All else is conclusion of law, or of law and fact. "A special verdict is that by which the jury find the facts only, leaving the judgment to the court." There is no part of the special finding that is of this character.

There is, probably, that in the finding which, if standing alone, the court might treat as a general verdict. But it is obvious that the jury did not intend to render a general verdict for the plaintiff, without restriction or limitation. On the contrary, if this finding be compared with the pleadings, it will be seen that the jury considered the defendant rightfully in possession when the crop was sown; that is, after the termination of the first year of the tenancy.

If error exists, it is one that affects a substantial right; the judgment is the same that would have been rendered on a general verdict for the plaintiff, and it is impossible to construe the language employed by the jury as expressing an intention to find for the plaintiff generally; we cannot deduce from the case that the jurors would have agreed to a verdict for the plaintiff containing no such reservations as they have attempted to make.

Another reason against allowing the judgment to stand is, that the verdict is not sufficiently certain to stand as a final decision of the special matters with which the verdict deals. It leaves it to be determined hereafter what crops were "sown before service of notice," and it attempts to pass upon matters not in issue. It is of the gravest importance that, when a final judgment is rendered, the record shall be definite and certain, and show unequivocally what matters have been adjudicated, and that the decision shall be a finality in regard to the matters in issue.

Any attempt to sustain such a departure from the rule as is here presented, could scarcely fail to involve the parties in greater uncertainty and difficulty than existed at the commencement of the action.

Let the judgment be reversed and the cause remanded for a new trial in the justice's court.

Circuit Court for Multnomah County, February Term, 1871.

HEO. A. PEASE v. DOLPHUS B. HANNAH.

**MENT—PLEADING.**—In an action for the recovery of the possession of real property, it is not necessary for the plaintiff to set out his muniments of title.

—Where a defendant set up a title in himself to an undivided interest, he was required to specify what interest or share he owns.

**DANCY.**—On motion, redundant matter was stricken out.

*Atchell & Dolph*, for the plaintiff.

*Atch & Gibbs*, for the defendant.

The plaintiff brings his action to recover an undivided interest in the premises in question, known as the Caruthers estate.

He alleges "that he is the owner in fee simple of the undivided half" of the premises; (describing the land); and that he "has been such owner since the fifteenth day of December, 1870, by the following chain of title," and proposes to set out, according to their legal effect, the muniments of his title. He alleges that "the remaining one-half of said property is owned by W. C. Johnson and F. O. McCown, who are tenants in common with the plaintiff in the whole said real property;" that he is entitled to the possession thereof, and that the defendant is wrongfully in possession and wrongfully withholds the same.

The defendant moved to strike out that portion of the complaint relating to the plaintiff's chain of title, and the motion was granted.

The defendants filed an answer denying the allegations of the complaint, and for further answer stating: "That the defendant is rightfully in possession of the land specified in said complaint, and that he is the owner in fee simple absolute of an undivided interest therein of the value of ten thousand dollars and upwards;" that certain other parties, whom he names, are owners of an undivided interest therein and that the heirs-at-law of Finice Thomas, deceased, "are other owners of undivided interests of the real property specified in said complaint."

This further answer the plaintiff objects to, and moves that it be made more specific as the quantity and amount for which the defendant defends, and as to the nature of his estate.

The answer also set out the following:

"The claim of the said plaintiff to an undivided half of the land specified in said complaint is wrongful and fraudulent in whole, and in part in this, that the said plaintiff pretends that the person through whom alone he, the said plaintiff, so claims, is the father and heir-at-law of the said Finice, deceased, when in truth and in fact such person is an imposter, and is not the father or heir-at-law of said Finice, deceased, and never had any interest in any of the land specified in said complaint."

This the plaintiff moved to strike out, as sham and irrelevant.

The motion to make more specific, and the motion to strike out, were granted.

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Circuit Court for Multnomah County, November Term, 1871.

F. O. McCOWN et al. v. D. B. HANNAH et al.

**JOINDER OF COTENANTS.**—In an action for the possession of land the defendant claimed for himself and others, his cotenants; alleging that he was owner of an undivided fifth of the parcel, and claiming to be entitled to the possession of one fifth in his own right, and to the four fifths as cotenant with his said tenants in common: *Held*, that the answer was defective in not giving the names of the alleged tenants in common.

**NEW PARTIES.**—The names of the alleged tenants in common of the defendant being set out in the amended answer, leave was granted to amend the complaint and to make them defendants. The motion of one of those cotenants, that the action be dismissed as to her, without prejudice, was overruled.

**CONTINUANCE.**—An issue of fact being joined as to some of the defendants, but as to others the cause not being at issue on a question of fact, the plaintiff submitted a motion to continue for the term because of the absence of witnesses, no motion being yet made to set the case down for trial; *Held*, that the motion was premature.



*Shell & Dolph, Johnson & McCown*, for the plaintiffs.

*on E. Wait, A. C. Gibbs and Hill, Thayer & Williams*,  
defendants, *D. B. Hannah et al.*

*Strong*, for the defendants, *Caroline Worth et al.*

is is an action for an undivided fourth of the tract of  
known as the Caruthers tract. The parcel was originally  
hundred and forty acres; a portion of it has been sold at  
administrator's sale as city lots, and the action is for the res-

The plaintiff alleges that he is owner in fee of one  
divided fourth of the premises, that *W. C. Johnson* and  
*s Moore* are owners in fee of three fourths, and tenants  
common with him of the whole premises, that said *John-*  
*o* owns an undivided fourth and said *Moore* and others  
undivided half thereof. That the plaintiff is entitled to  
possession thereof, "and that the defendant, *D. B. Han-*  
*wrongfully* withholds the same from him, the said plain-  
to his damage in the sum of \$500."

he defendant, *D. B. Hannah*, answered, alleging that he  
certain persons other than those mentioned in the com-  
ment were tenants in common of the said premises and  
ers thereof in fee. That the said *Hannah* was owner in  
of one undivided fifth of said premises, and that his said  
nants were owners in fee of the other four fifths of the  
premises. And that as such owner and cotenant he  
lawfully in possession of the said premises, and that he  
ended for the whole thereof. The defendant demurred  
the answer, as not stating sufficient facts to constitute a  
ense.

It was held, that to enable the defendant to defend for the  
ole of the premises, including the undivided interests  
the cotenants, with or under whom he claims, the de-  
fendant should disclose the names of his cotenants or state  
his answer why the names are not set out. An amended  
swer was filed setting out the names of divers persons  
cotenants with the defendant, and specifying the share  
titled by each in the premises, and also referring to other  
ersons who are not named, and declaring them to be

owners of an undivided interest in said premises in fee, and cotenants with the defendants, and declaring that their names are unknown to the defendant. The defendant moved for leave to amend his complaint, to include as defendants the persons so designated in the defendant's answer.

*Messrs. Wait & Gibbs*, for the defendant, Hannah, in opposition to the motion, cite section 314 of the code, to the effect that "a defendant who is in actual possession may for answer plead that he is in possession only as tenant of another, naming him and his place of residence," and if the landlord do not apply to be made defendant, "he shall be made defendant, if the plaintiff require it."

The court expressed the opinion that this case is within the intent and meaning of that section, that as to the four fifths, the defendant was seeking to establish a right to the possession as cotenant of others, and his possession is virtually the possession of those, as the possession of a tenant in the ordinary sense of that word is the possession of the landlord; that virtually the defendant is claiming the four fifths as tenants of the persons designated, that if he succeeds in establishing his defense his success will inure to their benefit, and that there is the same reason for making them parties, in order that they may be bound by the judgment if it proves to be against their claims, that there is in case of an ordinary tenancy, for bringing in the landlord. It was accordingly *held*, that leave to amend should be granted.

Caroline Worth, one of the defendants, thus made a party, being served, moved that the action be dismissed as to her, without prejudice to her rights in a future action or suit.

*Wm. Strong, Esq.*, for the defendant, Caroline Worth, urged in support of the motion: That, aside from the provisions of statute, ejectment afforded a summary mode of obtaining the possession, and that the action affected the possession only. That if the plaintiff claims to proceed under the statute to obtain a right, the statute must be construed strictly. That the plaintiff is not within the statute, because the defendant, Hannah, does not plead "that he is in possession *only* as the tenant of another," but also claims in his own right.

THE COURT, UPTON, J. Formerly the action of ejectment afforded a means of obtaining possession, but was not one of ultimate rights of the parties. The evident intent of the code is to change the character of the action in this respect, and to so change the action as to enable the parties to bring the action to obtain the possession and a judgment that will determine all questions relating to the title, and which will be a bar to any future proceeding in relation to that tract. This is not a statute conferring a right, but one dealing with the remedy for an injury to, or an invasion of, a right.

The plaintiff does not come into court with a purpose to assert a right by aid of the statute, hence it is not a case where a right is created by statute and where the statute must be at least in part so construed strictly. It is a statute that prescribes the mode of obtaining a remedy, and being a remedial statute, it must be so construed as to carry out the intention of the legislature according to the spirit and meaning of the act, to be ascertained by the ordinary rules of construction.

It is true there is one fifth interest for which the defendant Hannah, defends in his own right, and as to that interest he does not defend as tenant of another. But since the plaintiff is in common in possession, is rightfully in possession of the whole, and may hold the whole, because he is in common, Hannah has a right to defend for the four fifths as well as for the one fifth, and yet he does not own in his own right the fee in all that he has a right to possess.

He owns but one fifth, and but for the tenancy he could possess in his own exclusive right only one fifth. It is only through his relation to his cotenants that he may defend the whole, or defend for more than one fifth. As to the four fifths I think he defends as tenant *only* within the meaning of section 314 of the code, and I think it is unreasonable to suppose that the legislature intended to make this case an exception, leaving it unprovided for, and thus enable a plaintiff to litigate for the whole premises successively, in one action after another, with several tenants in common. The motion to dismiss as to Caroline Worth, without prejudice, was overruled.

On the first day of the present term the plaintiff filed a motion and an affidavit for a continuance. On the sixth day of the term he brought the motion on for argument. The motion was opposed by Hannah and such other defendants as had answered, Caroline Worth and two other defendants were still entitled to time in which to answer, and they did not appear to the motion. *It was held*, that the motion was premature.

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Circuit Court for Multnomah County, February Term, 1871.

DAVID TAGGART v. ORVILLE RISLEY et al.

**WARRANTY.**—One who is bound by a covenant of general warranty can not set up an after acquired title.

**AVOIDANCE.**—An answer that seeks to avoid the force of an alleged covenant of warranty, by a statement that the covenantor did not undertake to convey any greater interest in the premises than one fifth, does not allege material fact.

THE complaint, after alleging that the land in question had been conveyed by W. W. Chapman to the defendant, Orville Risley, states that the said Orville Risley and his wife for a valuable consideration conveyed the said lot to Charles Goodnough, (the plaintiff's grantor), by their deed duly executed and delivered. And that the said Orville Risley and his said wife in and by their said deed covenanted as follows: "And the said parties of the first part for themselves and their heirs, the said premises in the quiet and peaceable possession of the said party of the second part his heirs and assigns, against the said parties of the first part and their heirs, lawfully claiming or to claim the same, shall and will warrant and by these presents forever defend."

The answer sets up that before the time of making the said deed to Goodnough, in December, 1860, the said defendant, Orville Risley, had acquired but an undivided one fifth part of the said lot. That the said W. W. Chapman,

the time of executing his said deed, owned but one fifth part thereof. And that the said Risley was the successor interest to the said Chapman, and that by his said deed said Goodnough he "did not undertake to convey any greater interest" than the said undivided one fifth part of the said lot 7.

It appears by the complaint that Daniel H. Lownsdale conveyed the same lot to the defendant Risley, by a deed executed May 30, 1861. Upon this last deed the defendant Risley relies, as an after acquired title, to four undivided thirds of the premises. The plaintiff demurred to the answer.

*Mitchell & Dolph*, for the plaintiff.

*W. Lair Hill*, for the defendant.

BY THE COURT, UPTON, J. The assertion that the defendant "did not undertake to convey any greater interest" in one fifth, is not a denial of a material allegation of the complaint; nor is it a statement of new matter in avoidance, on which an issue of fact can be taken. The answer admits that the defendant Risley made the covenant set up in the complaint. The covenant differs from a covenant of general warranty only in limiting the persons against whose claims the grantor covenants; and he especially includes himself.

The case is clearly within the rule that prohibits one who bound by a covenant of general warranty, from setting up an after acquired title. The phrase "the said premises," ordinarily used in deeds of conveyance, is construed to mean the lands previously described in the instrument; and when there are no limiting words in the instrument, tending to show that the contract was for less than the whole of the parcel described, a defendant who admits the execution of the covenant, does not raise a material issue of fact by stating that he did not undertake to convey any greater interest than one fifth. The demurrer to the answer should be sustained.

Circuit Court for Clackamas County, March Term, 1871.

DAVID WILLS v. DANIEL WILSON and W. C. WILSON.

**ALTERATION.**—Adding to a promissory note the words “in gold coin,” is a material alteration.

**NOTICE.**—If the plaintiff took the note knowing that it was altered without the consent of one of the makers, he can not recover against the maker not consenting.

**IDEM.**—If it is so altered, and the plaintiff before receiving the altered note was put upon inquiry, he cannot recover against the party who did not consent to the alteration.

**IGNORANCE.**—Ignorance of the law will not excuse.

**ALTERATION.**—If the plaintiff was without fault and was deceived, and received the note believing that the note was altered by both the makers, when in fact one of the makers did not authorize the alteration, the plaintiff is entitled to recover against the latter upon the original note, to the same extent as if no alteration had been made.

THIS was an action on a promissory note. The answer does not deny the consideration or the execution of a promissory note for the amount claimed, but the separate answer of Daniel Wilson sets up, that since the execution of the note, the plaintiff and W. C. Wilson had altered the note by adding to it the words, “in gold coin.”

The replication denies that the alteration was made by the plaintiff, but alleges that it was made by W. C. Wilson; and sets up, in substance, that the plaintiff was deceived by W. C. Wilson and made to believe that the alteration was made with the consent of both defendants.

The evidence disclosed that W. C. Wilson purchased sheep of the plaintiff, and that Daniel Wilson, the father of W. C. Wilson, signed a note with him for the purchase price. The plaintiff, after having the note two or three days, discovered that it was not made payable in coin, and went to the premises where both the defendants lived, and finding W. C. Wilson in the street, asked him for a new note. W. C. Wilson took the note into the house, leaving the plaintiff in the street, and shortly came out with the note, with the words “in gold coin” added. The plaintiff received the altered note and kept it some years after ma-

rity, and then brought this action. The plaintiff first de-  
clared upon it as a note for coin; a trial was had, and the  
jury disagreed. The plaintiff then amended his pleading,  
and now claims to recover on the note as originally made.

*A. F. Forbes*, for the plaintiff.

*Mitchell & Dolph*, for the defendant.

After the jury were sworn and the case stated to the jury,  
the defendant moved the court for a judgment on the plead-  
ings. The motion was overruled.

After the close of the plaintiff's testimony, the defendant  
moved for a nonsuit.

It was held that it was a question of fact for the jury,  
whether the plaintiff, when the note was returned to him,  
had reason to believe that the note was altered by the con-  
currence of Daniel Wilson, and the motion was overruled.

The plaintiff, having requested that the instructions to  
the jury be given in writing, requested the following, which  
the court declined to give:

If the alteration was not made by W. C. Wilson and by  
the plaintiff, or by the concurrence of the plaintiff, the  
plaintiff is entitled to recover.

If the change was innocently made, without any bad  
intent on the part of the plaintiff Wills, and not by him or by  
concurrence, the plaintiff is entitled to recover."

The defendant Daniel Wilson asked the following instruc-  
tion, which the court *declined* to give:

Under the pleadings in this case, the plaintiff cannot  
recover that he consented to the alteration of the note.

If the note was altered after its execution, and such al-  
teration was made without the knowledge or consent of  
Daniel Wilson, the plaintiff cannot recover upon such note,  
whether it was, either before or after alteration."

The taking and retaining the note by the plaintiff from  
Daniel Wilson, as altered, was an adoption of the act of  
altering the same by the plaintiff, if the jury are satisfied  
that he did so take and retain the same. The plaintiff tak-  
ing the altered note was bound to know that the alteration was  
made by Daniel Wilson as well as by W. C. Wilson."

The following instructions requested by the defendant, were given:

"Alteration by adding to this note the words 'in gold coin' was a material alteration.

"The alteration of the note by W. C. Wilson, at the request of the plaintiff, without the knowledge or authority of Daniel Wilson, if done, would have been an unlawful act."

"It is a presumption of law that an unlawful act was done with an unlawful intent."

**THE COURT.** UPTON, J. then instructed as follows:

If the plaintiff had reason to believe, and did believe, at the time the note was altered, that both the defendants consented to the alteration, and the circumstances were not such as to put a reasonable man on inquiry as to the consent of Daniel Wilson, the plaintiff is entitled to recover to the same extent as if the note was not altered.

But if W. C. Wilson acted without authority, and the plaintiff was not deceived, or if the circumstances were such that a reasonable man would have suspected or believed the act to be done without Daniel Wilson's consent, the plaintiff, by accepting the altered notes, released Daniel Wilson. In that case, the alteration can not be disregarded as innocently made. If the plaintiff was ignorant of the law, and did not know the effect of altering the note without the consent of Daniel Wilson, that circumstance is not available. Ignorance of the law cannot operate as an excuse, nor change the rights of the parties.

If the plaintiff was deceived about the facts, and believed the alteration was made with the consent of both defendants, and had no reason to suspect the contrary, his accepting the altered note will not amount to entering into a new contract with W. C. Wilson alone and will not discharge Daniel Wilson from liability.

When the circumstances are such as would excite suspicion and naturally attract the attention, a party will be presumed to have been put upon inquiry, and if he does not inquire he will be presumed to have known the facts.

The jury returned a verdict for the defendant.



Circuit Court for Clackamas County, March Term, 1871.

**THE OREGON AND CALIFORNIA RAILROAD COMPANY v. WILLIAM BARLOW AND WIFE.**

**TO OF WAY—ACTION TO CONDEMN LANDS—PRACTICE.**—In an action to condemn lands to the use of a railroad company, when the issue is formed by a statement in the complaint that the defendant's damages do not exceed the sum of two hundred dollars, and a statement in the answer that the land sought to be appropriated is of the value of \$234, and that the additional damages to the defendant resulting from such appropriation will amount to \$2,516, the defendant was permitted to open and close the case.

**MATE OF VALUE.**—The amount to be paid for the land appropriated should be its value at the commencement of the action.

**ESTIMATE.**—The estimate should not include the value of timber on the defendants' adjacent lands, cut down and destroyed by the plaintiff.

**DAMAGE FROM FIRE.**—If a railroad is to be constructed so near to the defendants' barns as to improperly expose them to danger from fire from passing trains, that is a proper subject to be considered by the jury in estimating damages. If the danger is such as to render it advisable to remove the barns, the cost of removal is a proper subject to be considered by the jury in estimating damages.

**POUNDING WATER.**—If, by an improper construction of the railroad now built, the road bed acts as a dam and improperly ponds water and causes it to overflow the defendants' lands, their remedy is by a proceeding to prevent or remove the obstruction, and it is not a ground for additional damages in this proceeding. The damages to be assessed are such as will result from a proper construction of the road.

**OVERFLOW.**—If a proper construction of the road will pond water upon the defendants' adjacent land, the overflow is a proper subject to be considered in estimating damages.

**PROTEST.**—Money paid into court by the plaintiff to enable the court to render judgment in pursuance of the verdict, was, on motion, ordered paid to the defendant, notwithstanding it is accompanied by a protest.

THIS was a proceeding under the statute to condemn and appropriate a parcel of the defendants' land for the use of the plaintiff's railroad.

The complaint describes this parcel of 4 69-100 acres of land, sixty feet in width, by metes and bounds, and "as lands of the defendants;" the initial of the boundary being designated as a point "on the northern boundary of the defendants' land claim." Other than this the pleadings do not show what land is owned by the defendants.

The complaint states that, believing that two hundred dol-

lars was sufficient to compensate the defendants for the land and all damages, etc., the plaintiff had tendered that amount, etc., making a formal plea of tender.

The answer averred that the true value of the 4 69-100 acres of land was \$234, and that if said land was taken and appropriated, the said defendants would be thereby damaged in the sum of \$2,516, in addition to the value of the land taken.

The plaintiff moved that the defendants be required to make their answer more specific, by stating in what manner the appropriation of land would cause them damage.

*Mitchell & Dolph*, for the plaintiff.

*Johnson & McCown* and *Charles Warren*, for defendants.

UPRON, J., overruled the motion, and the plaintiff replied denying that the parcel of land was worth more than \$200, and denying that the construction of the road would cause damage to the defendants; and alleging that it would cause benefits to the defendants greater than the damages claimed by them.

The cause coming on for trial, the defendants claimed the affirmative of the issues, and asked to be allowed to open and close the case. This was granted, the plaintiff objecting.

The jury viewed the premises.

On the trial the defendant asked his witness the following questions:

What was the value of the strip of land described in the complaint *at the time this action was commenced?*

The plaintiff objected that it was irrelevant, immaterial and incompetent, and claimed that the question should be confined to the value at the time the plaintiff took possession of or appropriated the land, and the estimate should be irrespective of any increased value by reason of the proposed improvement.

*It was held*, that the witness may be asked what it was worth at the commencement of this proceeding. (1)

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<sup>1</sup> A corporation, named the Oregon Central Railroad Company, had commenced the construction of this line of road and had transferred the road to the plaintiff. The road had been constructed over this land more than a year previous to the commencement of this action; and when this question arose, it was in evidence, that the road had been constructed, but it was not shown who constructed it, nor that any transfer had been made.

the defendant testified that he had two rows of black walnut trees along the margins of an avenue leading from his place, and that six of those trees were grown on the sixty acres sought to be appropriated.

His counsel asked him, what were those six trees worth?

On this question the plaintiff objected. That the witness had already given his opinion of the value of the land at a much higher value than that claimed in the answer, and that the trees being part and parcel of the land sought to be appropriated, it was not competent for the witness to give an estimate of the value of the trees separately.

It was held, that estimating the value of the trees was one thing, and coming at the value of the land including the trees, was another. That there is no rule preventing a witness from testifying to a higher value than that claimed in the pleading, although the jury are limited to that amount in rendering their verdict.

The witness was permitted to answer, and said the trees were worth from \$50 to \$100 each. (1)

The defendant proved that he had two farm barns standing one hundred and seventy-eight feet from the centre of the railroad track, and that the barnyard in which they stood extended to within eighty-nine feet of the track. The defendant offered evidence tending to prove that the barns were in danger of being burned by passing locomotives. To this evidence the plaintiff objected, that the probable or possible damage was too remote; that it was only a possibility; and that if the plaintiff caused the destruction of the defendant's barns by fire, the plaintiff would be liable in an action for damages.

It was argued by the defendants' counsel, that although the defendants might recover in a future action if they were guilty of no contributory negligence, yet if they continued to use the barns as heretofore, if there was danger, the dan-

<sup>1</sup> It was virtually conceded by the defendant's counsel, before the close of the trial, that as the walnut trees were destroyed before the commencement of this action, a separate action would lie for destroying the trees, and that he was not entitled to recover their value in this action; and the evidence on that subject was subsequently ruled out with the defendant's consent.

ger would be such that it would be clearly a case of contributory negligence, and if the defendants were compelled to remove their barns, or change their mode of using them, that was a reason for claiming damages in this proceeding.

The objection was overruled. The defendant introduced evidence tending to prove that the danger was so great as to render it advisable to remove the barns. The defendant then asked a witness the cost of removing the barns. The plaintiff objected, on the grounds before stated.

The objection was overruled.

The evidence tended to show that a few acres of the defendants' land being level and nearly or quite surrounded by higher lands, and having no distinct channel through it, was, before the construction of the railroad, in extremely wet weather, covered with water for a few days at a time. That the railroad was constructed across and over the center of this part without a sluice to allow the water to pass under the road, and the road-bed operated as a dam, causing the water to stand higher on the east than on the west side of the railroad, and to stand for a much longer time than formerly on a portion of defendant's land. There was conflicting evidence as to where, and in what direction, was the natural surface flow or drainage of this water, before the construction of the railroad; and as to the proper mode of relieving the land of surplus water after the construction. The cost of drainage by a ditch parallel to the railroad was variously estimated; the opinions of witnesses ranging from \$10 to \$180. The cost of a good sluice under the railroad was estimated to be \$75.

The plaintiff moved that all the evidence on the subject of the overflow be ruled out as irrelevant.

The motion was overruled.

Of the written instructions presented by the plaintiff, the court *declined* to give the following:

"The defendants cannot recover anything in this case by reason of any probable danger of fire to the barns of the defendant situated on adjacent lands outside the sixty feet sought to be appropriated.

"The defendants are not entitled to recover for any damage done to adjacent lands of defendants, outside of the

et sought to be appropriated, by reason of water d back on such lands by the embankment of the rail-

determining the compensation to which the defend- e entitled for the strip of land actually sought to be riated, you should find what that strip of land was *at the time the plaintiffs took it*, and irrespective of reased value by reason of the railroad."

following are the instructions given to the jury:

ill be proper for you to observe a distinction between s claimed by the defendants as the value of the land the plaintiff seeks to appropriate, and what is called g damages. The defendants are entitled to com- on for the parcel or strip of  $4\frac{69}{100}$  acres irrespective benefit or advantage to their adjacent lands caused proposed improvement or by the construction of the d.

the question whether the defendants are entitled to : any more than the actual value of the  $4\frac{69}{100}$  acres de- upon whether there are resulting damages, aside from lue, exceeding resulting advantages or benefits to the ants, in consequence of the road.

plaintiff admits the value of the land described in the unt to be \$200, and the defendant claims that it is \$234; of course you cannot place its value at less than nor more than \$234.

estimating its value you will find what it was worth at ne this proceeding was commenced.

you believe from the evidence that the defendant's are so situated as to be unreasonably exposed to dan- fire from passing locomotives, that is a proper sub- r you to consider in determining whether the resulting es are greater than the benefits.

you think they are in such danger that it would be ad- e to remove them from their present position, the cost h removal is a proper subject for consideration in mak- our estimates.

e defendant cannot recover in this action any damages n- pensation for walnut trees. All evidence on that t has been ruled out, and the subject has been with-

drawn from your consideration. It has been ruled out because, as to the land sought to be appropriated, you are to find its value at the time this action was commenced, and not at the time the plaintiff took possession. Such growing trees are a part of the land, and if they were to be valued at all in the case, they would be valued as land, and it is admitted that when this proceeding was commenced the walnut trees were not in existence. If the defendant has an unsatisfied demand for taking those trees, he must recover, if at all, in another action; for, if we should attempt to include that matter in this case, the judgment in this case would be no bar to another action for the same thing; and you are to treat the case as if there had been no such walnut trees.

If the plaintiff has neglected to put in a sluice, where one was needed to prevent the plaintiff's work from causing an overflow of the defendants' land, the defendants' remedy is by a proceeding to compel the plaintiff to put in the necessary sluice; and if such is the cause of the alleged overflow, the defendants cannot recover any damages in this proceeding because of such neglect. The damages to be considered in this case are such as will be caused by constructing a railroad in a proper manner. If the railroad now built is improperly constructed, and an overflow is caused by improperly neglecting to put in a sluice by which the plaintiff ought to have avoided such overflow, the damage thus caused can not be considered in this case, but the defendants' remedy must be by proceedings to compel the plaintiff to put in the sluices.

If you think some injury is done to the defendants by ponding water upon their land adjacent to the sixty feet, and that a sluice is not necessary, such injury is a proper subject to be considered in estimating damages. In other words, if a proper construction of the road will pond water upon the defendants' adjacent land, the overflow is a proper subject to be considered in estimating damages.

The court has refused to admit evidence that the plaintiffs while constructing the road, cut down or destroyed timber growing on lands adjacent to the sixty feet sought to be appropriated, and you should not permit anything that has

aid on that subject to influence your verdict. If the ants have suffered any injury in that respect, the law them a remedy in another proceeding, and the nature case is such that no record can be legally made to hat such damages have been considered and determined proceeding.

opinions of experts or persons skilled in a particular of business have been given in evidence, to aid you iving at correct conclusions on some points with which may be more familiar than you can be.

determining any controverted question of this kind, you ive to their opinions such consideration as is proper, iberating that such opinions are not offered to control judgment, but to instruct and to convince, and thus you to arrive at the truth. In the end, it is the opin- f the jury upon which the determination of the point rest. After carefully considering these opinions with er evidence, and giving them due weight, it rests upon o decide according to your convictions.

e jury returned a verdict in favor of the plaintiff for appropriation of the land described in the complaint, and vor of the defendants for \$700 damages.

e plaintiff filed a motion for a new trial, assigning er- of law and insufficiency of the evidence, which was sub- d without argument, and overruled.

e plaintiff paid into the hands of the clerk \$700, to- r with money sufficient to satisfy the costs, and at the time filed a paper stating that the plaintiff pays the "under protest and without waiving the right to appeal the judgment rendered, or to be rendered, herein," and notifying the clerk not to pay the money to the defend- until the case was determined on appeal.

judgment was rendered, on the plaintiff's motion, in dance with the verdict. Afterwards the defendants' ney filed an affidavit stating that he had demanded the \$700 of the clerk, and that the clerk refused to pay the to the defendants, and moved the court for an order e clerk, directing him to deliver that sum to the defend- ; and the question having been argued and submitted, as ordered that the clerk pay the \$700 to the defendants.

CIRCUIT COURT FOR WASHINGTON COUNTY, MAY TERM, 1871.

WM. B. CHATFIELD v. WASHINGTON COUNTY.

Re-enacting the law fixing the salary of the county treasurer, does not deprive him of the right to a percentage for receiving school funds, allowed to him by a statute not referred to in the re-enactment.

*W. D. Hare*, for the plaintiff.

*G. H. Durham*, for the defendant.

UNDER ss. 254, 5 and 6 of the code, this case was submitted, upon an agreed statement of facts, to the circuit court. UPTON, J., presiding.

The parties state that the plaintiff is treasurer of Washington County, and as such, has in his hands \$6,000, collected by him, and belonging to what is known as the irreducible school fund, and that he has received no compensation for his services in that relation, aside from the salary which he draws as treasurer.

In 1856, an act was passed which authorized the board of school land commissioners "to demand the services of any county officer in any business relating to the school lands and funds in his county;" and provides that the county treasurer, if so required, shall receive, receipt for, and safely keep such funds, and that "county treasurers for their services under this act, shall receive out of the general fund one per cent. of the amount of school moneys received by them.

A law of 1854 gave to the treasurer of Washington County a salary of three hundred dollars. An act was passed in 1868, making no allusion to the act of 1854, but amending and re-enacting the section that fixed the salaries of county treasurers. It changed the salaries of some other treasurers, but left that of the Washington County treasurer as before—three hundred dollars.

*It was held*, that the amendment made in 1868 did not deprive the treasurer of Washington County of the right to receive one per cent., although the act of 1854, and the amendment made in 1868, both speak of the salary "as a full compensation for the services" of county treasurers.



CIRCUIT COURT FOR WASHINGTON COUNTY, MAY TERM, 1871.

HOLLISTER Respondent v. CHARLES HAGUL,  
Appellant.

ON APPEAL.—Where on appeal from a justice's court the respondent obtains a verdict for less than he recovered in a justice's court, the costs on appeal are in the discretion of the court.

THE plaintiff had obtained judgment in a justice's court \$50, for the reasonable value of keeping the defendant's car. The defendant had set up a special contract and a bill.

The defendant appealed, and in this court the plaintiff obtained a verdict for \$25.

The plaintiff's costs in the justice's court were about \$45, in this court the plaintiff filed a costs bill amounting to, besides the costs in the court below.

The defendant moved for a judgment for costs.

*E. Bybee*, for the defendant.

There is no special provision in the justice's act, and by section 539 of the practice act, in this class of actions, the defendant is entitled to costs, unless the plaintiff recovers less than one dollar or more.

*D. Hare*, for the plaintiff, claimed that sections 539, 540, and 541, apply only to cases commenced in the county circuit court.

*PROX, J. Held*, that this is a case where the judgment appealed from "is modified," within the meaning of the clause of section 542 of the general practice act, which provides: "But where on appeal to the supreme or circuit court a new trial is ordered or a decision given modifying the judgment appealed from, the costs on appeal shall be awarded or not in the discretion of the appellate court."

That, in general, costs follow the judgment when the statute is silent; and when the statute leaves the matter to the discretion of the court, such should be the practice, un-

less there are special reasons for varying the rule. That in this case the defendant had it in his power to avoid all costs by tendering the amount that has been found due; and that this is a sufficient reason for not awarding costs in his favor. But that inasmuch as it is shown that there was some grounds for his appeal, the plaintiff's cost bill should not be allowed in full.

The plaintiff was allowed the costs he recovered in the court below, and \$20 of the costs on appeal.

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CIRCUIT COURT FOR WASHINGTON COUNTY, MAY TERM, 1871.

JOHN CHIPMAN v. WINSTON BRONSON.

NOTICE OF APPEAL.—Where the notice of appeal specified a judgment for \$57.75, and the transcript disclosed a judgment for \$52.50, the appeal was dismissed.

THE notice of appeal described the judgment in the words, "from a judgment rendered in your favor against me on the 20th day of March, 1871, by R. B. Willmot, justice of the peace, \* \* \* for \$57.75 and costs."

The transcript disclosed a judgment for \$52.50.

*Hyer Jackson*, for the respondent, moved to dismiss the appeal for insufficiency of the notice.

*Hare & Tongue*, for the appellant, claimed that a verdict had been rendered for \$57.75, and that either there was a mistake in the transcript, or the justice had inadvertently entered judgment for a wrong amount. The transcript contained no copy of a verdict. Time was allowed for correcting the transcript.

No correction being made, the motion was argued and submitted.

BY THE COURT, UPTON, J. This court acquires jurisdiction through the notice of appeal. It is necessary that the notice should identify the case with reasonable certainty to

g the cause into this court; and the identification should such, that when the record is made up, the notice will of f show that this is the same cause that was pending in court below. It may not be necessary in all cases to e the amount of the judgment appealed from, but if it is ed it should be stated correctly.

f the justice of the peace had rendered judgment for 75 when no more than \$52.50 was claimed, this court ld be bound to set aside the judgment or direct it to orrected. The law undoubtedly contemplates as great tness in this court as in the justices court.

i the case of such an error disclosed by the transcript i a justices court, this court would have jurisdiction if it could see that no substantial wrong would be , could correct the error by requiring the excess to be tted. But in this case, unless the law has been com- l with, this court has not acquired jurisdiction. It is a case of mere error that may be disregarded if no sub- tial right is prejudiced, or on the assumption that the llant acted in good faith and that no one has been ed, because the jurisdiction does not depend alone upon the parties intended to do, but upon what has been done. think the misdescription of the judgment is fatal and the appeal should be dismissed.

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DISTRICT COURT FOR WASHINGTON COUNTY, MAY TERM, 1871.

— ALBEE v. — — — ALBEE.

NT AND CHILD—CONSIDERATION.—Where a father gives his minor on the privilege of working for himself and having whatever wages e may earn, and afterwards the minor voluntarily returns and abors on his father's farm until he becomes twenty-one years of ge, the law does not imply a promise on the part of the father to ay wages to the son for the time during the minority.

ED PROMISE.—Where a son, on becoming of age, remains with his ather and works for his father as an ordinary laborer on a farm

under a parol contract that he should receive land for his pay, and he does not receive the land, he is entitled to recover the reasonable value of his labor.

**PLEADING—NEGLIGENCE.**—In an action for work and labor, if the defendant seeks to show that the plaintiff did not labor diligently, he should raise the question by his answer.

**PLEADING—PROMISE TO SELL LAND.**—Although it is necessary that an agreement for the sale of land should be in writing, it is not necessary that the pleading should expressly aver that the agreement was reduced to writing.

The complaint was for \$40 per month, alleged to be the reasonable value of labor done by the plaintiff for the defendant at his request, from a specified day in 1868, for a period of two years.

The answer, in regard to each allegation of the complaint, contained a denial qualified by the words "except as hereinafter set forth."

The answer proceeded to set forth, that the plaintiff was the defendant's son; that during all the time set forth in the complaint, except the last six months thereof, the plaintiff was a minor.

That before the time mentioned in the complaint, the plaintiff had been a wayward and bad boy, and that he had wrongfully left his father's house. That the father, in hopes of benefiting his son, and to induce him to return to, and remain at his father's house, at the time first mentioned, mutually agreed with his son, the plaintiff, that the plaintiff should remain and work on the defendant's farm during the defendant's life. And that he should have as compensation all the proceeds of the farm except such as was necessary for the defendant's support and at the defendant's death, should have the farm. And that all the work that had been done by the plaintiff, had been done for the plaintiff's benefit on said farm in pursuance of the said agreement.

The answer also stated that the plaintiff's labor was worth no more than the board, clothes and spending money furnished by the defendant to the plaintiff while the work was being done.

The plaintiff moved to strike out that part of the answer relating to the character of the plaintiff, as irrelevant and scandalous.

the motion was sustained.

The plaintiff demurred to the answer; that it did not appear that the promise was in writing.

PROX, J. *Held*, that although a promise for the sale of is void unless in writing, it is not necessary to declare the pleading that the promise is in writing.

The demurrer was overruled.

The replication denied making the contract set forth in answer, admitted that such a plan had been talked of, denying the plaintiff's minority, but averred that the defendant refused to enter into such a contract. And averred that the defendant had previously given the plaintiff his time.

*E. Bybee* and *B. Killin*, for the plaintiff.

*Ware & Tongue*, for the defendant.

The jury being impaneled and sworn, the plaintiff, called on his own behalf as a witness, was asked:

Q. How long did you work for the defendant?

*Mr. Hare*—I object, on the ground of irrelevancy. It appears by the pleadings that the time was six months after majority, and eighteen months before.

The objection was sustained.

Q. How much was the labor worth?

*Mr. Hare*—I object to proving the value before the time of majority.

Q. How much was it worth during the last six months?

A. It was worth \$40 per month.

The defendant was called as a witness on his own behalf.

Q. What was the bargain under which the plaintiff went to work for you?

*Mr. Killin*—I object to parol evidence of the contract set forth in the complaint.

*Mr. Tongue*—We will show that the plaintiff went into possession under the contract.

The objection was sustained.

Q. What was the plaintiff's board worth?

*Mr. Killin*—I object; there is no issue as to the price of board.

*Mr. Hare*—The answer denies that the work was worth more than the board, clothes and money furnished.

The objection was sustained.

Q. What was the reasonable value of the plaintiff's labor?

A. It was not worth anything.

Q. State what kind of work he did on the farm?

The question was objected to as irrelevant, and the objection sustained.

— — — *Albee*, sworn. I am a brother of the plaintiff. I lived on the farm most of the two years in question.

Q. How much was the work that the plaintiff did during the last six months worth?

*Mr. Killin*—I object to the question. There is no issue but the plaintiff did good work.

*Mr. Hare*—We have denied that the work was worth anything, except as in the answer stated; and we have stated that it was not worth so much as his board, and clothes, and the money furnished him. I think we are entitled to show that he was living with the old gentleman as he did before he became of age, and was not at work but a small part of the time.

*By the Court*—I think the kind or quality of service rendered is not put in issue. The real question to be determined is the reasonable value of farm labor at the time and place.

Q. What was the wages of farm hands at that time?

A. About \$25 per month.

The court gave the following instructions:

The law has provided that a contract for the sale of land which is not reduced to writing is void. For that reason, the contract which the defendant says he made, cannot be enforced, and we are compelled to treat the case as if they had not attempted to make the contract; or, at least, we cannot determine the compensation according to the terms of the contract the defendant sets up. The plaintiff claims that he ought to have wages for eighteen months of the time, for the reason, that before that his father had given him his time. If he had worked for a third party, that

it be a reason for his being entitled to receive the pay earned, but when he voluntarily returned to his father the law does not raise a presumption that his father promised to pay him what his labor was worth; it is more reasonable to presume that he and his father renewed their former relations toward each other. You will, therefore, disregard what is said about the labor performed before the plaintiff reached the age of majority.

The plaintiff can only recover for work done after he became twenty-one years old. The parties have agreed that he worked six months after that time; and there is but one question of fact in dispute; that is: what was then the reasonable value of labor in the business of farming?

There has been some attempt to show that the plaintiff did not work continuously, and that he did not earn the wages of an ordinary farm hand; but that question cannot be decided in this case, and all evidence on that subject, when presented, has been ruled out. It would be unreasonable and extremely inconvenient, if on every occasion on which a person sues for wages, he was compelled to be prepared to produce an array of witnesses to prove that he had lost time, and that he had done all his work skillfully. The court has accordingly provided, that if the plaintiff is to meet such questions, the defendant must apprise him in his answer that the defendant will dispute his skill and diligence. It is on this ground that all evidence touching the kind or quantity of labor has been ruled out. The plaintiff is entitled to recover for six months' labor, at the customary rate of wages at the time and place.

The plaintiff had a verdict for \$150.

CIRCUIT COURT FOR MULTNOMAH COUNTY, JUNE TERM, 1871.

W. W. CHAPMAN v. JAMES H. WILBUR.

**TRUSTEE.**—Where one in possession, without title, conveyed two adjacent blocks of land in trust, “for the purpose of erecting an academy *thereon* and *therewith*,” with covenants for further assurance, and having afterwards acquired the legal title, executed a deed purporting to be confirmatory of the former deed, and purporting to recite its substance, but which describes the former deed as a deed conveying the “land for the purpose of establishing *thereon* a seminary of learning to be divided into a male and female academy,” and which in terms grants the land in trust, “for the uses and purposes aforesaid.” *Held*, that the change in language does not denote an agreement on the part of the *cestui que trust* to change the nature of the trust.

**VOLUNTARY CONVEYANCE.**—The execution of an assignment by the trustee (he being the grantee) which was written on the back of the confirmatory deed, was held not to be conclusive proof that the trustee knew the contents of the confirmatory deed.

**RATIFICATION.**—Upon proof that the trustee had no knowledge of a discrepancy between the terms of the original deed and those of the confirmatory deed, and that the latter was in the custody of another, and was never in the custody of the trustee, except for the purpose of signing the release written thereon. *Held*, that such signing was not a ratification of, or consent to, a change in the character of the trust.

**CONSTRUCTION.**—In construing contracts, meaning must be given to each of the terms employed if possible.

THIS is a suit to recover a parcel of land, formerly conveyed by the plaintiff, in trust, on the ground of forfeiture by misappropriation.

*J. H. Reed and W. W. Chapman*, for plaintiff.

*A. C. Gibbs and Caples & Moreland*, for defendant.

UPRON, J. This case was referred, and the referee heard the cause and reported a decree in favor of the plaintiff; it is now submitted on the defendant's motion to set aside the report, and on the plaintiff's motion for confirmation.

The following are the material facts: On the 7th day of September, 1850, that is, twenty days before the passage of the donation act, Stephen Coffin, D. H. Lownsdale and W. W. Chapman, being in possession, conveyed two adjacent



locks of land, known as blocks 205 and 224 in the city of Portland, to "James H. Wilbur, trustee, for the use and benefit of the Methodist Episcopal Church of Oregon" \* \* \* for the purpose of erecting an academy *thereon and there-  
on*," \* \* \* "to be by him conveyed to such person as shall be appointed to receive and hold the title for the use and benefit of the Methodist Episcopal Church of Oregon." His deed contained the following: "And we further covenant that if we shall obtain title to said property from the United States, we will convey the same as aforesaid by deed of general warranty. We further covenant to warrant and defend the said property against the claims of all persons claiming by, through or under" us.

Soon after receiving the deed, Wilbur went into possession of the premises, and in concert with the said church erected a building on block 205, and instituted an academy upon it. The plaintiff, about the first day of September, 1853, obtained the legal title to the premises from the United States, and on the tenth day of that month he and his wife executed a deed of the premises to "James H. Wilbur, trustee of the *Oregon Annual Conference* of the Methodist Episcopal Church in Oregon." This deed professes to recite the purport of the former deed and to be confirmatory of it, but departs from its tenor in several particulars.

It states the date of that deed as of the "twenty-fifth of June, 1851," and refers to the grantors as having then "by deed of quitclaim conveyed to the said James H. Wilbur, trustee as aforesaid, the property hereinafter described, for the purpose of establishing *thereon* a seminary of learning, *to be divided into a male and female academy.*"

It is not shown to whom this latter deed was delivered, or with whom it was left at that time, but it was afterwards found in the hands of some one of the several persons interested in maintaining and conducting the academy.

In 1853 a corporation was formed by act of the territorial legislature, called "the board of trustees of the Portland Academy and Female Seminary." This corporation was organized, and its trustees held its first meeting on the 4th

of March, 1854. It is admitted that this corporation is the agent or person duly appointed "to receive and hold the title for the use and benefit of the Methodist Episcopal Church of Oregon," and to manage the affairs of the academy.

Up to about 1853, Mr. Wilbur had continued to act as such agent and trustee, and in the construction of the academy, which was completed in 1851, he had advanced of his own funds over \$5,000. Afterwards the defendant, Wilbur, assigned or transferred the two blocks to the said Board of Trustees of the Portland Academy and Female Seminary, and that Board, having audited the accounts of the defendant, and found a large amount due him on account of advances made by him in constructing the academy building, bargained with him to take block 224 in satisfaction of that claim, and the Board executed a conveyance to him of that block on the 9th of June, 1860; since which time the defendant has held block 224, claiming it to his sole use.

The plaintiff claims that these acts have worked a forfeiture, and that block 224 should revert to the plaintiff. It is claimed that Wilbur, while trustee, accepted the confirmatory deed as a fulfillment of the covenants of the original deed of September 7th, 1850, and that thereupon the rights acquired by means of the first deed merged in the legal title, and the first deed was no longer of any force.

To sustain this position the plaintiff produced, among other proofs, the following endorsement, written on the confirmatory deed:

"I hereby relinquish, convey and give up all my right, title and interest to block No. 205, described in this deed, to the Trustees of the Portland Academy and Female Seminary.

J. H. WILBUR.

"Dated PORTLAND, Aug. 15, 1855."

The evidence shows that the deed had not previously been delivered to Wilbur; but at the time of that endorsement it was produced by some person interested in the affairs of the Academy, at whose request Wilbur made the assignment above set forth; that Wilbur did not then read it or know its contents; and he testifies that he never knew

contents, or that there was any discrepancy or difference between its terms and those of the deed of Sept. 7th, 1850, until the year 1869. And that he had not had charge of the affairs of the Academy since 1853.

Aside from what appears on the face of the deed and the recital, and the fact that about 1855, it was in the hands of some one of the persons having the management of the academy, the court is left to conjecture in regard to its origin. Several circumstances, and chiefly the error in reciting the date of the original deed, indicate that the original deed was not present when the confirmatory deed was executed. And there is no doubt the misdescription of the date resulted from mistake. I think it more reasonable, since some of these discrepancies or departures from the letter of the original deed is positively shown to be the result of inadvertency or mistake, to conclude that the other departures in these terms resulted from the same cause, than to hold, without other proof, that the parties mutually agreed to change the character of the trust.

It is claimed that the principal object in changing the names employed to express the trust, was to provide for maintaining an academy for males on one of the blocks, and an academy for females on the other. The evidence relied upon to support this conclusion, is the language of the second deed above quoted, and the name given to the corporation created by the legislature. The act speaks of Portland "academy and female seminary;" but the second deed speaks of a "seminary of learning, to be divided into a male and female academy." I can not say that either these expressions decidedly indicate whether males and females were to be taught in one building or in two; or if two, whether both buildings were to be erected on one block. The dissimilarity of these names indicates the absence of a matured plan to change the character and plan of the institution, or the nature of the trust. If a change in the nature of the trust had been decided upon, it is highly probable that the parties would have left the fact to be inferred from ambiguous expressions contained only in the recitals of the deed; to say nothing as to whether the

trustees had power to make such change, and thus bind the *cestuis que trust*. The discrepancy between the names employed in the act of the legislature, and those in the second deed, as well as the general tenor of the second deed, when compared with the first, indicates inattention to the particulars of the trust, rather than a mature plan of changing its nature.

This conclusion is strengthened by the circumstances that the *cestui que trust* was not consulted, that the prior and subsequent action of the grantees proceeded upon the theory of building but a single academy or seminary, and that, of the many persons now resident here, who then took an active interest in the institution, no one has been produced who recollects hearing of the proposition, or knows any facts tending to show that such a change was contemplated.

When we examine the two deeds for the purpose of determining whether the covenants of the former have been abandoned or merged in the latter, we find that the second deed, which purports to recite the purposes of the first, makes the grant "to the said Rev. James H. Wilbur in trust" \* \* \* "for the uses and purposes *aforesaid*." The phrase, uses and purposes, may as well be referred to the uses and purposes actually expressed in the first deed; as to those erroneously quoted in the second, since the reference makes it necessary to read both deeds together. I cannot think it a reasonable deduction from the deeds, that the parties intended to make the change.

It is not necessary to determine the question whether Mr. Wilbur or the subsequent agents or trustees had the power to make such change without the consent of *cestui que trust*, because the weight of evidence is that they never contemplated the change.

It follows that the covenants expressed in the original deeds are still in force; and that the right of the trustees to sell one of the blocks in order to raise funds with which to erect an academy building depends on the construction of that instrument.

If it was the intention of the parties that a portion of the land should be sold to raise money wherewith to build, it is

It is a material question in this case whether the block was sold before the building was erected, or sold in satisfaction of money actually advanced for that purpose in good faith before the sale.

A lengthy investigation was had, with the intent to show that the money had not been advanced in good faith as alleged. But the attempt was not successful. It is shown that the account was audited by the board of trustees, who were appointed in pursuance of law, and whose business it was to pass upon it. This board deemed the account correct, and deemed it for the interest of the institution that the block should be sold to satisfy the demand. The only debatable question presented is whether it was the intention of the parties, as expressed in the conveyance of the land to the trustee, that a part of the land might be sold. The plaintiff is estopped by his covenants and can not object to any use of the land that is in accordance with the terms of the grant.

It is a rule in construing contracts, that meaning must be given to each of the terms employed if possible.

When the parties expressed the purpose of erecting an academy thereon and therewith, they intended something by the words employed; and unless there is some sufficient reason to be found, a court has no more right to reject the word "therewith" as meaningless, than to reject the word "hereon."

It is said the building cannot be erected thereon, that is, on the whole, after one half is sold. Literally, the position is correct, and it is equally true that if none of it is sold a building cannot be erected therewith. Shall the whole contract be rejected because it is impossible to comply with a perfectly literal construction; in other words, because it is possible at the same time to erect a building on the whole of it, and with the whole of it?

I can see no reason for rejecting the word "therewith," and the only reasonable construction of the language used indicates that a portion of the land would be made use of to procure means with which to erect a building on the residue. This was giving to the trustee no broader dis-

cretion in this respect than was given him in other particulars; as for instance, in regard to the kind and size of the building, the time when it should be commenced and completed, and the part of the premises on which it should be situated.

The report of the referee is set aside, and the decree should be for the defendant.

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CIRCUIT COURT FOR MULTNOMAH COUNTY, JUNE TERM, 1871.

THOMAS ATKINSON v. PATRICK MORRISSY.

**ESTOPPEL.**—Where A., who was mortgagor, having a right to redeem, took from B., who was assignee of a mortgagee in possession, a lease from month to month of the mortgaged premises, A agreeing to pay a monthly rent, "and to quit and give up possession of said premises upon demand at the end of any month;" *Held*, that he was not estopped to set up his right to redeem; and that it is not a necessary inference from the transaction that the parties intended to convert B's claim into a legal title.

**REDEMPTION.**—In general a mortgagor cannot claim redemption without a tender of the debt. But a distinction is made in cases where the debt or duty is wholly uncertain, and cannot be ascertained but by the judgment of the court.

**EQUITY JURISDICTION.**—Where the principal object of a suit is to determine a controverted question as to whether an equity of redemption exists, the controversy is sufficient to afford ground of equity jurisdiction.

**TENDER.**—Where the defendant refused to accept money from the plaintiff, and placed his refusal on the ground that the plaintiff had no right to redeem, the bill was sustained although the plaintiff had neither made a formal tender, nor brought money into court.

**IMPROVEMENTS.**—Where the mortgagee in possession had placed valuable improvements on the land, the plaintiff consenting that it should be done at his expense, the cost of the improvement was added to the amount otherwise due to the mortgagee.

THE plaintiff seeks to redeem certain premises. The defendant denies the plaintiff's right to redeem, and claims to be owner in fee.

The plaintiff being owner of lots 3, 4, 5, 6 and 7 in Block 2, in Frushes' addition to East Portland, mortgaged them to one Thomas Cully, in March, 1869, to secure \$800 and interest.

On the sixth of May, 1869, the plaintiff conveyed lots 3, and 6 of the block to one P. J. Martin by a deed absolute on its face, to secure \$400 and interest, then owing to the plaintiff to Martin.

On the thirtieth of June, 1869, the plaintiff and the defendant entered into a written agreement; the plaintiff agreeing to convey to the defendant lots 5 and 6 in that block, on or before the fifteenth of August, 1869, for \$500 to be paid by or before that time. The plaintiff agreeing that on or before that time he would remove incumbrances from lots 5 and 6. The defendant advanced \$300 to the plaintiff to take a mortgage on lots 3 and 4 for its repayment, but stipulated in the agreement that if the plaintiff complied with the terms of the agreement, the \$300 should apply in payment as part of the purchase price of lots 5 and 6.

The plaintiff paid a portion of the \$400, principal, and the interest owing to Martin, and reduced the amount to \$15.50.

On the 17th of August, the defendant being notified by Martin, of Martin's relations with the plaintiff, paid Martin \$375.50, and Martin executed to the defendant a deed for lots 3, 4, 5 and 6.

On the 10th of January, 1870, the plaintiff and the defendant signed an instrument, reciting the defendant's purchase, under the deed to Martin, in which instrument the plaintiff agreed to pay the defendant, "for the use and occupation of the premises the rent of twenty dollars a month

\* \* and to quit and give up possession of the said premises upon demand from said Morrissey, at the end of any month."

Before the commencement of this suit, the plaintiff surrendered the possession of the premises to the defendant.

The plaintiff paid a portion of the mortgage executed to Cully, and on the 14th of January, 1870, the defendant paid the balance due thereon, amounting to \$675.80, and took an assignment from Cully to himself; and he also paid certain mechanics' liens, the taxes on the premises, and made improvements.

He alleges that he is owner in fee; that he has paid upon

said premises money to the amount of \$1,760.00; made repairs to the value of \$686.28; and done work to the value of \$100.00, amounting in all to \$2,546.28.

The case was submitted for final decree on the pleadings and proofs.

*Strong & Trimble, for the plaintiff.*

*Mitchell & Dolph, for the defendant.*

UPTON, J. The answer, as originally filed, claimed the absolute title in fee, to lots 3, 4, 5 and 6, by virtue of the deed from the plaintiff to Martin, and from Martin to the defendant. And also claimed lots 5 and 6 by virtue of a purchase under the agreement of date, June 30th, 1869.

To that portion of the answer setting up the latter claim, the plaintiff objected on the grounds:

1st. That it is inconsistent for the defendant to claim an equitable title, and ask a specific performance of an agreement to sell, at the same time that he asserts that he holds the legal title.

2nd. That the allegations of the answer do not show that the defendant had paid the remaining \$200, or show any offer to perform.

3d. That the answer disclosed that the defendant had abandoned that contract without offering to comply with it.

The part of the answer last mentioned was struck out, but the defendant still claims that he is entitled to lots 5 and 6 under the evidence.

Neither the evidence nor the allegations of the answer justify the defendant's claim under the agreement.

It is true, that the plaintiff did not remove the incumbrances prior to the 15th of August, but the covenants were mutual, and the conveyance of the plaintiff to the defendant and the payment of the \$200, and removing the incumbrances from lots 5 and 6, were to be simultaneously performed. There is no claim that the defendant offered to make the payment. The circumstance that two days after the payment became due, he contracted with Martin, does not tend to show a compliance with that agreement; but it



ows conclusively that he intended, either to assume Martin's position as mortgagee, or to become owner of the legal title to the four lots, without respect to that agreement:

It is clear that the defendant, not having complied or offered to comply with the agreement, can claim nothing under it. And I think this disposes of this branch of the defendant's case.

It is not claimed but that parol evidence may be received to show that a deed, which is in its form absolute, was intended as a mortgage; and the proof is clear that the conveyance of lots 3, 4, 5 and 6 from the plaintiff to Martin was given to secure the payment of money. But it is claimed that the defendant purchased from Martin without notice of the plaintiff's right to redeem. And it is said that the purchase was made with the knowledge and consent of the plaintiff, and with the intention on the part of both parties to vest the absolute title in the defendant; and that the lease was intended as an acknowledgment of such change of ownership.

There are some conflicting statements as to what was communicated by Martin to the defendant, before the defendant paid Martin's demand and obtained the conveyance; but from what the defendant himself testified, it seems to be unquestionable, that he put upon inquiry, concerning the defeasance. He shows that he knew that Martin claimed money, and how much money. That Martin held the land in order to obtain the money that was due to him, and would not sell it without the plaintiff's consent. Although the defendant flatly denies some part of Martin's statements; yet his evidence, as a whole, tends to corroborate Martin.

Martin says, "I told the defendant at that time, the exact amount that Atkinson was owing me, and that upon the payment of that, I would surrender my claim upon the land to anybody Atkinson desired to *give or sell* it to." "He asked me as to the title and I told all I knew about it."

Some stress is laid upon the circumstance that the plaintiff consented to the conveyance from Martin to the defendant; but that argument is deprived of all force,

when it is shown that the defendant knew the facts. With that knowledge he could acquire no higher right than Martin held, and it would have required a deed from the plaintiff, or a foreclosure, to pass the legal title to the defendant.

It is not a necessary inference from the transaction of making the lease, that the parties intended to convert the defendant's equitable claim into a legal title, and the evidence abundantly shows a belief and an intention, at and after that time, on the part of both parties, that the plaintiff had and should have the right to redeem. The effect of the lease was to place the plaintiff in a position that he would be compelled to surrender the possession of the premises to the defendant before he could maintain this suit. He has surrendered possession, and that effect of the lease is at an end.

What it is claimed the lease effected, might have been effected by a deed of quitclaim; the parties were acting under advice of counsel, and undoubtedly would have executed some sufficient instrument, if it had been their intention to destroy the equity of redemption.

A point urged in behalf of the defendant, more strenuously perhaps than any other, is, that the plaintiff has neither tendered the money necessary to redeem, nor brought it into Court.

"In general, the proposition may be laid down that a mortgagor cannot claim redemption without a tender of the debt." (2 Hilliard on Mort. 86.) In *Gordon v. Hobart*, cited by Mr. Hilliard, Judge Story notices a distinction between "cases where a particular and certain debt or duty is *admitted* to be due and unperformed," and "cases where the debt or duty is wholly uncertain and indeterminate, and cannot be ascertained but by the judgment of the court."

The inference is, that in the latter case the jurisdiction may be founded on the necessity of ascertaining the amount of the debt, or the nature and extent of the duty; and that when the right to redeem is wholly denied, a tender is not an indispensable fact to be alleged. There is a manifest reason and necessity for the distinction between cases where the right to redeem is unquestionable, and cases where the prin-

ipal object of the suit is to determine a controverted question as to whether an equity of redemption exists. Such a controversy is sufficient to afford grounds of equity jurisdiction; and the court having acquired jurisdiction for one purpose, should retain it for other purposes when necessarily a part of the same subject matter.

The pleadings present a direct issue on the question whether the plaintiff is entitled to redeem on any terms.

And the evidence shows that the defendant, before the commencement of the suit, signified to the plaintiff his intention to hold the premises unconditionally; and not to permit a redemption on any terms. He declared to the plaintiff that no money was due from him, and refused to accept money from the plaintiff; placing his refusal on the ground that the equity of redemption had no existence. This rendered a decree unnecessary. (*Everett v. Saltus*, 15 Wend. 474; *Canpell v. Woodward*, 2 Sandf. Ch. 143.)

The weight of evidence tends to show that the improvements were made at the plaintiff's charge with his consent; and although the consent may have been reluctantly given, inasmuch as the plaintiff is to have the benefit of them, in case he redeems, equity requires that their cost should be added to the amount otherwise due to the defendant. A decree should be entered allowing the plaintiff to redeem on payment of two thousand two hundred and thirty-five dollars, and the costs of this suit.

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CIRCUIT COURT FOR MULTNOMAH COUNTY, JUNE TERM, 1871.

### JACOB SHARTLE v. W. I. HUTCHINSON.

**UNDER.**—Slandorous words charging an heinous crime, are actionable of themselves.

**✓ PLEAD THE TRUTH.**—If the words spoken were true, their truth is a plea the defendant has a right to make, and he cannot be blamed for setting it up. But he must take the risk of its truth if he sets it up.

**DAMAGES.**—If the charge was false, repeating it in the answer is repeating the slander; and is in that case a circumstance proper to be considered by the jury in determining the amount of damages.

THE plaintiff claimed \$10,000 damages in an action for slander.

The words of the defendant, set out in the complaint, imputed to the plaintiff; *peccatum illud inter christianos non nominandum*.

The answer averred as a defense that the words were true; and in mitigation, that they were spoken under circumstances of great aggravation, and at a time when the defendant was greatly excited.

*Mitchell & Dolph*, for the plaintiff.

*Caples & Moreland*, for the defendant.

The defendant's counsel requested that the charge be given in writing.

The following instructions presented in behalf of the defendant, the court declined to give: "Should the jury find that the plea of justification has not been sustained by the testimony, the fact that such plea has been set up, cannot be considered by the jury in aggravation of damages."

THE COURT, UPTON, J., instructed as follows:

*Gentlemen of the jury*:—In an action for slander, where the alleged slander consists of charging the plaintiff with the commission of a heinous crime, if the words were spoken as alleged, and the charge is not true, the words are actionable of themselves. And if they were falsely spoken of the plaintiff by the defendant, the law implies an intent to injure from the words spoken.

In this case the plaintiff admits that he used the words charged in the complaint, and asserts that the charge is true.

If the charge is true, and the plaintiff was guilty of the crime, that is a plea the defendant has a right to make, and he cannot be blamed for setting it up. But he must take the risk if he sets it up, and if it is false and he sees fit to repeat the charge by placing it on the records of the court, that is an aggravation of the wrong that the jury should consider.

have been requested to instruct you that "should the jury find that such a plea of justification has not been sustained by the testimony, the fact that such plea has been made cannot be considered by the jury in aggravation of damages." I decline to give this instruction; but on the contrary, instruct you that if the charge was false, repeating the answer was repeating the slander, and is in that case a circumstance proper to be considered by the jury in determining the amount of damages.

The defendant has a right, even when he declares the charge is true, to give evidence of circumstances in mitigation of damages. If it is true that the defendant was exceedingly angry and excited when he made the charge in the instance, that may be a circumstance worthy of your consideration as affecting the question of damages, and if he believed the charge was true, his belief may be considered for the same purpose, should the evidence satisfy you that he did so believe. But if the charge is false, and he knowing it to be false, has come into court and repeated it in his cool moments, the repetition is in such cases a circumstance in aggravation that overrides any excuse that the excitement of the occasion might have afforded.

If you think from the evidence that the charge was not true, and yet that the defendant had reason to believe the charge to be true, and did so believe when he made the charge, and still so believes, the circumstances may go to the mitigation of damages, but is not a justification.

It may be considered by the jury in fixing upon the amount of damages, but if the imputed crime is not proved, the defendant's belief cannot be treated as evidence to prevent the plaintiff's right to recover.

If the plaintiff is entitled to recover, the amount of damages is a matter to be determined by the jury.

Witnesses are not permitted to appear and give opinions as to the amount, but the jurors are to act upon their own notions of what is a reasonable amount to be assessed as damages under the facts proved.

The plaintiff had a verdict for \$4,500.

CIRCUIT COURT FOR MULTNOMAH COUNTY, JUNE TERM, 1871.

BEN. HOLLADAY and C. TEMPLE EMMET, v. S. G. ELLIOTT et al.

**DISSOLUTION OF PARTNERSHIP—ACCOUNTING.**—If a partner being without fault, can show that his adversary has violated the term of the partnership contract, and abused the trust with which, as a partner, he was clothed, and that he has partnership assets which he has not accounted for, this entitles such partner to an accounting. In pleading it is only necessary for a party, whether plaintiff or defendant, to state the facts that constitute his cause of action or his defense.

**AMENDMENT.**—If a proposed amendment to a pleading sets up only a cause of action or of defense that existed at the filing of the former pleading, it devolves upon the party asking the amendment to show a reasonable excuse for the delay.

**IDEM.—SUPPLEMENTARY ANSWER.**—There is a clear distinction between a supplementary answer and an amendment that sets up a defense which was in existence at the time of the original answer.

**DUTY OF COUNSEL.**—Where counsel had appeared and subscribed the original answer, and the excuse was made that the defendant had no means to secure the aid of counsel: *It was held*, that the law will not tolerate the position that counsel can or will place themselves on the record as such, and afterwards permit this excuse to be true in point of fact.

THIS is a suit for the dissolution of partnership, and the answer filed consists of denials of the allegations of the complainants.

The defendant, S. G. Elliott, moves the circuit judge at chambers, for an order granting leave to file an amended answer in the nature of a cross-bill, the cause being before a referee for hearing.

*Mitchell & Dolph*, for the plaintiff in opposition to the motion, make the following points of objection:

1st. The judge at chambers is not authorized to hear the motion.

2d. The case is referred and an amendment cannot be regularly ordered unless the case is ordered into court.

3d. The statute does not authorize such an amendment after the trial has commenced.

4th. All material matters now proposed to be set up were known to the defendant when the answer was filed, or at

before the case was referred, and the motion comes too

The same matters are already set up in other suits  
ng between the same parties; namely, in one suit in  
ourt, in one suit in the United States circuit court for  
istrict of Oregon, and in one suit in the fifteenth dis-  
court of the state of California.

*ssrs. Patterson & Felton and Judge Shattuck*, for the  
adant, claim that the circumstances justify the applica-  
and excuse the delay. The principal grounds being,

The leading facts upon which the right to affirmative  
is based, came to the knowledge of the defendant re-  
y.

The defendant was absent from the state when the  
er was filed.

The defendant was, until recently, laboring under too  
a financial embarrassment to be able to secure the ser-  
of counsel.

ne motion being argued and submitted upon the defend-  
affidavit, and the facts that appear in the pleadings, was  
n under advisement, and the following opinion was

pron, J. The cause is submitted on the defendant's  
on for leave to file an amended answer in the nature of  
ose-bill, for the purpose of bringing before the court for  
stigation diverse transactions and contracts between the  
utiff and other persons and corporations not heretofore  
e parties to this suit, which transactions are alleged to be  
raud of the defendant, and for the purpose of setting  
e certain of those contracts, and of compelling the plain-  
to account.

n order to arrive at a clear understanding of the facts  
n which counsel rest their arguments, I have attempted to  
unge the more prominent transactions out of which the  
troversy has arisen, in order of their respective dates.

t appears from the pleadings that the plaintiff, Emmet,  
the defendant, Elliott, were acquaintances, or at least  
business relations, as early as 1866. On the third of

September of that year, they joined with others in a written proposition to certain citizens of Oregon, in regard to securing stock in a railroad corporation to be organized in this State.

On the twentieth of March, 1867, Albert J. Cook made Mr. Elliott his attorney in fact.

On the twenty-second of April, 1867, The Oregon Central Railroad Co. was incorporated, and on the same day that corporation contracted with A. J. Cook for the construction, by him, of 150 miles of railroad.

On the second of May, 1867, A. J. Cook made a written assignment of this contract to the defendant, Elliott.

On the twelfth of May, 1867, The Oregon Central Railroad Co. contracted with a firm called A. J. Cook & Co., that the firm would construct 210 miles of railroad. In each case it was provided that the contractor should receive, as compensation, certain bonds to be secured by mortgage on the proposed railroad; and in the second contract it was provided that the contractor should also receive certain stock of The Oregon Central Railroad Co. Some of the bonds were delivered by The Oregon Central Railroad Co., to A. J. Cook & Co. On the twelfth of September, 1868, the plaintiffs and the defendant, Elliott, formed a partnership under the firm name of Ben. Holladay & Co., for the purpose of equipping and operating one or more railroads in the state of Oregon, and the states and territories adjacent thereto. This firm, at its formation, succeeded to the contracts and the assets of A. J. Cook & Co., and entered upon the work of building the line of railroad, the defendant, Elliott, being superintendent of construction by the terms of the contract of partnership. On the seventeenth of October, 1868, the legislature of Oregon, designated The Oregon Central Railroad Co. as the company entitled to certain lands granted by congress. On the fourth of October, 1869, the plaintiff, Holladay, employed a new superintendent, and gave Mr. Elliott notice that he, Elliott, was discharged—Mr. Holladay claiming in this suit that Mr. Elliott had been guilty of fraud in procuring the formation of the partnership firm of Ben. Holladay & Co.; that he was in-



petent to superintend the work, and that he had been  
ty of breach of the contract of partnership; Mr. Holla-  
claiming to act in conjunction with Mr. Emmet, as-  
ed control of the work of constructing the railroad. On  
tenth of October, 1869, Mr. Holladay published a notice  
he name of Ben. Holladay & Co., that Mr. Elliott was not  
orized to make contracts on behalf of Ben. Holladay &

About this time, Mr. Elliott commenced a proceeding in  
court against the plaintiffs, which was dismissed on his  
ion, on December 20, 1869.

On November 4th, 1869, the plaintiffs commenced this  
, and the amended complaint was filed on the following

About this time Mr. Elliott left the state of Oregon, not  
ing served with process, but knowing of the pendency of  
suit; and on Nov. 23, 1869, publication of the summons  
made.

About this time Mr. Holladay, using his own notes, or  
se of himself and friends, or those of Ben. Holladay &  
, borrowed about \$800,000 to \$1,000,000, pledging the  
ids of the Oregon Central Railroad Co., which had been  
ained of A. J. Cook & Co., as collateral security, out of  
ich loan he applied enough to his own private account to  
isfy all the advances he had made in the business of Ben.  
olladay & Co.

December 20th, 1869, Mr. Elliott, on his own motion, dis-  
ssed his proceedings in this court against Holladay and  
Emmet.

On February 14th, 1870, the plaintiffs filed in this cause  
proof of service of summons, by publication, on the defend-  
t Elliott.

On March 14th, 1870, the defendant Elliott filed his an-  
er in this cause.

On March 16th, 1870, a corporation was formed under the  
me of the Oregon and California R. R. Co.

On March 26th, 1870, the Directors of the Oregon and  
alifornia Railroad Company passed a resolution proposing  
purchase from the Oregon Central R. R. Co., all its

property; and Mr. Holladay, as president of the first named company, communicated the proposition to the latter company.

On March 29th, 1870, the Oregon Central R. R. Co. made and delivered a writing, under seal of the corporation, purporting to convey all its property to the Oregon and California R. R. Co.

On April 11th, 1870, the replication was filed in this cause.

On April 15th, 1870, the Oregon and California R. R. Co. mortgaged its road to trustees, to secure its bonds to the amount of \$30,000 per mile. And at the same time executed as further security a deed of trust conveying its lands to the same trustees.

About this time, or before, the defendant Holladay made arrangements to take up the obligations given for the \$800,000 or \$1,000,000, before mentioned, and to withdraw the bonds of the Oregon Central R. R. Co.; and he surrendered the said bonds to that company to be cancelled, or otherwise disposed of. And about this time the Oregon and California R. R. Co., Holladay being president and owning a majority of its stock, sold \$3,750,000 of its bonds at 60 cents on the dollar, obtained a portion of the proceeds, and made arrangements to receive more from time to time.

On June 24th, 1870, Mr. Elliott commenced a suit in this court against these plaintiffs charging them with confederating together, in violation of the partnership articles of the firm of Ben. Holladay & Co., for the purpose of rendering valueless his interest in said firm, estimating his interest at \$7,000,000. And charging them with having for that purpose deposed him from his position as superintendent, assumed the control of the affairs and assets of Ben. Holladay & Co., cancelled the contract for construction, and conspired to dissolve the old company and to form a new one; with having transferred the interest of the said Elliott to the new company, and with threatening to sell the bonds of the new company.

July 5th, 1870, a motion was made in the last named cause to make the complaint more specific.

On November 23d, 1870, the parties stipulated in this case that each should have a six months' time to take evidence.

In December, 1870, Mr. Elliott commenced a suit in the ninth district court of the state of California in relation to the same subject matter, and including these plaintiffs as defendants, which suit is pending.

In December, 1870, the cause was by consent referred for trial of all the issues.

In May, 1871, a suit was commenced by Mr. Elliott in the United States circuit court for the district of Oregon, making the Oregon Central R. R. Co. and the Oregon and California R. R. Co. defendants.

Several matters touching the proceedings in this cause, occurring since the seventeenth of May, 1871, have been added to.

The six months in which to take testimony alluded to in the stipulation, expired on the twenty-third of May, 1871, but by consent, or by order of the referee, the time has been prolonged, and the taking of testimony is not fully at an end.

The plaintiffs had introduced their evidence and rested, before this motion was made.

The defendant and two of his counsel were at San Francisco, expecting to leave by the steamer advertised to leave on the seventeenth day of May, but they were unexpectedly delayed, and did not arrive here until the plaintiffs had introduced their testimony.

The affidavits and exhibits filed upon the hearing of the motion, show in detail the mode in which the transactions were referred to were effected.

With the understanding of the facts, I have considered the reasons presented for and against the motion to amend.

The question whether this motion can be heard at chambers becomes unimportant, since the term has commenced and the court is now in session.

The point that the referee should first be required to report the case to the court, is a question of practice that I do not find decided upon authority, and I pass it upon

similar grounds. If the motion depends upon either or both of those grounds, upon its being overruled the application can be immediately made in form.

Passing for the present, also, the question whether the application is within the letter of ss. 94 to 104 of the Code, I propose to consider first to what extent the amendment presents matter occurring since the former answer, and what material facts are presented that have come to the knowledge of the defendant since he commenced his suit on the twenty-fourth of June last. One of the objects sought in this suit, as disclosed by the complaint, and as proposed by the amendment, is an accounting. Of course the gist of the controversy is the determination of the issues in regard to breach of the contract of partnership; but an accounting, although secondary, is one of the objects. It is therefore necessary to consider what will entitle a party to an accounting?

If either of the partners, being without fault, can show that his adversary has violated the terms of the partnership contract, and abused the trust with which as a partner he was clothed, and that he has partnership assets that he has not accounted for, that showing entitles such partner to an accounting.

It is only necessary for a party, either plaintiff or defendant, to state the facts that constitute his cause of action or defense. (*McDonald v. Bear River & A. W. & M. Co.*, 15 Cal. 145; *Green v. Palmer*, 15 Id. 411.) He is not required to state the evidence that proves those facts, nor is it necessary, to entitle him to an accounting and to the benefits of the accounting, that he should set out a detailed history of his adversary's dealings.

Whether we are examining the facts actually occurring since the last answer, or considering those that are newly discovered, we are confined to such as it is necessary to plead.

Those that are in this sense new, as distinguished from newly discovered, are such as occurred after March 14, 1870.

There is a clear distinction between a proposition to file a supplementary answer, to enable party to obtain a

more full and adequate remedy, or to set up as a distinct defense some new and distinct occurrence that of itself amounts to a defense or cause of suit, and a proposition to set up a defense or cause of suit that was in existence at the time of the former answer. This distinction is important, and should not be overlooked if we would arrive at correct conclusions.

Section 105 of the Code provides for cases of the former class, and the sections from 94 to 104 apply to the latter. These provisions of the Code, so far as they are applicable to this motion, are declaratory of the law as it existed before the Code was enacted, and I think the same rules would be in force if the subject had not been mentioned in the Code. Facts of the former class, when material and necessary to the proper determination of the case already made by the pleadings, are admissible when presented properly, from the bare circumstance of the facts having transpired since the party had an opportunity to plead. But defenses or causes of suit of the latter class the court has no right to admit, unless the neglect or delay is shown to be excusable.

The real question to be determined, is whether the defendant ought to be allowed, now, to file an answer setting up affirmative allegations in the nature of a cross-bill. Under the facts presented upon this motion I have no hesitation in drawing a line of distinction between those facts that had come to the defendant's knowledge at the time he filed his complaint, June 24, 1870, and those that have been disclosed in the course of taking depositions during the last month.

If this amendment is a proposition to set up a defense or cause of suit that was in existence at the time of the former answer, it of course devolves on the defendant to show a reasonable excuse for the delay. And I think there is no doubt but that if it was in existence, and known to the defendant, as early as June 24, 1870, the intervening time and the action since taken in the case places him in the same attitude.

If the distinction first mentioned is sound, those subsequent transactions, the proof of which would only tend to

similar grounds. If the motion depends upon either or both of those grounds, upon its being overruled the application can be immediately made in form.

Passing for the present, also, the question whether the application is within the letter of ss. 94 to 104 of the Code, I propose to consider first to what extent the amendment presents matter occurring since the former answer, and what material facts are presented that have come to the knowledge of the defendant since he commenced his suit on the twenty-fourth of June last. One of the objects sought in this suit, as disclosed by the complaint, and as proposed by the amendment, is an accounting. Of course the gist of the controversy is the determination of the issues in regard to breach of the contract of partnership; but an accounting, although secondary, is one of the objects. It is therefore necessary to consider what will entitle a party to an accounting!

If either of the partners, being without fault, can show that his adversary has violated the terms of the partnership contract, and abused the trust with which as a partner he was clothed, and that he has partnership assets that he has not accounted for, that showing entitles such partner to an accounting.

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full and adequate remedy, or to set up as a distinct and some new and distinct occurrence that of itself leads to a defense or cause of suit, and a proposition to set up a defense or cause of suit that was in existence at the time of the former answer. This distinction is important, and should not be overlooked if we would arrive at correct conclusions.

Section 105 of the Code provides for cases of the former class, and the sections from 94 to 104 apply to the latter. The provisions of the Code, so far as they are applicable to this motion, are declaratory of the law as it existed before the Code was enacted, and I think the same rules would apply with force if the subject had not been mentioned in the Code.

Facts of the former class, when material and necessary to the proper determination of the case already made by the pleadings, are admissible when presented properly, the bare circumstance of the facts having transpired before the party had an opportunity to plead. But defenses to the cause of suit of the latter class the court has no right to consider, unless the neglect or delay is shown to be excusable. The real question to be determined, is whether the defendant ought to be allowed, now, to file an answer setting up affirmative allegations in the nature of a cross-bill. Upon the facts presented upon this motion I have no hesitation in drawing a line of distinction between those facts that had come to the defendant's knowledge at the time he filed his answer, June 24, 1870, and those that have been disclosed in the course of taking depositions during the last term.

Under this amendment is a proposition to set up a defense or cause of suit that was in existence at the time of the former answer, it of course devolves on the defendant to show a reasonable excuse for the delay. And I think there is no objection but that if it was in existence, and known to the defendant, as early as June 24, 1870, the intervening time and delay since taken in the case places him in the same position.

Under the distinction first mentioned is sound, those subsequent transactions, the proof of which would only tend to

give a more adequate remedy, but which are not necessary to constitute the defendant's cause of suit, ought not to determine the question whether the delay in setting up the main subject-matter of the cross-suit is excusable.

By those facts set forth in the proposed amendment that cannot be weighed in determining whether the delay is excusable, I allude to the details of the mode of forming the new railroad company and attempting to dissolve or abolish the old one; and the various transfers of stocks, bonds and lands, that have been made, together with the dealings of the plaintiff with third parties that have transpired since surrendering the construction contracts.

I suppose all that can be claimed from these facts, is that proof of them will afford more full and perfect means of relief, if it results that the defendant is entitled to relief. But the defendant's case—that is, the question whether he is entitled to relief, rests entirely on facts existing prior to those transactions.

For the purpose of determining whether the delay is excusable, the facts are to be considered as they were developed to the defendant when, on June 24, he resolved to claim affirmative relief in an original suit, in place of setting up the same facts in this suit.

The matters alleged as grounds for this motion, may be reduced to three classes:

The defendant's want of knowledge of some of the important facts,

His absence from the State and the secrecy and artifice of the plaintiffs,

And his want of means and consequent inability to secure the aid of counsel.

There are very many matters mentioned in the exhibits, and unknown to Mr. Elliott until recently, which are claimed in argument as being facts necessary to the defendant's claim of affirmative relief. Many of them are matters of detail not necessary to be mentioned in the pleadings, although material as evidence. Others go to show what kind or extent of relief should be had, if the defense is maintained. But of some, it is claimed, a knowledge was



pensable. Prominent among these, is the circumstance about the time of the commencement of this suit, or days before, Mr. Holladay, or the firm of Ben. Holladay & Co., obtained \$800,000 or \$1,000,000 by means of rail-bonds in the hands of the firm, out of which Holladay reimbursed for all the advances he had made to Ben. Holladay & Co.

I correctly understand the position taken, it is that Mr. Elliott had known that fact, he would have had no reason to know or believe that his interests in the firm of Ben. Holladay & Co. were greatly enhanced in value, and I believe that, upon an accounting, there would have been a large balance in his favor, and that that knowledge would have been a reason for applying for affirmative relief which he could then have acted upon. The force of this discovery, as an excuse for not setting up an affirmative defense, must rest on the assumption that Mr. Elliott, for want of this knowledge, was induced to believe that his interest in the firm of Ben. Holladay & Co. was of little value; he was induced for a time to abandon the idea of seeking to set aside the bill, or of seeking to obtain affirmative relief. His right to an accounting, and to his distributive share of the assets, and his right to be reinstated, did not depend on the questions whether the firm owed Mr. Holladay or whether he was indebted to the firm. And I cannot see that a want of this knowledge was a reason for not setting up a claim for affirmative relief by cross-bill, unless the defendant was made to believe his interest was not of sufficient value to warrant the course. But counsel have not taken the position, and do not suggest that he has ever thought of such abandonment of the assets, and of course Mr. Elliott could not have known that he was misled or deceived so as to be of such opinion for any considerable time, for, in his complaint of June 1871, he places a very considerable estimate on his interest in the firm, and states his damages at \$2,000,000.

It is not necessary to go into the subject whether the assets of Ben. Holladay & Co. are to be considered greatly enhanced by the firm having obtained cash to be expended in its enterprise, through a pledge of bonds held by them,

together with the note of one of the firm or of the whole firm, inasmuch as the right to an accounting does not depend on the question whether the amount of assets is great or small or upon whether they have increased or diminished. And as to the propriety of the act of obtaining the money, if it was fairly obtained for the business of the firm including reimbursing individual members for advances made by them, it would be a fruitless attempt at self-deception for the court or the parties to ignore the fact that in all such cases the bonds are made by the corporation and obtained by contractors expressly for the purpose of raising money by pledging or by selling the bonds. It cannot be doubted Mr. Elliott contemplated some transaction similar to that which was effected by Mr. Holladay, if the members of the firm had continued to co-operate; and he probably would have approved of this if no dispute had occurred between the members of the firm. This is not a matter like that of breaking up the partnership, that goes to the gist of the case.

It may be a very important fact on the question of the kind or amount of relief to which the defendant may be found entitled, but at the most it is a mere transfer of one kind of assets into another kind, and I cannot think ignorance of it goes far as an excuse for the delay in offering the proposed cross-bill.

An inspection of the complaint filed by Mr. Elliott will disclose that Mr. Elliott had such knowledge as enabled his counsel to draft a sufficient pleading to admit this fact in evidence, without its being necessary he should know of this particular transaction.

Many of these facts, relied on as newly discovered, are of a class which are treated in practice as but evidence not required to be set forth in the pleadings. I cannot recall one of the circumstances occurring prior to the finding of Mr. Elliott's complaint in June last, but could be introduced in evidence under the allegations of that complaint. Or if the same allegations of fact had been set forth as an answer in this case, I think there are none of the pertinent facts set up in the exhibits, as occurring prior to that time that

be admissible under the proposed amended answer, but admissible under the allegations of the complaint of Mr. Elliott in June, 1870.

Whether we take the literal reading of the code, or pursue the practice that formerly prevailed in courts of chancery, the result is that: "A general statement of the matter of fact is sufficient, and it is not necessary to charge minutely all the circumstances which may conduce to prove the general proposition for these circumstances are matters of evidence, and need not be charged in order to let them in as proofs." (Eq. Pl. s. 28.)

In the present complaint the defendant set up the attempt to form a new railroad company and to dissolve the old one, the cancelling of the construction contracts, and the issuing of bonds by the new company and threatening to sell them. This has laid the foundation for evidence of all the transactions of the parties that are pertinent up to the sale of the stock of the Oregon and California Railroad Company. If the allegations contained in Mr. Elliott's complaint are set forth in the answer, the proposition to add a supplemental answer would have been very different from that now made.

The absence of Mr. Elliott can hardly be urged; he was duly verified his complaint in June, 1870; and what he alleged as unfair dealing, has all transpired within a short past, and it is not necessary for me to refer further to controverted statements of the parties on that matter. The principal ground of excuse is, that the defendant's means were somewhat exhausted, so that he was unable to meet the expenses of the litigation, and that this embarrassment has been caused in whole or in part by the conduct of the plain-

... the other expenses, aside from that of employing counsel, there are circumstances tending to support the defendant's position, which would certainly be deserving of consideration if the necessity of meeting such other expenses had caused the delay; but that is not claimed. As far as relates to the defendant's inability to employ counsel, the record of the court and the theory of the law

are conclusively against this excuse. The records of the court show that the defendant had the fortune to secure the services of counsel in time for all the purposes of the case, and the court cannot but know that they are men able and skilled in their profession. And the law will not tolerate the position that counsel can or will place themselves on the record as such, and afterwards permit the excuse here urged to be true in point of fact.

If this motion had been made before the case was referred, or even before the parties commenced taking evidence, the proposition would present less difficulty.

It was said in argument that the defendant's request was merely asking to be heard, and the subject was treated, to some extent, as if denying this motion was equivalent to turning the defendant out of court without a hearing. But this is not the case. If the defendant is entitled to affirmative relief, he can still proceed to obtain it. I have reason to suppose that in the earlier proceedings in this case it was the opinion of counsel that an original suit was the safer or better course for the defendant. And I certainly am no way confident but that it is more economical and better for all parties to first try the issues and determine the questions that form the gist of the controversy, that is, the right and the wrong of the attempt to dissolve the firm of Ben. Holladay & Co., before going into the extensive investigations suggested in the proposed amendment.

I have not thought it necessary to investigate the questions raised as to the pendency of other suits, and the bearing that they should have on this application.

Granting this motion would necessarily cause more or less delay, would probably necessitate a re-examination of witnesses to some extent, and would put it in the power of either party to cause as much delay as would result ordinarily from granting a continuance. If we compare the defendant's showing on the subject of diligence, or of excusing the want of it, with that which is required to procure a continuance, I think it lacks much of bearing that test.

I do not think the facts justify granting the motion.

CIRCUIT COURT FOR MULTNOMAH COUNTY, JUNE TERM, 1871.

MARY HARTY v. W. S. LADD.

**ACKNOWLEDGMENT OF DEED BY A MARRIED WOMAN—PAROL.**—Where the certificate of the acknowledgment of a deed by a *femme covert*, does not show that she was examined separate and apart from her husband, parol evidence is not admissible to show that she was in fact so examined.

HIS action is for the recovery of an undivided third of a parcel of land, that had been conveyed by Dennis Harty, the plaintiff's deceased husband, in his lifetime, to the defendant grantor.

He answer denies knowledge or information sufficient to form a belief as to the several allegations of the complaint, and sets up as separate defenses:

1st. That the defendant is owner in fee of the premises.

2d. That on the sixth day of May, 1867, the said plaintiff executed the said Dennis Harty, then pretending to be husband and wife, under their hands and seals, executed and delivered to Stephen Coffin, a deed of the premises, and duly acknowledged the same. That "the said plaintiff then and there, on an examination separate and apart from her said supposed or pretended husband, acknowledged that she executed the said deed voluntarily, and without fear or compulsion from any one, before the said William Beck, justice of the peace." That "by accident and mistake, the said William Beck, justice of the peace as aforesaid, in his certificate of the acknowledgment of the said deed, omitted to state in said certificate that the plaintiff was examined separate and apart from her said husband, and that upon her examinations she acknowledged that she executed the said deed voluntarily, and without fear or compulsion from any one. But defendant in fact says that such examination of said plaintiff was made separate and apart from her husband, and the plaintiff did" then and there, before said justice of the peace, so acknowledge.

3d. That the said Dennis Harty's purchase of said premises, was an exchange of lands. That he gave in exchange of this and other property, "the one half of the donation

land claim of the said Harty and his wife, the plaintiff, being said Dennis' half of said land claim, which land claim was situated in ——— county, in the state of Oregon." And that the said premises was re-exchanged and reconveyed by the said Dennis Harty, to the said Coffin, said defendant's grantor, for the said half of the said donation land claim. And that the said Dennis Harty departed this life more than one year prior to the time of the commencement of this action, and the plaintiff has commenced no previous proceeding to recover her dower in the premises.

The plaintiff demurs to each of the two defenses last mentioned, as not stating sufficient facts.

*Shattuck & Killin*, for the plaintiff.

*Logan & Waldo*, for the defendant.

BY THE COURT, UPTON, J. The power of a married woman to divest herself of her interest in land by joining in the execution of a deed, is a power derived from the statute. By the common law she had not the capacity to thus divest herself of her interest, and the statute concerning conveyances has not wholly removed the disability of a married woman to convey real estate by deed, but has qualified it, or created an exception to the rule by providing a special mode by which a wife may divest herself of her interest in lands. The affirmative provisions are in substance that lands may be conveyed by deed, signed, sealed "and *acknowledged* or proved *and recorded*, as directed in this title."

"A husband and wife may by their joint deed convey the real estate of the wife."

"The acknowledgment of the wife shall be taken separately and apart from her husband."

"The officer taking the acknowledgment shall endorse thereon a certificate of the acknowledgment thereof."

The deed shall be recorded "*with the certificate of acknowledgment.*"

For the reason that the deed of a married woman ~~has~~ no force or effect, except that which is derived from these provisions of statute, it follows that the deed must be made in

pliance with the statute. The statute can no more be complied with, without the proper certificate being inserted on the deed, than without the acknowledgment or the signature of the wife.

*femme covert* derives her power to convey by deed from statute, and a full compliance includes the specified on the part of the certifying officer. The statute contemplates that the specified certificate will be made, and sections 1 and 22 of the act concerning conveyances indicate the recording of the deed, "with the certificate of acknowledgment," is essential to constitute a conveyance by a married woman. I think that the very language of the statute which confers on a wife power to convey, excludes the idea of proving her acknowledgment or her execution of the deed in a case where the certificate has never existed.\*

The objection to the defense last set out in the answer, is that the answer is uncertain as to the tract of land alleged to have been exchanged. If it was necessary to designate the tract, it should be described with certainty.

The demurrer should be sustained as to each of the two defenses last set forth in the answer.

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COURT COURT FOR MULTNOMAH COUNTY, NOVEMBER TERM, 1871.

### MARY CLINE v. JACOB CLINE.

**OBJECTION—MOTION TO STRIKE OUT.**—When a pleading is filed in good faith, the question, whether it contains facts constituting a cause of suit, should be tried on demurrer and not on a motion to strike out.

**OBJECTION—MATERIAL AVERMENTS.**—The law intends that the pleader should state only material facts. Whether an allegation is material may be determined by this question: "If it be denied will the failure to prove it decide the case, in whole or in part?" If it will, the fact alleged is not material.

The cause was submitted on the defendant's motion to set out parts of the complaint. The facts are stated in the opinion.

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*ott v. Pierce*, 1 Pet. 323; *Brown v. Farren*, 3 Ohio, 155; 3 Mo. 30.

*Bronaugh & Catlin and R. E. Bybee, for the plaintiff.*

*Mitchell & Dolph, for the defendant.*

UPRON, J. The defendant moves to strike out several designated parts of the complaint, and as to each part, puts the motion on the ground that the part is irrelevant, immaterial, sham, and the statement of evidence. The motion, as a whole, embraces every part of the complaint, and much of the argument has been addressed to the question whether the complaint states facts sufficient to constitute a cause of action.

I do not deem that question properly raised by this motion. If a complaint is filed in good faith and presents issuable facts, and the defendant desires to raise the question whether the facts stated constitute a cause of action, he should present that question by demurrer, that when the decision is made, a judgment may be rendered, unless leave is obtained to amend or plead over. I shall, therefore, not undertake to pass upon that question on this motion.

The principal questions raised by this motion are whether certain parts of the complaint contain statements of fact as contradistinguished from evidence, and whether certain allegations, are redundant.

The complaint sets out the substance of a decree of divorce, obtained by the plaintiff against the defendant in the circuit court of this state in 1862; and says it was therein decreed, "That all the estate, right, title and interest of the said Jacob Cline in said lots 3, 4, 5 and 6, in block 111 in the city of Portland, be, and the same is, divested out of the said Jacob Cline, defendant, and the same is hereby vested in the four minor children of the parties," that is, four minor children of this plaintiff and this defendant, fruit of the marriage dissolved by said decree. The complaint further states that this plaintiff was by said decree made guardian of said four minor children and decreed the possession of the said lots. And that while the plaintiff was so in possession of said lots a street tax of \$551.75 was assessed upon, and became a lien on said lots, and this plaintiff to



and protect said lots from sale on said lien, paid the street tax. The complaint charges that afterwards this defendant sold his interest in said lots to one Fitch, who commenced an action of ejectment in the United States circuit court for the district of Oregon, against said minors, in which action it was adjudged that said minors were entitled to said lots only during their minority. And Fitch, as grantee of this defendant, recovered a judgment therein, to the effect that he was owner of said lots in and against three of the said children of these parties, said three children having reached their majority,) and against the fourth, he was adjudged to be entitled to the reversion, and to be entitled to have exclusive possession, for the said minor's majority. This complaint shows also that in the divorce suit \$1,500 was decreed as alimony to the plaintiff; and that the said tax was so paid by this plaintiff out of the money so decreed to her as alimony, and that the said lots were so in her possession as guardian; that the payment was in order to release said lots from the lien and said street tax, and to prevent them from being sold therefor; and that the payment was made for the benefit of said minors, they then being minors.

The first question discussed, is, whether setting forth the facts of the state court and the judgment of the United States court, is a concise statement of facts that constitute the cause of suit. If the plaintiff is suing to recover a title which is predicated upon a judgment in her favor, and the judgment is binding on the defendant as a party, or because of res judicata, the rendition of the judgment is a material fact. If the rights and liabilities of the parties arise from other sources, and are not based upon or determined by the judgment, the rendition or existence of the judgment is not a part of the facts constituting the cause of suit. One of these allegations purports to vest the fee of this property in the said children of these parties, and the other adjudges it to be in a third party, who may be treated as a stranger so far as the proceeding is concerned. And I think it may be said that these allegations of the complaint are designed rather to show the present condition of the title, or to show

that the plaintiff does not know which of the two adjudications correctly represent its condition; or the plaintiff must design to show that by the first decision she was led into an error, and that she had good reason to believe, and did believe, at the time she advanced the money, that the title stood as set forth in the decree of the state court. But the complaint fails to aver what is the present state of the title, or that she does not know its condition, or that she has been misled or deceived in regard to it.

The defendant claims that one or more of the propositions just mentioned as omitted from the complaint, should be averred; and that propositions of that character are the facts essential to be plead, and the only ones he is bound to traverse or to admit. In other words, that such are the facts which the code requires should be concisely stated in a pleading.

The plaintiff claims that a narration of the circumstances under which the plaintiff proceeded is essential to a proper understanding of the case.

In determining whether any part of this motion should be granted—and if any part how much—it is necessary to construe the provision of the code which requires “a plain and concise statement of the facts;” or if that language is deemed so clear as not to be of doubtful import, to examine the complaint to see whether it is a concise statement of the facts constituting a cause of action or suit. The law intends that the pleader shall state only material facts.

The distinction between facts, upon which a judgment may be predicated, and evidence, by which the material facts may be established, is so clearly drawn in the text books and in reported cases, that it does not seem necessary to repeat a statement of the grounds upon which that distinction rests. If it were not for the importance of maintaining system and uniformity in our modes of practice, it might not repay the labor either of the court or of counsel to examine and consider such questions as are raised by this motion.

Yet these questions are found to be of practical importance in many ways. If one is permitted to set out his evi-

se, under a system of practice that does not contemplate course, he obtains an unfair advantage over his adversary by compelling him to admit or to deny every assertion the pleader chooses to make. If for want of time to go into details and minor points of pleading and practice, for any other reason, the practice is permitted, and one party to an action or suit, pursues that course, the tendency is to induce, if it does not compel, the other party to resort to a similar mode; and if the practice is sustained, instead of a concise statement of facts, pleadings may become a mere discursive and indefinite mass of evidence, inferences and arguments, making the records of the court very uninteresting sources of information, and rendering the trial of a case laborious, and its results extremely uncertain. From these considerations, it becomes a duty of the court to give to this class of motions, whatever attention is necessary to prevent the evil above suggested.

I know of no more lucid exposition of the distinction between pleading the facts that constitute the cause of action in a suit, and presenting a statement of the evidence on which the party relies, than that set forth in a manuscript written by one of the commissioners engaged in framing the New York code. It is substantially republished in the case of *Green v. Palmer*, 15 Cal. 411. It is there said, the following question will determine in every case, whether an allegation is material. 'If it be denied, will the party be able to prove it, decide the case in whole or in part?' If the answer be in the affirmative, the allegation is material; if not, then the fact alleged is not material; it is not one of those facts which constitute the cause of action, defense, or remedy.

If we apply this test to what is said of the decree of the circuit court, and of the judgment of the United States circuit court, touching the title to the lots of land, we shall ascertain whether those allegations are facts constituting the cause of suit.

If the defendant should deny that any judgment was rendered in the United States circuit court, and on the trial the plaintiff should totally fail to prove the judgment; but if it could be shown that the title to the property is in fact

as the plaintiff says it was there adjudged to be; it is obvious that the plaintiff's case would suffer nothing by her failure to prove the rendition of that judgment.

It is in this respect, parallel to a case, where it should be plead that the defendant *admitted* that he made a particular contract. If the execution of the contract is proved, it becomes immaterial whether the defendant admitted the execution or not.

In this case it is immaterial, that is, it is not an essential ultimate fact in the case, whether the United States circuit court rendered that judgment or not. The material question in that particular, is whether Mr. Fitch owns the land, or the certain estate in it, and not whether it has been so adjudged.

If the plaintiff believes her wards to have been owners of the lots, as was declared in the decree of divorce, and deems that a material fact, the complaint should state that her wards were owners in fee; but if her wards were only entitled to the possession during their minority, and the quantity and duration of their interest is material, the duration of their estate should be set out, and not a judgment which has been rendered on that subject between other parties.

It was said in argument, that it is better to set out in narrative form, what has transpired between the parties, that the whole matter may be before the court.

The proposition amounts to this: that in a case of this kind, it is not sufficient to state the facts that constitute the cause of suit, but the plaintiff should be permitted to set out the circumstances, with such detail and particularity, that it shall become evident that the allegations of fact contained in the complaint are true, and that it may be obvious from the pleadings, what fortuitous circumstances caused the material facts to be as they are. Whatever may be the conveniences of such a system, I am confident the inconveniences would greatly preponderate. And it is certain it will require legislation to make it admissible.

If the plaintiff has been misled about the title, and bases her claim in whole or in part, on that ground, she should not leave it to be inferred from the evidence which she sets

; that she has been misled; she should omit the evidence and state the facts, that show that the defendant ought to refund the money.

I am unable to see how it is material, out of what fund hers the plaintiff advanced the money.

As to those parts of the complaint which recites what was judged in regard to the title; and as to the allegation in regard to the alimony decreed, the motion should be granted.

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CIRCUIT COURT FOR CLACKAMAS COUNTY, OCTOBER TERM, 1871.

W. HARPER by NORTON (Guardian of W. W. Harper,) v. A. M. HARDING et al.

**SETTING ASIDE A DECREE—JURISDICTION.**—As a general rule, a decree of a court having jurisdiction cannot be attacked collaterally, and it is not a sufficient showing of a want of jurisdiction to allege that the defendant was insane at the time of the trial.

**WARRANT OF REVIEW.**—To warrant a review of a decree by an original suit, except for error appearing on the record, a reason must be shown why the facts now presented were not presented and determined on the former trial.

The plaintiff, W. W. Harper, who it is averred is insane, acts by guardian, to set aside certain deeds and to recover possession of the premises in controversy.

The plaintiff charges that on June 2, 1860, said Harper executed a mortgage while said Harper was insane; that while said Harper was still insane, the said mortgage was foreclosed, and the premises sold to the mortgagee, A. M. Harding, in April, 1864, who afterwards conveyed to the defendants, King and Hawley. He also charges that the mortgage was without consideration.

The complaint then proceeds as follows: "For further and separate cause of suit, the plaintiff avers that on the eighth day of August, 1864, the said King and Hawley fraudulently and without consideration, obtained a deed for the above described premises from W. W. Harper. That

the said Harper was insane at the time of the execution of the deed. That said defendants now hold said premises adversely to the plaintiff under said deeds."

The defendants demurred, on the ground that two causes of suit are improperly united, and are not separately stated, and that the complaint does not state facts sufficient to constitute a cause of suit.

During the argument, the words "for further and separate cause of suit" were stricken out by consent.

*H. F. Forbs*, for the plaintiff.

*Johnson & McCown*, for the defendants.

BY THE COURT. (UPTON, J.) I think the complaint is insufficient. In order to maintain this suit the plaintiff must show that the defendants are not entitled to the premises, either under the foreclosure or under the deed executed subsequently.

If the allegation is true, that Mr. Harper was insane when he executed the mortgage, that is a fact that might have been plead and proved in the foreclosure suit. As a general rule a judgment or decree of a court having jurisdiction cannot be attacked collaterally; and when a decree is attacked for want of jurisdiction, it is not a sufficient showing of such lack, to declare that the defendant was insane at the time. It does not appear by this complaint but that Harper was duly served and appeared by guardian. Nor is any reason shown why his alleged insanity was not plead in that suit. In fact there is nothing set forth in this complaint to show that the same allegations that are made in this complaint were not set up and passed upon in the foreclosure suit. For aught that appears, the court in which the mortgage was foreclosed, may have heard and determined the matters which the plaintiff now seeks to present, and it does appear that the court then pronounced a decree upon the subject matter involved in this suit; that is, the due execution of the mortgage. A plea of insanity may have been negatived; or the present plaintiff may have been represented by guardian and may have failed to set up the in-

ty. The presumption being in favor of the judgments decrees of a court of record, in the absence of any allegations on the subject, it will be presumed that the court having jurisdiction of the subject and of the person, proceeded lawfully and decided correctly. The decree of foreclosure cannot be attacked collaterally, and the facts stated are not sufficient to authorize a review of the decree of foreclosure. The demurrer should be sustained.

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CIRCUIT COURT FOR WASHINGTON COUNTY, OCTOBER TERM, 1871.

### DARLING SMITH v. LYDIA SMITH.

**AFTER AFFIDAVITS.**—On a motion to open a decree under sec. 57 of the code, counter affidavits may be filed.

**INTERPRETATION.**—Where a literal construction of the words of an act leads to an absurdity, resort will be had to the ordinary means of interpretation, and the court will look to the occasion and necessity of the law, the defects in the former law, and the designed remedy.

**TERMS.**—The times of holding the circuit courts in the third, fourth and fifth districts, are not changed by the act of 1870.

**ORDER BY PUBLICATION.—MOTION TO OPEN A DECREE.**—The circumstances that an affidavit to obtain an order of publication of summons, was made upon information only, and that it did not show what effort had been made to learn the defendant's residence, may be considered on a motion, for leave to answer after default and decree.

**DIVORCE.—HUSBAND TO ADVANCE MONEY.**—Where a decree of divorce, obtained without personal service of summons was opened, and the wife allowed to defend, and there were circumstances tending to show that the plaintiff had induced or permitted his wife to go to another state that he might obtain a divorce in her absence without her knowledge; it was directed that an order be entered requiring the plaintiff to provide for the expenses of her return; but it was required that the order should contain provisions guarding against diverting the money to any other purpose.

**THIS** is an application to open a decree of divorce, and to allow the defendant to answer, made under section 57 of the code. This section provides that a defendant, against whom publication is ordered, may for cause be allowed to defend

at any time before judgment, and may, "upon good cause shown, and upon such terms as may be proper, be allowed to defend after judgment, and within one year after the entry of such judgment, on such terms as may be just."

The defendant filed, with her motion, the affidavit of her attorney; and the plaintiff filed counter affidavits. The defendant moved to strike out the counter affidavits.

The motion to strike out was overruled, and the court permitted the counter affidavits to be read.

The plaintiff's attorneys also presented this objection to this proceeding, that the amendment, found on page 4, of the acts of 1870, repeals the act of 1868, providing the times for holding the supreme and circuit courts, and does not provide any time for the holding of this court; and that no term can now be legally held except terms fixed by order of the court or of a judge thereof. This objection and the motion to open the decree, were both submitted at the same time.

*W. D. Hare* and *O. Humason*, for the plaintiff.

*Ball & Durham* and *B. Killin*, for the defendant.

BY THE COURT, UPTON, J. An act was approved on the twenty-sixth day of October, 1868, which provides "the times and places for holding the supreme, circuit and county courts." Section 2 of that act provides the times and places for holding the circuit courts in *all* the districts of the state.

The legislature of 1870 passed an act entitled "an act to amend an act entitled 'an act to provide for the times of holding the supreme, circuit and county courts,'" approved October 28, 1868, which purports to enact "that section 2 of said act be amended so as to read as follows:" and proceeds to set out so much of said section 2 as relates to the first and second districts, making no change in regard to those districts, except to designate the *third* Monday in October instead of the *first* Monday, as one of the times of holding the circuit court in Coos county. This amendatory act makes no mention of the *third, fourth or fifth* districts.



is claimed that this amendatory section stands now as substitute for the whole of section 2, of the act of 1868, that there is now no time fixed by law for holding the circuit courts in the third, fourth or fifth district. There is evidently an inadvertency in drafting the act of 1870, I am aware that there has been serious apprehension that the matter here presented has resulted in repealing the law fixing the times for holding the circuit courts in this and two other districts. But I trust this apprehension is unfounded. In construing a statute, the purpose is to ascertain what was the intention of the legislature; and a proper application of acknowledged rules of construction I trust, dispel all doubts on this subject. It is assumed that this is a case where the words of the statute are clear and precise, and, consequently, admit of no interpretation, and are within the rule laid down in *Jackson v. Lewis* (17 N. 475.)

That in order to be within the rule there laid down, the language must not only be clear and precise, but the sense must be manifest, and it must lead to nothing absurd. "The maxim, *falsa demonstratio non nocet*, is founded in common sense as well as law, and is not less applicable to statutes than to wills and deeds." (*Waterloot Turnpike Co. v. McCall*, 6 Hill, 616.)

When a literal construction of the words of an act leads to absurdity, resort will be had to the ordinary means of interpretation, and the court will look to the occasion and necessity of the law, the defects in the former law, and the intended remedy. (*Donaldson v. Wood*, 22 Wend. 395.)

Section 3 of the act of 1870, shows that the object of the law was to change the time of holding the court in Coos county; and that change was made for a particular reason which is expressed in the act. It is difficult, if not impossible to avoid the conclusion that that was the sole object of the amendment.

The construction contended for is to obtain, an appropriate title, would be, "an act to amend the second subdivision of section 2 of," etc. and to repeal the third, fourth and subdivisions thereof. As no intention to repeal is ex-

pressed, it is a question whether such construction will not conflict with sec. 20 of art. 4 of the constitution.

But if, from all other considerations, this act would be technically a repeal, the difficulty may be avoided by calling up another technicality. The act of 1870 purports to amend an act approved the twenty-eighth of the month. The act providing for holding this term, was approved on the twenty-sixth of October, 1868. One who relies on a technical point, must be fortified against similar objections. I am very confident there is no valid objection to holding the regular term of this court at the present time; and I shall proceed to consider the case presented by the motion.

It is shown by the affidavits, and other proofs on file in the cause, that the plaintiff, being a resident of this state, went to Massachusetts, where the defendant had resided up to that time, and the parties were married at Lowell, in that state, and came to this county, where they lived together until December 20, 1870, at which time the defendant returned to the eastern states with her husband's consent. She claims that she went there for the purpose of visiting her friends, that she intended to return here in a few months, and that her husband promised to send her money for the expenses of her return to this state; and that he failed to send it. The complaint in the cause is based on a charge of adultery, alleged to have been committed while the parties were residing together in this county, and a decree of divorce was rendered in favor of the plaintiff in July last.

The defendant is still in Massachusetts, and claims that she is innocent of the crime charged, that she had no knowledge of this suit, and no reason to apprehend a suit until after the decree was rendered. That she has never received any copy of the summons or complaint, that the plaintiff knew her postoffice address, and that the decree was obtained by artifice and deception. She asks leave to defend; and that the plaintiff be required to furnish means to enable her to meet the expenses of the defense. The plaintiff has sufficient property to meet all necessary expenses of this suit.

The order of publication of summons did not require a copy to be deposited in the postoffice.

The plaintiff claims that the defendant left this state with intention permanently to separate from him, and with an intention never to return, and that all his proceedings in the case have been in good faith and regular.

This application to open the decree presents a question that is delicate, and yet of such importance as to demand a thorough examination. There are special reasons for great caution in passing upon this kind of an application in a suit for divorce. The enormity of the wrong, if the divorce is obtained by deception, is the greatest of these reasons, but there are others that are of more than ordinary consequence to individuals and to the public. The law gives one year in which to make such an application, and yet the period is only six months, during which the letter of the statute restrains the parties from marrying, and it is evident that the serious consequences may result from an erroneous decision of a question of this kind.

The present controversy is complicated by uncertainty in regard to the facts. If I was satisfied, either, that the defendant returned to the Atlantic States, intending a permanent separation, or that she received a copy of the process in time to enable her to answer before the default, I should overrule the application.

One of the reasons for holding the case under advisement, at the close of the last term, was an uncertainty in my mind, as to the question whether the defendant had actual knowledge of the pendency of the suit, and a desire to extend the time in which an application similar to this might be made before decree.

The propriety of that course was commanded by the circumstances that the affidavit for service by publication was made by the plaintiff, and the suggestion was of the proper force, in view of the wrong that would be done, if abuse of the process of the court should be designedly a matter of circumvention, to procure a decree of divorce without notice to an absent party.

We have no means at the present time, of knowing the

whole truth in regard to statements made in support of the motion. An affidavit made by the defendant herself, has been ruled out, for want of formality in the official certificate attached to it; hence we have not even the defendant's sworn statement in regard to the truth of her allegations. These controverted facts of so serious character are of great public, as well as private, interest; and proof cannot even be presented in regard to them, unless, at least, further time be granted. The first question to be determined, is whether the defendant shall be allowed any further hearing, either on her allegations of fraud and want of notice, or on the merits of the original cause.

If it is true that the plaintiff permitted the defendant to go away with a belief that his affection for her was undiminished, and with the expectation on her part of returning, to spend with him the remainder of their lives, and yet purposed obtaining a decree without her knowledge, the proceeding is such an outrage upon her, upon the court, and upon the public, as to render an investigation an imperative duty.

If, on the contrary, this application is an afterthought, and, as is claimed by the plaintiff, is a mere attempt to extort money, the investigation can do but comparatively little harm.

The affidavit of the defendant's attorney, upon information and belief, which standing alone would scarcely challenge serious consideration, serves as a thread upon which to connect and arrange the facts and circumstances otherwise shown in regard to the time when the parties ceased living together, the manner of their separation, the circumstances of the defendant's departure, the provision made for her, and the commencement of this suit so recently after such separation. These several matters, if not worthy to be called a chain of circumstantial evidence, tend to throw a suspicion over the transaction, that it is very desirable should be removed. And the reasons thus presented in favor of a re-examination of this cause, are greatly strengthened by what appears in relation to the order for service by publication. The affidavit for the order is not made by

plaintiff, but is made by his attorney; and upon the important subject of the defendant's residence and postoffice address, it states only, that the defendant does not reside in state, and "defendant's residence is unknown, and cannot with reasonable inquiry be ascertained."

At the trial the plaintiff testified that when the defendant left this state it was to go to Lowell, Mass., or Bedford, Me., and there is very strong reason to believe the postoffice address of the defendant could have been ascertained with reasonable inquiry as that of writing or telegraphing those towns.

At the circumstance that such inquiry does not appear to have been made, and the fact that the affidavit was not made by one having the best means of knowledge, I think it will be considered on this motion. In saying this, I do not design to express any opinion on the question whether the affidavit contained sufficient *prima facie* to warrant the order of publication; but assuming that the order and the proceedings are in conformity with the statute, it seems to me proper to consider whatever may be peculiar in the mode of commencing and prosecuting the suit, if such peculiarity tends to throw light upon the question under consideration. For this end it is proper to notice the situation of the parties, the manner of obtaining service, together with the fact, which I think must be taken as true, that the defendant did not appear of the case in time to answer.

Upon these considerations, I think it my duty to open the case, and permit the defendant to answer.

It will also be ordered that the plaintiff deposit with the clerk \$250, to enable the defendant to meet the expenses she may incur in the suit; and if the defendant desires to return to this state to make her defense in person, proper steps can be taken to bring about that result; but the plaintiff will not be required to advance any money for that purpose upon any uncertainty as to the use that will be made of it. The defendant's attorney will prepare the form of an order in relation to meeting the expenses.

CIRCUIT COURT FOR MULTNOMAH COUNTY, NOVEMBER TERM, 1871.

**JULIEN PROVOST V. MILLARD & VAN SCHUYVER.**

**POWER OF THE COURT OVER PROCESS.**—Every court has power to control its own process, and prevent its abuse.

**SATISFYING JUDGMENT.**—Ordinarily a court has power to direct a decree or judgment, which is of record before it, to be canceled of record, upon a proper showing that it is in fact satisfied.

**JURISDICTION.**—This court refused to entertain a bill to compel a plaintiff who had obtained a decree of foreclosure in another district to appear there and cancel the decree.

THE complaint shows that these defendants in 1870 commenced a foreclosure suit, in the circuit court in Marion County, against this plaintiff and others who are named, and recovered a decree for \$281.33 and interest, and for the sale of certain lands in Marion County. That the said premises were sold under said decree, and that these defendants "became the purchasers thereof," and "bid for said lots the sum of \$354.75, and said premises were duly struck off to them on said bid." That the sheriff made out a certificate, which these defendants refused to accept, and alleged that their bid was induced by misrepresentations.

The plaintiff alleges that by reason of the said sale "the said decree is fully paid and satisfied, and that the same ought to be satisfied of record by the said defendants;" but that the said defendants neglect and refuse to satisfy the said decree; and that the said defendants have sued out an *alias* execution on said decree.

The defendants demur on the grounds that: This court has no jurisdiction of the matter set up in the complaint, and that the complaint does not state facts sufficient to constitute a cause of action.

*Hill, Thayer & Williams*, for the plaintiff.

*Sullivan & Thompson*, for the defendants.

UPTON, J. This complaint is of course addressed to the equity side of the court; the relief prayed is not such as a court of law can administer. Were it a judgment or a

ee of this court that it was proposed to cause to be satisfied of record, the necessary steps could be taken by motion, as well in an action at law as in a suit in equity; but the court of law has no process that would afford the relief the plaintiff in this cause claims.

Upon the same principle that equity will not interfere where a party has a plain, speedy and adequate remedy at law.

I think a court of equity should not interfere or attempt to meddle with a proceeding of another court in which the parties have appeared, and to the control of which the question submitted is subject. I think that it appears by the complaint that the plaintiff has an adequate remedy in that court.

The gist of the complaint here is, that the decree of that court ought to be satisfied of record, that it is not satisfied, that these defendants have caused an execution to issue. There is certainly no more necessary rule, nor one better established, than that every court has power to control its own process to prevent its abuse. Ordinarily, a court has power to direct its own decree or judgment, to be canceled of record upon a proper showing that it is in fact satisfied; and at that end there can be no doubt the court has all the requisite power over parties, to such judgments and decrees, who voluntarily come before the court or have been duly brought before the court by its process. I think, therefore, that this plaintiff has a plain, speedy and adequate remedy by applying to the court that has control of the decree and of the process that may be applied for under the decree. The bill of complaint should be dismissed.

CIRCUIT COURT FOR MULTNOMAH COUNTY, NOVEMBER TERM, 1871.

W. F. WILCOX v. M. KEITH et al.

**MECHANIC'S LIEN.**—In a proceeding to enforce a mechanics' lien under the statute, the complaint should show that the contract was made with an owner or his agent.

In a proceeding under the statute to enforce a mechanics' lien, the complaint alleged that the contract was made with said M. Keith, as owner of the building. The defendant demurred.

BY THE COURT, UPTON, J. It is a material point that the contract be made with the owner of the building, and unless it is so made there is no lien. The complaint should show every fact requisite to establish the existence of the lien. It should be direct and certain as to the allegation that the contract was made with the owner of the building; or, to use the language of the statute, it must be made with the owner of the building, "or with the agent of such owner."

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CIRCUIT COURT FOR MULTNOMAH COUNTY, NOVEMBER TERM, 1871.

WILLIAM MAROONEY, Respondent, v. JAMES McKAY, Petitioner.

**PRACTICE.**—By the summons it appeared that the court was held in Couch precinct, in Multnomah County; in the return, the constable described himself as, "constable of Couch precinct," without naming the county; the return was held sufficient.

**IDEM.**—A copy of the complaint, certified by the justice of the peace, is sufficiently certified to authorize its service with the summons.

THE plaintiff obtained judgment before a justice of the peace in an action for work and labor, and the case comes into this court upon a writ of review on petition of the defendant.

In the return on the summons the constable gives his official title, "constable of Couch precinct," without naming the county.



The complaint was in writing, was certified by the justice of the peace only.

The petitioner claims that he was not duly served with summons in the action, and that the justice failed to acquire jurisdiction, in this:

c. The record does not show that the summons was served by a constable of this county.

d. The copy of the complaint was not properly certified. *Fitchell & Dolph*, for the petitioner.

*P. Mason*, for the respondent.

BY THE COURT, UPTON, J. It is shown on the summons that the court is held in Couch precinct, in Multnomah county. The summons and return being read as one instrument show in what county, as well as precinct, the constable's office.

The point in regard to certifying to the copy of complaint to justice's court, raises a question of practice which appears not to have been decided. The general practice act requires that the copy of the complaint, served with the summons, should be certified "by the plaintiff, his agent or attorney, or by the county clerk;" and the act regulating the practice in justices' courts does not expressly mention the act of certifying, but it provides that the pleadings may be oral or in writing, and, "when the complaint is made orally, the justice must endorse the substance of the same on the summons." I think that a copy of complaint certified by the justice before whom the cause is pending, may be sufficient, either upon the assumption that where there is no clerk, *eo nomine*, the act may be done by the officer whose duties include the labors usually performed by a clerk; or since the act when done by the justice of the peace is, of course, done on the motion and implied request of the plaintiff, it may be considered done by his agent.

I cannot think the statute demands such literal and arbitrary construction as to justify reversing a judgment because a copy of the complaint served with the summons was not certified by the justice of the peace only. The judgment should be affirmed.

CIRCUIT COURT FOR MULTNOMAH COUNTY, NOVEMBER TERM, 1871.

W. A. HOLBROOK et al. v. W. W. PAGE et al.

**PLEADING.**—Averments in the answer not presenting issuable facts will be struck out on motion.

**REDUNDANCY.**—Express admissions of facts alleged in the complaint are unnecessary, and may be struck from the answer as redundant.

**MOTION TO STRIKE OUT.**—Where a part of that to which a specific objection is pointed is properly pleaded, the objection will not be sustained.

THE plaintiffs are owners of lot 2, and the defendants are owners of lot 1, in block 182 in the city of Portland, and the controversy relates to the locality of the line between those lots. It presents the question whether that line is fifty feet, or whether it is fifty-seven feet, south of the south line of Salmon street, *as that street is now used and occupied*. A motion is made to strike out parts of the answer.

The complaint states that the plaintiffs are owners in fee simple, and have a right to the possession of lot 2, in block 182; states that the block is two hundred feet square, and bounded on the north by Salmon street. "That said lot No. 2 is the south half of the northeast one quarter of said block, fronting fifty feet on Sixth street, and running back one hundred feet in depth, its northern boundary line being parallel with and fifty feet distant from the south line of Salmon street, as the same is now used and occupied." That the defendants are in possession of and wrongfully withhold from the said plaintiffs a strip of land ten feet in width off from the northerly side of said lot No. 2, running back one hundred feet, the depth of the lot. The plaintiffs claim the land and \$200 damages.

The answer contains a denial that the defendant has been in possession or has detained any part of lot 2 in said block; and avers that the north boundary line of said lot No. 2 is *fifty-seven* feet distant from the south line of Salmon street, as the same is now used and occupied. That the defendants are owners in fee simple of lot 1 in said block, and that the south boundary line of said lot 1 is *fifty-seven* feet distant

the south line of Salmon street, as said street is now and occupied.

In addition to the foregoing, and to some other denials, answer contains the following statements, each of which plaintiffs move to strike out as sham, frivolous and irrelevant:

st. The defendants "aver that the plaintiffs now are, and a long time past have been in possession of lot No. 2, in block No. 182, in said city, as the same was originally laid out, platted and sold by the patentees from the government to the United States, and as the same was conveyed to and purchased by their ancestor and his grantors under whom the plaintiffs derive title."

d. Defendants admit that the said block No. 182 is a parcel of land two hundred feet square, bounded on the north by Salmon street, east by Sixth street, south by Main street, and on the west by Seventh street, but not as such streets are now used and occupied.

Id. The defendants aver that such south boundary line between lot No. 1, and division line between said lots 1 and 2, in block 182, was established long since, by mutual consent and agreement between these defendants and the then owners of lot No. 2 in said block; and that fences were built at the time of said agreement, concerning said boundary and division, at the common expense and cost of these defendants and the owners of said lot No. 2, in accordance with and on the said southern boundary line of lot No. 1 and division line of lots No. 1 and No. 2. That said fence now stands, and makes the division line between said lots. That since said agreement these defendants have made valuable and permanent improvements on said land adjacent and abutting said boundary line and fence, viz.: buildings of the value of \$1,000. That said buildings and improvements were made upon said lot No. 1 by the defendants upon the faith of the creation of said boundary line established and agreed upon as aforesaid, all of which these plaintiffs and their ancestors well knew.

*Wm. Strong, for the plaintiffs.*

*Page & Bingham, for the defendants.*

BY THE COURT. The first branch of this motion should be granted. The matter pleaded is vague and indefinite. It assumes that there has been some original laying out, platting and selling which is material, and it states a conclusion based upon that assumption; but it is indefinite and states nothing that is material as to the time of the plaintiff's possession. It presents a conclusion, and not an issuable fact.

The second matter alluded to is wholly redundant. It is not necessary in an answer to expressly admit any part of the complaint. If this were a direct admission it would be surplusage, but it neither admits or denies directly any material allegation nor presents anything upon which an issue can be formed.

As to the defense last specified in the motion, the only part upon which I think there can be any question is that which sets up a mutual agreement settling the boundary. A contract of that kind, duly made, would be a good defense, and might well be set up by answer, unless the setting it up specifically is unnecessary, on the ground that the defendant could give it in evidence under the allegation that he is owner in fee.

If there is any doubt upon the question whether such an agreement adjusting a controverted boundary, ought to be specially plead, the doubt is a sufficient reason for refusing to strike out. If a part of that which is included in this branch of the motion ought to be retained, the whole that is included in this part of the motion must also be retained.

The first and second propositions of the motion will be granted, and the third branch overruled.

CIRCUIT COURT FOR MULTNOMAH COUNTY, NOVEMBER TERM, 1871.

E. B. DUFER, v. THOMAS CULLY.

**DAMAGES.—CONTRIBUTORY NEGLIGENCE.**—A plaintiff who sues for damages for negligence, must not himself be guilty of any fault that contributed to the injury.

**NOTICE.—DOMESTIC ANIMALS.**—The owner of a domestic animal is not in general liable for injuries resulting from the vicious disposition of the animal, unless he is chargeable with notice.

**IDEM.**—Where in trespass *quare clausam fregit*, the defendant is considered liable without notice for injuries resulting from the vicious disposition of the animal, it is an exception, and is based upon the wrong committed in breaking the plaintiff's close.

THE plaintiff sues to recover damages for wounds and injuries to his person, caused by a vicious bull, the property of the defendant, alleged to have been wrongfully permitted to run at large.

The answer denies knowledge that the bull was of dangerous or ferocious disposition. Denies that the bull was wrongfully at large. Denies that the bull pushed or struck the plaintiff.

The case was tried before a jury. The evidence tended to show that the bull, with several other of the defendant's animals, was running at large upon unoccupied lands of the neighborhood, that the bull strayed into, or broke into the plaintiff's enclosures, and the plaintiff, with two other men, went to drive the bull away, the plaintiff being armed with a pitchfork; and that after the bull was driven into the highway, the bull made a fierce charge upon the plaintiff knocked the plaintiff down, giving to him a very painful, and what appeared to be an extremely dangerous wound, from which, however, the plaintiff recovered in a few weeks. The pitchfork with which the defendant sought to defend himself, was broken off at the shank, and the tines of the fork were carried away in the scalp of the bull where they remained until forcibly extracted after the bull reached the defendant's premises.

The evidence was conflicting, as to whether the defendant

knew of the vicious character of the bull. And the defendant attempted to draw out, on cross-examination, that the plaintiff unnecessarily vexed the animal.

On the trial, it was questioned whether evidence of the defendant's knowledge of the vicious character of the bull was material.

*Hill, Thayer & Williams*, for plaintiff, cited *Van Leuven v. Lyke*, 1 Comst. 515, and claimed that the defendant is liable, in the absence of such knowledge.

*J. H. Reed*, contra, cited *Tift v. Tift*, 4 Denio, 175; *Vrooman v. Sawyer*, 13 John. 339.

BY THE COURT. I think the evidence of the defendant's knowledge, is pertinent. This is not an action for a breaking of the plaintiff's close, and the complaint does not charge a trespass on the plaintiff's premises. The case of *Van Leuven v. Lyke*, and the authorities there cited touching the point, sustain the general doctrine that the *scienter* must be proved to render the owner of a domestic animal liable, but recognize as an exception, that "this rule does not apply when the mischief is done by such animals while committing a trespass upon the close of another." These authorities base the exception upon the principle, that the common law holds a man answerable, not only for his own trespass, but also for that of his domestic animals, and as it is natural for such animals as horses, oxen, sheep and swine to rove, the owner is to take notice of the propensity at his peril, and held that where the action is trespass *quare clausam fregit*, proof that the animal was trespassing on the plaintiff's grounds at the time, excuses proof of knowledge of the animal's vicious propensity.

The court distinctly held that proof of the *scienter* was necessary in that case, and placed the necessity on the ground that there was no allegation of a breach of the close. All the cases cited, go to the extent that when the vicious disposition of the animal is the foundation of the action, knowledge of that disposition should be brought home to the owner of the animal.

The defendant requested the court to instruct the jury, that:

1. "A plaintiff who sues for damages for negligence, as in this case, must himself be without fault;" in lieu of which the following was given:

A plaintiff who sues for damages for negligence, as in this case, must not himself be guilty of any fault that contributed to the injury.

The following instructions, requested by the defendant, were given as asked:

2. To render the owner of a domestic animal liable for an injury committed by such animal, from its vicious propensity, it must be shown that the defendant had notice of its vicious propensity, or that he had reason to apprehend that the animal would do similar mischief to that complained of in the complaint.

3. In the complaint in this case, there is no allegation charging that the defendant's bull did any act for which the law holds the defendant liable, without proving a *scienter*.

4. If the defendant had no notice or knowledge that his bull had done or was disposed to do similar acts to those alleged in the complaint, the plaintiff can not recover.

5. If the bull was vicious, and had previously committed injuries similar to those alleged in the complaint, the plaintiff can not recover, if the injuries alleged in the complaint to have been received were brought about by the acts and aggressions of the plaintiff.

The verdict was for the defendant.

## IN THE CIRCUIT COURT FOR THE COUNTY OF BENTON.

J. D. RUSSELL, Plaintiff, v. H. C. LEWIS, Defendant.

**COUNTY COURT.—PROBATE.—JURISDICTION.**—The county court is to be regarded in probate proceedings as a superior jurisdiction; it being a court of record deriving its power as a probate court from the constitution. And when its orders for the sale of real and personal property of deceased persons appear to have been regularly made, reciting all the jurisdictional facts necessary to authorize the order, no presumption will be indulged against the recitals, and extrinsic evidence of their truth is not necessary, but the burden of showing that the court has not acquired jurisdiction is on the party who disputes the truth of the recital.

**ORDER OF SALE.—MISTAKE IN DATE.—PRESUMPTION.**—The order of sale recited notice to all persons "to appear on this day;" an order to show cause was made returnable on the fifth of April, but the heading of the order of sale was, "at a term of the court began and held on the first Monday, the fourth of April," etc.: *Held*, that a mistake in making up the record will be presumed, rather than that the order was made before the return day.

*Chenowith*, for plaintiff.

*Strahan & Burnett*, for defendant.

THAYER, J. This was an action to recover certain real property, situate in Benton County, Oregon. The plaintiff claimed title to it as one of the heirs at law of Robert W. Russell, deceased.

The defendant claimed title to the property by virtue of certain proceedings in probate, had in the county court of Benton County, Oregon, under which the property was sold, and claimed to have been acquired by the defendant, through mesne conveyances from the purchasers under the probate proceedings.

It appears that Robert W. Russell died in said county of Benton, about the first of the year 1860, intestate, seized of certain real estate, including the property in question; that he left no wife, children, father nor mother; that the plaintiff was a brother of deceased, and entitled to inherit the one third of his property, and would be the owner of a one third interest in the land in question, if not divested of title by the probate proceedings. It was admitted in the outset,



upon the trial, that one Gallatin Adkins was, on the sixth day of February, 1860, duly appointed by the said county court for Benton County, the administrator of the estate of the said Robert W. Russell, and that he duly qualified and entered upon the discharge of his trust as such administrator. The defendant gave in evidence, subject to objection by plaintiff's counsel, certain orders granted by the said county court for Benton County, during the year 1864, in proceedings in probate, in the matter of the estate of the said Robert W. Russell, deceased, among which was an order to show cause why the property in question should not be sold; also an order confirming the sale thereof, reported by the administrator to have been made, and a deed executed by the said administrator upon such sale to certain parties, and plaintiff had admitted that defendant had acquired all the right in the property which said parties received under said administrator's said deed. The several orders appeared to have been regularly made and recited all the jurisdictional facts necessary to authorize the said county court to grant such orders, and the said deed of the administrator was regular upon its face, and appeared to have been executed in accordance with said orders, and the proceedings thereupon had. Plaintiff's counsel contends, however, that neither of said orders, nor the administrator's deed, should be admitted in evidence without first proving the necessary facts authorizing county courts to make such orders in like cases. This presents the main question in the case. That is, whether county courts of the state of Oregon, in probate proceedings, are to be regarded as courts of inferior or superior jurisdiction. If those courts, in the exercise of probate jurisdiction, are to be regarded as courts of special and limited jurisdiction, then the position of plaintiff's counsel is correct. But, on the contrary, if they are courts of general jurisdiction in such cases, their jurisdiction to make orders of that character will be presumed without any proof of the particular facts necessary to confer jurisdiction. These various orders of the county court for Benton County were judicial records. (See sec. 719, Civil Code, Stat. p. 328.) "The jurisdiction sufficient to sus-

tain a record is jurisdiction over the cause, over the parties and over the thing, when a specific thing is the subject of the determination." (See Stat., p. 330, sec. 732.) The jurisdiction of county courts, in probate matters, is derived from the constitution of the state of Oregon. (See sec. 12, art. VII, Const. Stat. p. 114.) And this jurisdiction, among other things, is to order the sale and disposal of the real and personal property of deceased persons, and is made exclusive. (See Stat. p. 365, sec. 869.) Section 731 of the civil code provides how any judicial record may be impeached, and the presumption arising therefrom overcome, by evidence of a want of jurisdiction. These orders were necessarily judicial records, in every sense of the term; they were the record of the proceedings in a court of justice, being a court of record, having general jurisdiction. (See sec. 1, art. VII, Const., which is as follows: The judicial power of the state shall be vested in a supreme court, circuit court, and county court, which shall be courts of record, *having general jurisdiction*, to be defined, limited and regulated by law, in accordance with this constitution. Justices of the peace may also be invested with *limited judicial powers*, and municipal courts may be created to administer the regulations of incorporated towns and cities.) This was a part of the judicial power of the state. There is no very satisfactory test to distinguish between superior and inferior courts. The supreme court, in the case of *Grignons' lessees, v. Astor* (2 How, U. S. Rep. p. 341, a case similar to this), said that "the true line of distinction between courts of general jurisdiction and courts of special and limited jurisdiction is this: 'A court which is competent by its constitution to decide on its own jurisdiction, and to exercise it to a final judgment, without setting forth in their proceedings the facts and evidence on which it is rendered, whose record is absolute verity, not to be impugned by averment or proof to the contrary, is of the former description; but a court which is so constituted that its judgment can be looked through for the facts and evidence necessary to sustain it, whose decision is not evidence of itself to show jurisdiction, is of the latter description.'" But the difficulty is to ascer-

tain when a particular court is competent to decide on its jurisdiction. The rule which classifies the two kinds of jurisdiction cannot be a mere arbitrary direction.

The court, however, in the last case referred to, did say that all courts of record which have an original general jurisdiction over any particular subject are not courts of special or limited jurisdiction. In the case of *Kemp, lessee, v. Kennedy* (5 Cranch U. S. Rep. p. 173), the question arose as to whether the court of common pleas of the state of New Jersey was a superior court of general jurisdiction, or a court of special and limited jurisdiction. That was an action of ejectment for the recovery of certain real property, which had been adjudged by the common pleas court to have been forfeited by one Kemp, for treason against the laws of that state. Chief Justice Marshall, in delivering the opinion of the court, says:

"In considering this question, the constitution and powers of the court, in which the judgment referring to the judgment of forfeiture was rendered, must be inspected. It is understood to be a court of record, possessing, in civil cases, a general jurisdiction to any amount, with the exception of suits for real property. \* \* \* In treason the jurisdiction was over all who could commit the offense. \* \* \* In respect to treason, then, it is a court of general jurisdiction, so far as respects the property of the accused." And the court held that while the judgment of forfeiture was erroneous, yet it was not void; that it had the effect to divest Kemp of the title to his property. Some of the New York courts, in determining this question, say that "to constitute a court a superior court, as to any class of actions, within the rule that the jurisdiction of a superior court may be presumed, its jurisdiction of such actions must be unconditional; so that the only thing essential to enable the court to take cognizance of them is the acquisition of jurisdiction of the person of the parties. (See Abbot N. Y. Digest, vol. 2, sec. 8, p. 261.)

I think the rule above stated goes too far, as under that test it would be difficult to see how the circuit courts of the United States could be regarded as Superior Courts in the

exercise of civil jurisdiction, as their jurisdiction in civil cases is not *unconditional*, but depends upon special circumstances, such as the controversy being between citizens of different states, and yet they are admitted to stand on the same footing with courts of general jurisdiction. (See *Buchanan v. Cowell*, 1 N. Y. Rep. p. 507.)

It appears to me that a court of record, vested generally by the constitution with any particular part of the judicial power of the state, in the exercise of that jurisdiction must, in the technical sense of the word, be considered a court of superior jurisdiction. And I do not see how, under a correct construction of the several provisions of the constitution and statutes before mentioned, they could be regarded otherwise. In that view of the case the authority to hear and determine the matter of the sale of property in question must be presumed, and that presumption can only be overcome by evidence of a want of jurisdiction in the court to determine that matter. I do not question the right to impeach the adjudication. No court can render a binding or valid judgment without first having jurisdiction over the subject matter; and, second, acquiring jurisdiction over the party to be affected, and as to whether a court had jurisdiction when it has assumed to decide is always a pertinent subject of inquiry, either in direct or collateral proceedings, (See the *Chemung Canal Bank v. Judson*, 8 N. Y. Rep. court of appeals, p. 254; *Dobson v. Pearce*, 11 Id. 164, per W. F. Allen, J.) This right, however, to inquire into the jurisdiction of a court does not, at least in the determining upon the validity of proceedings in our own courts in collateral actions, include the right to controvert the return of an officer, showing that service of process has been regularly made. The law, for certain reasons, founded on public policy, makes such returns in collateral proceedings conclusive, but this does not deny or affect the right to disprove the bare presumption of jurisdiction, nor preclude a party from controverting a mere recital in the record. (See 4 Conn. p. 280; 5 Wend. 148.)

In the case under consideration, it has not been shown that the county court for Benton county did not acquire

jurisdiction of the probate proceedings. It was necessary, of course, that the court first acquire jurisdiction in order to make a judicial record of any validity. But as jurisdiction in this case is presumed in favor of the record, the burden of proof that it did not acquire jurisdiction was with the plaintiff. The plaintiff's counsel also insists that the order of sale was irregular and void, for the reason that it was made on the fourth day of April, 1864, when the order to show cause why the sale should not be decreed was not returnable until the next day — the fifth day of April, 1864. I do not propose to decide what would be the effect of such an irregularity, if such were the fact; but I am not satisfied that such is the case. The order of sale recites as follows: "That legal notice has been given, notifying all persons to appear upon this day," which refers to the day on which it was granted, as there is no doubt but that the order to show cause was returnable on that day. It would be inferred, however, from the caption of the order of sale, that it was granted on the fourth day of April. I cannot believe that the county court would grant an order requiring persons interested to show cause, on the fifth day of April why the property should not be sold, and then decree the sale on the fourth day of April. If the evidence fully established the fact, I would have no other alternative; but from all I can see I am inclined to believe there has been a mistake in making up the record, that the order of sale was not granted on the day the caption would indicate. Mistakes of that character will be presumed rather than to suppose a court would commit such an apparent blunder. (See *Moore v. Tracy*, 7 Wend. p. 231.) The heading of the order is as follows: "At a term of the court began and held on the first Monday, the fourth day of April," &c. Then follows the proceedings. I do not think it a necessary inference from that fact, that the order was granted on the first day of the term. It might have been granted on a subsequent day in the term, and I presume it was in fact granted upon the fifth instead of the fourth day of April.

Judgment for defendant, with costs and disbursements.

CIRCUIT COURT FOR MULTNOMAH COUNTY, FEBRUARY TERM, 1872.

A. P. ANKENY et al. v. MULTNOMAH COUNTY.

A NOTE payable at a specified place in this state is an "indebtedness within this state," within the meaning of the revenue law, notwithstanding the owner of the note may be a non-resident and absent.

THIS case comes before the court upon a writ of review, directed to the county court, sitting as a court for the transaction of county business. The parties submitted an agreed statement of facts to the following effect:

The petitioners were assessed in 1871 for certain lots of land owned by them, valued at \$64,000. At the time of the assessment the petitioners were indebted in the sum of \$10,000 upon a promissory note, secured by a mortgage on a portion of the said land, valued at \$24,000. The note was made payable to A. R. Eddy, at the bank of British Columbia, in Portland, Oregon; and the said Eddy was not in Oregon nor a resident of the state.

Both the assessor and the county court refused to deduct the indebtedness secured by the note and mortgage from the valuation of the petitioners' property.

*Shattuck & Killin*, for the petitioners.

*A. C. Gibbs*, district attorney.

UPTON, J. The statute (Gen. L. p. 628, sec. 1, amended in 1865) provides that the assessor shall "deduct the amount of indebtedness within this state of any person assessed."

The case presents the question whether the amount specified in a note, which is payable at a particular place in this state, should be deducted, notwithstanding the owner of the note may be absent from and a non-resident of the state.

In *Johnson v. Oregon City* (2 Oregon, 327) it was held in this court and on appeal, that the place where a promissory note is taxable, depends on the residence or location of the

owner of the note, and not upon the place where the paper, which is the evidence of the indebtedness, may be temporarily deposited.

The district attorney claims that, upon the principles there laid down, the indebtedness under consideration follows the person of Mr. Eddy, the owner of the note.

The counsel for the petitioners claim that, by stipulating in the note for a particular place of payment, the parties have limited the character of the contract in this particular, and that this note does not evidence an indebtedness which the owner of the demand can carry out of the state at his will.

It is certain that the words fixing a place of payment do affect the nature of the contract in some respects. They limit the rights and liabilities of the parties in several particulars, and the place of payment is a material part of the contract. (*Bowen v. Newell*, 13 N. Y. 290; *Troy City Bank v. Lauman*, 19 N. Y. 477; *Lee v. Selleck*, 33 N. Y. 615.)

If the case turned upon the same point that was before the court in *Johnson v. Oregon City*, the decision there made would settle the question in favor of the county; but the statute should not receive the same construction it would have borne if the legislature, in defining the exemption, had used the words, "the amount of indebtedness *that is taxable* in this state." It is not in the power of the holder of the note to change the place of payment; the petitioners have by their contract reserved the right to transact the business in this state, and to prevent a cause of action from arising upon this note in any other state. If the terms of the contract are carried out, the money that is payable will be in this state after it has left the hands of the makers of the note, and will be subject to the payment of any taxes the state may impose upon it.

I think by the terms of the statute the amount of the note should be deducted from the petitioners' assessment; and a judgment will be entered to that effect.

CIRCUIT COURT FOR MULTNOMAH COUNTY, FEBRUARY TERM, 1872.

A. P. ANKENY v. MULTNOMAH COUNTY.

AN ordinary promissory note, the owner of which is absent from this state, is not an "indebtedness to this state," which can be deducted from the debtor's assessment.

UPTON, J. This case presents facts similar to those of the case of *A. P. Ankeny et al. v. Multnomah County*, except that the note in this case was given by the petitioner to Je-  
minia Wheeler, who is absent from the state, for \$15,000, and it does not appear that any particular place of payment is designated in the note. The agreed case contains the statement that the note "was or is payable in Portland," and shows that the money was used in making improvements on the property which is assessed to the petitioner.

The fact that the money went into improvements and was thus taxed, is not a matter which the statute authorizes the court to consider; and the statement in the alternative, that the note was or is payable in Portland, does not justify the conclusion that payment could not be enforced at any other place; but it must be treated as an ordinary promissory note; and according to the decision in *Johnson v. Oregon City*, its *situs* is with its owner. When Mrs. Wheeler left the state, she carried with her the property in the note, and the right to bring an action upon it in any other country in which the maker or his property may be found. As the property in the note was no longer in this state after she departed, and the petitioner retained no right to satisfy it in this state, I think it cannot be treated as a deduction authorized by the statute, and that the proceeding of the county court should be affirmed.



CIRCUIT COURT FOR MULTNOMAH COUNTY, FEBRUARY TERM, 1872.

MRS. N. J. GASTON et al. v. M. L. McLERAN et al.

AN answer setting up usury, must aver clearly every particular necessary to establish the usury charged, and must distinctly negative every supposable fact which, if true, would render the transaction innocent or lawful.

It seems more consonant with rules of construction, to hold a stipulation for reasonable attorney's fees, in case of suit, to refer to the fees given by statute, than to hold that the parties have by such stipulation rendered a contract usurious, which would otherwise have been innocent.

THIS is a suit to foreclose a mortgage executed by the defendants in favor of the plaintiff, Mrs. N. J. Gaston, to secure a promissory note, in form as follows:

"\$2,000                      PORTLAND, OREGON, December 14, 1870.

"Twelve months after date, without grace, we jointly and severally promise to pay to the order of Mrs. N. J. Gaston, at the First National Bank of Portland, Two Thousand Dollars, for value received, with interest from date thereof until paid, at one per cent. per month, principal and interest both payable in United States gold coin; interest payable quarter-annually, and in case suit is instituted to collect the note or any portion thereof, we promise to pay such additional sum as the court may adjudge reasonable, as attorney's fees in said suit.      Due, Dec. 14, 1871.

"M. L. McLERAN,

"R. S. McLERAN,

"F. W. McLERAN."

The plaintiff alleges that \$100.00 is a reasonable attorney's fee in the suit. The first defense set up in the *answer* is in the following words: "Defendants answering the complaint of the plaintiff in the above entitled suit, admit that the defendants, M. L. McLeran, R. S. McLeran, and F. W. McLeran, executed the note set forth in said complaint, but defendants deny that any of them received the sum of \$2,000 as the consideration of the said note, or any other or greater sum than \$1,960, and that said note was and is usurious."

The *answer* "for a further and separate defense," states the note was given in pursuance to a mutual agreement,

that the defendants should pay, "upon the full face of said note, more than legal interest, and a greater rate of interest than allowed by law, to wit: "interest at the rate of one per cent. per month, and such further sum as the court might adjudge reasonable as attorney's fees, in case suit should be instituted to collect said note, or any portion thereof, which sum is claimed by the plaintiffs in this suit to be one hundred dollars, and said note is usurious." *The answer* denies that \$100 is a reasonable attorney's fee, and alleges that \$50 is a reasonable attorney's fee in this suit. It also denies that the plaintiffs are entitled to recover said sum of \$100, or any sum from the defendants, or any of them as attorney's fees, and denies that the defendants jointly or otherwise owe the plaintiffs any sum except \$1,960 and interest since the fourteenth day of September, 1871, at one per cent. per month. And the defendants pray that judgment for \$1,960 be rendered against them in favor of the State of Oregon, for the use of the Common School Fund.

The plaintiffs "demur specially to the first paragraph of said answer, and they also demur specially to the second paragraph thereof" (containing the said further and separate defense), and for cause say, "that neither of said paragraphs state facts sufficient to constitute a defense."

*Shattuck & Killin*, for the plaintiffs.

*Mitchell & Dolph*, for the defendants.

UPTON, J., delivered the following opinion: The defense set up in the first paragraph of the answer is insufficient. The declarations of the defendants as to what they admit, can be of no consequence; as a matter of law they admit whatever material allegation of the complaint they do not directly deny. What is said on the subject of admissions being disregarded; there remains the words, "defendants deny that they received the sum of \$2,000, as the consideration of said note, or any other greater sum than \$1,960, and that said note was and is usurious." If we supply words and treat the last cause, not as a denial, but as an allegation that the note is usurious, the allegation will not be the

statement of facts constituting a defense, and will not of itself be sufficient. (*Gould v. Horner*, 12 Barb. 601.) This clause, declaring that the note is usurious, neither adds to nor modifies the preceding denial, nor does the denial add to the clause. The law intends that the pleader should state only material facts, and it adds nothing to this defense to set forth the conclusion that the note is usurious. The negation contained in the first defense is simply a denial that the consideration for the note was any other or greater sum than \$1,960. The only allegation of the complaint in regard to the consideration being that the note was "for value received," this denial does not meet or traverse any allegation of the complaint, and it does not appear from the complaint and this branch of the answer, taken together, that the note was for money loaned.

An answer of usury must aver clearly every particular necessary to establish the usury charged, and must distinctly negative every supposable fact which, if true, would render the transaction innocent or lawful. (*Banks v. Van Antwerp*, 15 How. Pr. 29; *Watson v. Bailey*, 2 Duer. 509.)

As to the second defense demurred to, that is, what is called a further and separate defense, I think it does not set up any new matter, or deny anything alleged in the complaint.

The complaint shows that it was the agreement of the parties that the defendant should pay the full face of the note, and interest at the rate of one per cent. per month, and such additional sum as the court may adjudge reasonable as attorney's fees, in case of suit instituted; and it shows that such sum, or reasonable value, is claimed by the plaintiff to be \$100. The defendant repeats these facts, and adds the allegation: "And said note is usurious."

This last allegation, we have just seen, is insufficient; it is not the statement of a fact, and the pleader has not added anything to his defense by reiterating the facts already set forth in the complaint, before stating the conclusion, that the note is usurious.

If such an answer raises any question, it is a question of law, such as might be raised by demurrer; it presents no

issue of fact, and it is unnecessary to say that a party cannot, at the same time, both answer and demur to the same matter. If there were no other objection to this defense, it would be fatally defective because of its failure, either to meet and deny facts set up in the complaint, or to set up new matter constituting a defense.

In addition to the objections made to the form of the pleading, there was on the argument much discussion of the question, whether or not, inserting such a provision in relation to attorney's fees as is contained in this note will have the effect to render a contract usurious where the note, as in this case, expressly provides for as great interest as the law will permit. I am not called upon by any question raised in this case to express an opinion on the effect of a stipulation in a promissory note, to pay a certain sum of money by way of indemnity, or of attorney's fees, in case of an action or suit. The practice of this court has been to give force to such stipulation, but I am not aware that an objection to that course has ever presented a contested case. In this case the parties have not stipulated for a definite sum, but for such sum as the court may adjudge reasonable. This form of the stipulation presents two other considerations, either of which when properly presented may become decisive of the sufficiency of the matter attempted to be set up by the answer.

1st. Would a court adjudge any sum reasonable, if its enforcement would be unlawful, or if such adjudication would render the whole contract usurious?

2d. If the court is called upon to adjudge what sum it is reasonable for the prevailing party to recover as attorney's fees, could the court, as a matter of law, adjudge any other sum than is provided by the code?

Section 538 of the code provides that "there may be allowed to the prevailing party, in the judgment or decree, certain sums by way of indemnity for his attorney fees in maintaining the actions or defenses thereto, which allowances are termed costs." And section 542 specifies definitely the amounts that shall be thus allowed.

It seems to me far more consistent with rules of con-

struction, to hold a stipulation in a note, for the recovery of such sum as the court may adjudge reasonable as attorney's fees, to be merely giving expression in words to that which would have been implied by the law without any express promise, than to hold that, by inserting such words in the contract, the parties have rendered the whole contract usurious and unlawful.

It can hardly be supposed that the parties intended that the amount should be ascertained by the trial of an issue of fact, since in ordinary cases of non-payment when there is no defense on the merits to the principal cause of suit, and no occasion for an answer except in relation to the amount of the fee, stipulating for such a mode of ascertaining the amount would necessitate the taking of testimony, and would greatly add to the expense and delay, without any corresponding advantage.

Whatever construction may be hereafter given to the stipulation in regard to attorney's fees, the defenses specified in the demurrer are insufficient and the demurrer must be sustained.

No application was made for leave to amend, and judgment was rendered for the plaintiff for the \$2,000 and interest, and for \$50 on account of attorney's fee, in accordance with the admission contained in the answer.

The defendant moved for a *new trial*, assigning as error the allowing of an attorney's fee greater than that prescribed by section 542 of the code.

The motion was overruled.

CIRCUIT COURT FOR MULTNOMAH COUNTY, FEBRUARY TERM, 1872.

**EMERANCE GROSLOUIS v. S. NORTHCUT.**

**DONATION LAW.—JUDICIAL SALE.**—A claimant under the donation law, may, before patent issues, obtain such an interest in the land as will be subject to judicial sale.

**STIPULATION.**—In construing a stipulation filed in the cause, the intention of the parties is to be determined from the language used in the written stipulation. A stipulation that the party was divorced in a designated suit is, in effect, an admission that the court had jurisdiction to grant the divorce.

**DIVORCE.—POWER OF THE COURT.**—Whether, under the act of 1854 concerning divorce, the court had power to transfer, in fee, the lands of a party to the children. *Query?*

**IDEM.—PLEADINGS.**—In a divorce suit where the pleadings make no reference to the property, the court cannot render a valid decree transferring from the wife to the children of the parties an estate in fee simple in a particular parcel of land.

**PRESUMPTION OF JURISDICTION.**—Every reasonable intendment will be invoked in support of the judgment or decree of a court of general jurisdiction.

**INCIDENTAL POWER.—PLEADING.**—Special disposition of the real estate of the parties, although incidental to the subject of the divorce, is within the provisions of the code requiring the complaint to state facts.

**PLEADING.—DECREE, WHEN VOID.**—After a decree has become final, any colorable statement of facts is sufficient to prevent the decree from being held void, but there must be some statements sufficiently general to comprehend the requisite facts by fair intendment. If there is nothing in the facts stated in the pleadings that would, if denied, render proofs necessary, no intendment in favor of the decision will arise to aid or supply an omission of essential facts.

THIS is an action of ejectment for the north half of a parcel of land known as the Petit land claim. The plaintiff was formerly the wife of Hubert Petit, but he obtained a decree of divorce against her in a suit commenced in 1857. Prior to that time Hubert Petit and his said wife were settled upon said land claim, and in 1871 a patent was issued in pursuance of their settlement and claim, granting to the said Hubert Petit the south half of said land claim, "and unto his wife, the said Emerance Petit, and to her heirs, the north half." The plaintiff claims title under this patent.

The defendant, to establish title in himself, claims that

by the decree in the suit for divorce, the title to the north half of the tract was vested in two minor children of the said Hubert and of this plaintiff, and that afterwards a guardian was appointed by the probate court, and the premises sold at a guardian's sale to the defendant.

By a stipulation on file the following facts are admitted:

Prior to September, 1857, the plaintiff was the wife of Hubert Petit, and she is now the wife of Peter GrosLouis. In September, 1857, said Hubert and this plaintiff were divorced by a decree, of which exhibit "S" is a copy. They then had two children, named Adelaide and Josephine Petit, and were owners of the said land claim. It was also expressed in the stipulation that the "plaintiff does not waive any objections she may have or desire to make of the validity, legality or sufficiency of any of the records produced by the defendant."

A jury trial was waived. The plaintiff introduced the patent and rested her case. The defendant offered exhibit "S," which was objected to by the plaintiff. It consists of a copy of the complaint and decretal entry in the case of *Petit v. Petit*. In the complaint Hubert Petit alleges facts, sufficient, if true, to constitute a cause of divorce against this plaintiff, but the complaint contains no allegations concerning land, nor any reference to property. It is entitled:

"In the district court of the first judicial district of Oregon Territory, Marion County, September term 1857." The decretal entry is as follows:

"*Hubert Petit v. Emerance Petit*, divorce—September 29, 1859.

"Now on this day it appearing that a decree had heretofore been rendered in this cause at the September term thereof, 1857, and that said decree had not been entered, and it further appearing that defendant had been served by publication as required by law—it is ordered that said decree be entered *nunc pro tunc*. It is therefore ordered that the bonds of matrimony heretofore existing between the parties be dissolved, and that said Hubert have the exclusive custody of the two children, the fruit of said marriage, namely: Adelaide and Josephine, and that the north half of

the land claim of said parties, being the part of said claim set apart to said defendant by the surveyor-general, be decreed to and the right and title thereof be vested in the said children, and plaintiff pay costs."

The defendant also offered copies of the records and files, showing all the proceedings in the county court under which the land was sold, from the petition for the appointment of a guardian for the minor children above named filed May 8, 1869, to the deed of the guardian, dated Aug. 26, 1869, inclusive. The plaintiff objected to this evidence upon various grounds, and the decision of the points as to the admissibility of the testimony was reserved.

*Sullivan & Thompson and R. Williams, for the plaintiff.*

The legal title did not pass from the government until the actual issuing of the patent. (Donation law sec. 8, 13 Pet. 499.)

Nothing less than a deed of the donee, containing covenants, is a good defense in ejectment against her patent. (3 How. 627; 3 John. Ch. 148.)

The complaint in the divorce suit is insufficient. The decree was made without authority and is void. (Comp. L. 1855, p. 538, secs. 7 and 8.)

The court had no power to vest title in the minor children. (*Fitch v. Durand*, U. S. circuit court dist. Oregon; 4 Iowa, 26; 4 Hill, 140.)

The proceedings in the probate court are insufficient. (Code p. 671, sec. 2; 2 Mass. 414; 4 Ib. 97; code 880, secs. 6, 10 and 11.)

*Rufus Mallory, for the defendant.*

UPRON, J., delivered the following opinion:

The plaintiff having introduced a patent from the United States, the burden of proof is on the defendant; and the questions to be determined relate principally to the admissibility and to the effect of the proofs offered by defendant.

The first point made in the plaintiff's brief, if sustained, would be a conclusive objection to all the defendant's evidence, and to the facts set up in the answer.

This point is, that the legal title remained in the United



States until the patent issued in 1871, and that up to that time neither the plaintiff nor any other person had any interest that could be the subject of a judicial sale.

I am unable to deduce, from the authorities cited, the conclusion that under the donation law the legal title does not pass to the donee by operation of the statute. It has frequently been held that a legislative grant is as effective to pass a title to land, in all respects, as a grant evidenced by a patent. (*Kernan v. Griffith*, 27 Cal. 87.)

The plaintiff's counsel cite *Wilcox v. Jackson* (18 Pet. 499), to sustain the position that, because the donation law provides for issuing a patent, the title does not pass until the patent issues. The circumstances that by the preemption act of 1836, under consideration in that case, patents are to issue in preemption cases, is there referred to as affording an inference or argument, that under the preemption laws "a perfect and consummate title" will not pass except by a patent.

The preemption acts contain no words of present grant, and it is not said in that case, and I think it is not said by that court in any case, that where the statute grants lands by words of present grant, and also provides for issuing a patent at a future time, the title will not pass until the patent issues. On the contrary, statutes that contain words of present grant are expressly excepted from the general rule there stated.

In that case the contest was between the assignee of a preemptioneer, holding a preemption certificate, and a military officer in possession, "claiming no right of ownership, but as an officer of the United States only, in command of said post, acting under the orders of the secretary of war, his superior officer, and the United States." One of the points decided in the case was that the land was a military reservation, and consequently not subject to preemption; and a further deduction was that it was not a subject within the jurisdiction of the register of the land-office, and that for that reason the register's decision and his certificate were void. It was in commenting upon such a case that Judge Barbour used the following language: "With the

exception of a few cases, nothing but a patent passes a perfect and consummate title. One class of cases to be excepted is, where an act of Congress grants land, as is sometimes done, in words of present grant. But we need not go into these exceptions. The general rule is what we have stated, and it applies as well to preemptions as to other purchases of public lands. Thus it will appear by the very act of 1836, which we have been examining, that patents are to issue in preemption cases. This, then, being the case, and this suit having been in effect against the United States, to hold that the party could recover as against them, would be to hold that a party having an inchoate and imperfect title could recover against the one in whom resided the perfect title." I do not deem this language a decided indication that Judge Barbour thought a provision for the subsequent issuing of a patent would have controlled words of present grant. On the contrary, I think that opinion recognizes what was then a settled doctrine of that court, that an act of Congress, couched in words of present grant, was sufficient to pass the legal title.

I have been unable to see what bearing the case of *Livingston v. Livingston*, (3 John. Ch. 148,) has upon this question.

The remaining case to which the plaintiff refers; is that of *Price v. Sessions* (3 How. 124). Property, real and personal, was devised to a daughter, to remain in the possession of executors until the daughter should arrive at the age of eighteen years; if she should die without heirs before arriving at that age, the property to go to certain other persons. When the daughter was about sixteen years of age, the executor who had the property in possession, married the daughter, and before she arrived at the age of eighteen, a law was passed securing to married women their property, free from the husband's debts. A portion of this property (which seems to have been slaves) was seized on execution for the husband's debt. It was held that the person who had married the devisee was in possession of the property not as husband but as executor. And that for that reason, that is, because the property had never been delivered to the devisee, the title had never vested in her. It is not a

case where she was held not to have the legal title, from the circumstance that a right or estate of her's in the property was liable to be defeated by contingent events. On the contrary, it was decided that for want of delivery the property had never become hers.

From a careful examination of authorities touching this subject, I am clearly of opinion that the first paragraph of section 329 of the code, page 230, is not an innovation, nor in contravention of any law of the United States, and that it is declaratory of the law as it had been previously established by decisions of the federal courts.\*

The decision of the merits of this case must turn upon other questions, but a reference to the authorities cited on this point seemed to be due, both on account of the able and earnest manner in which this subject has been pressed upon the attention of the court, and that it may be understood that this point in the plaintiff's case is not an element in the reasoning that leads to the conclusions at which I have arrived in regard to the merits of the case.

The following are some of the other points made by the plaintiff.

1. That the record shown by exhibit marked "S," does not show jurisdiction in the court to grant the divorce.

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\*This subject is referred to in *Doll v. Meador*, 16 Cal. 295; *Van Valkenburg v. McCloud*, 21 Cal. 330; *Megerle v. Ash*, 28 Cal. —; and *Owen v. Jackson*, 9 Cal. 322. And it seems to be considered well settled, that the circumstance that the grantee takes a defeasible estate does not prevent the title from passing to him. Nor does the fact that there are conditions subsequent to be performed.

The cases of *Summers v. Dickinson*, 9 Cal. 554; and *Kernan v. Griffith*, 27 Cal. 87, treat of the act of Congress of Sept. 28, 1850, which grants swamp lands, and explicitly declares that "the whole of those swamp and overflowed lands, etc., are hereby granted to said state." These cases decide that the title passed immediately upon the passage of the act. Provision was made in the act for the survey of those lands, and for the issuance of a patent to the state at a future time.

In the United States supreme court, many of the cases, in which patents have been set aside in favor of a prior purchaser or donee, have proceeded on this principle, and a patent has in some cases been held absolutely void, on the ground that the title had previously passed from the United States by act of Congress.

See on this subject, *Fremont v. United States*, 17 How. 566; *Rutherford v. Green's Heirs*, 2 Wheat. 198, 505; *Strother v. Lucas*, 12 Pet. 454; *Green v. Lister*, 8 Cranch, 244; *Patterson v. Winn*, 11 Wheat. 380; *Polk v. Wendal*, 9 Cranch 87, and 5 Wheat. 301; and *Blunt v. Smith*, 7 Wheat. 240, 273.

See also *Stoddard v. Chambers*, 2 Wend. 313; *Jackson v. McCall*, 3 Conn. 79.

2. That, in that suit, the complaint does not state facts sufficient to authorize a divorce.

3. It does not state facts that authorized a decree as to the property.

4. It was not in the power of the court in any case to transfer the lands of the wife to the children in fee.

5. The guardian's sale was not regularly made.

I think the first and second points, so far as they relate to granting the divorce, cannot be raised by the plaintiff in the face of the stipulation that the parties were divorced by the decree. The plaintiff claims that her rights in this respect are reserved by the saving clause in the stipulation, and her counsel claims that such was the agreement of the parties, expressed at the time the stipulation was signed. The court cannot look beyond the written stipulation to ascertain the intention of the parties, and I do not think the saving clause sufficient to enable the plaintiff to say at this late day, that the record does not disclose a decree of divorce. The admission debars the plaintiff from denying that there was enough before the court in the first instance, in 1857, to authorize the rendition of the decree, or afterwards in 1859 to justify entering it *nunc pro tunc*. It is true as a general proposition that consent cannot confer jurisdiction; but this is not a case of conferring jurisdiction, it is, in effect, an admission that the court had jurisdiction, and there is not, in my opinion, enough in the record to show affirmatively that the court had not jurisdiction to enter a decree granting a divorce.

I shall therefore take it as conceded that the court had jurisdiction of the persons and of the subject matter of the bonds of matrimony, for the purpose of entering a decree of divorce, and shall proceed to inquire as to the validity of that part of the decree which purports to vest the title of the wife's land in the children. The statute then in force (Comp. L. 1855, p. 540) provides, that "the court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the respective merits of the parties, and to the condition in which they will be left by such divorce, and to the party through

whom the property was acquired, and to the burdens imposed on it, for the benefit of the children. And all the property \* \* \* *not otherwise* disposed of or regulated by order of the court shall, by such divorce be divested out of the guilty party, and vested in the party at whose instance the divorce was granted."

There is a conflict of authorities upon the question whether a court had power under that statute, in any case, to transfer the property of the parties in fee to the children.

In the case of *Fitch v. Durand*, tried before Judge Deady in the United States circuit court for the district of Oregon, it was held that a decree of similar purport to the one under consideration, did not operate to pass the fee, but only enabled the children to hold the property during their minority. The decision is placed upon the ground that the circuit courts of the Territory had not jurisdiction and power to make such disposition of the real estate of a party. It was there conceded that, "if the act has received a settled construction in the courts of Oregon, it is the duty of this (U. S. circuit) court to follow such construction."

The decree then under consideration was rendered in the case of *Cline v. Cline*, in the circuit court for Multnomah county, in 1862. On the argument in *Fitch v. Durand*, counsel cited five other cases in which, between September 1855 and November 1860, the circuit courts in the same district had rendered decrees purporting to transfer real estate in fee to the children of the parties. No such case was cited from any other district, and the circumstance that the act had been so construed in only one district, was referred to as one reason for considering its construction still an open question.

The case now under consideration, was tried in another district, but the attention of the court was not called to it. It was said in the case of *Fitch v. Durand*, the act "contained no provisions for an appeal from the inferior courts in which the original jurisdiction was vested, to the supreme court, and therefore its provisions never came before the latter court, and were never considered or expounded by it." \* \* \* "In the other judicial districts,

no such construction appears ever to have been given to the act, and only in these comparatively few instances in a period of nine years, in that one. If this state of things is any evidence of a settled construction of the statute, by the courts of Oregon, it is against the one claimed by the defendant. I conclude, then, that the question is unsettled, and that this court must construe the act for itself." And it was there held that, "the decision of the circuit court given in the suit for divorce, so far as it provides that the premises in controversy should be held by, or for the use of the minor children \* \* \* beyond the time when they should become of age respectively, is simply void."

As no such provision of statute has been in force since 1863, and as it is quite possible this is the last time its construction will be questioned in the courts of this state, I am disposed to rest the decision of the case solely upon what appears to me a much less debatable ground.

It will be observed that the complaint in the suit for divorce makes no allusion to the property or to the pecuniary affairs of the parties, or of either of them.

The recitals in the decretal order, purporting to justify the entry of the decree *nunc pro tunc*, do not show that anything was determined concerning the property in the first instance, by the court that heard the cause. And there is enough appearing on the face of the record to show that the judge who made the order *nunc pro tunc*, was not the judge before whom the cause was tried. The clerk has certified that exhibit "S" is a copy of the whole of the record; we consequently have before us the judgment roll in the suit for divorce.

It is necessary, in order to sustain the defendant's positions, to assume that the circuit court could render a valid and binding decree in regard to a subject matter that is not mentioned in the pleadings; and that a judge could at a subsequent term, by an order *nunc pro tunc*, enter a decree making a transfer, from the wife to the children, of a particular parcel of land that was not previously described or mentioned in the pleadings or in the record.

Every reasonable intendment will be invoked in support

of the judgment or decree of a court of general jurisdiction. And courts often exercise powers that are incidental to the principal subject of the litigation. But such incidental power is not applied to a subject matter that is wholly extraneous and not mentioned in the pleadings. It always operates upon some matter that is regularly brought before the Court.

For example, in suits to remove clouds from title, or in bills of peace, where the principal point in the litigation is to establish and perpetuate a right, the court will sometimes afford incidental relief by reforming or canceling a written instrument, or by compelling its production and delivery, even when such relief is not the principal object of the suit; but the facts in relation to such instrument must be laid before the court by the pleadings. If the instrument was merely produced in evidence, and not mentioned in the pleadings, its reformation or cancelation would not be decreed. So in forcible entry and detainer, the court will afford incidental relief by granting restitution of the premises, but the premises are designated in the pleadings. So in the foreclosure of a lien, a writ of assistance is sometimes issued in favor of the purchaser, but this would not be done if the record contained no designation of the premises.

I am unable to call to mind any class of cases where courts have, by virtue of such incidental power, exercised judicial discretion to make a special and final disposition of a parcel of real estate that is not referred to in the pleadings or prior proceedings.

Under the statute above cited the decree in a suit for divorce may possibly in certain cases, by operation of law, affect the title to property that is "not disposed of or regulated by order of the court," even where the property is not mentioned in the pleadings. But that circumstance does not add to the incidental power of the court, and it is not material to the inquiry here whether property not mentioned in the pleadings would be thus affected, for it is not claimed that this property has been transferred by mere operation of law. The question is whether it has been disposed of by the special adjudication set forth in the decree.

The object in requiring facts to be stated in the pleadings is threefold: that the facts may be brought before the court, whose office it is to apply the law to the facts; to apprise the opposite party what is intended to be proved; and to lay a foundation for recording that which shall be adjudged concerning the facts alleged. Neither party has the right to introduce any proofs except such as support or contradict something that is alleged in the pleadings. How, then, can the court exercise a discretion, having regard to the property of the parties, "the condition in which they will be left by such divorce, and to the party through whom the property was acquired," if the pleadings contain no reference to the subject. There are but two possible modes for such a proceeding when there are no allegations in regard to property, the judge must exercise the discretion mentioned in the statute without any knowledge of the facts, or he must act upon knowledge obtained outside of any legitimate proceeding connected with the trial of the cause.

I cannot doubt that, under that statute, it was contemplated that the court would act upon proofs, or upon facts taken as confessed, in attempting to make special disposition of real estate; and that special disposition of the property of the parties, although incidental to the granting or refusing the divorce, is within the provisions of the code requiring the complaint to state facts.

It is true that after the decree has become final, any colorable statement of the essential facts would be sufficient to prevent the decree from being held void; but the instances in which the effect of omissions, or defective statements of facts, are avoided by presumptions in favor of the jurisdiction, are where the pleadings have contained statements sufficiently general to comprehend the requisite facts by fair intentment.

If the issue joined be such as necessarily required, on the trial, proofs of facts imperfectly stated or omitted, without which proof the decision of the clause would not have been made, the imperfection or the omission will not be fatal. But this is the case only when a necessary intentment must arise, not merely from the decision, but from



the united effect of the decision and the issue upon which the decision was given, that the imperfectly stated or the omitted facts must have been proven on the trial. If there is nothing in the facts stated in the pleadings that would render such proofs necessary, no such intendment in favor of the decision will arise to aid or supply the defect. (*Garner v. Marshall*, 9 Cal. 268; *Hentsch v. Porter*, 10 Cal. 555.)

No such intendment arises to excuse such an omission in case of a judgment by default, for the default admits only such facts as are actually alleged, and there is no necessity for the plaintiff proving anything further. (1 Chitty, Pl. 673.)

By the common law, as well as by the code, the defect that the complaint fails to state facts constituting a cause of action, was not waived by failing to demur, or to answer; and this is upon the principle that courts will not, and can not, adjudicate upon that which is not brought before them.

In this case it is virtually admitted by the stipulation that the court had jurisdiction of the subject matter of the alleged divorce, and of the persons of the plaintiff and defendant. The question is whether there is any reasonable intendment or presumption that can be indulged, that the subject matter of the defendant's property was legally placed before the court for adjudication.

It is a case where the defendant might have appeared and filed an answer, describing her property. But if she had answered, the recital that she had been served by process by publication would have been unnecessary, and that recital, omitting all mention of an answer, certainly does not indicate that an answer was filed. This matter, however, is placed beyond conjecture; the clerk certifies that exhibit "S" is a copy of the whole record, and it is shown by inspection that the complaint is the only pleading. It is not a case calling for presumptions as to what pleadings were filed, for all the facts in relation to these matters are fully disclosed. The facts present this question: Could a judge who was trying a divorce suit, without having before him, judicially, any allegations or any knowledge as to whether either party owned any property, make a valid

decree specially transferring a specific parcel of land in a direction it would not pass by operation of law?

Aside from the general principle upon which the law universally requires pleadings upon which to predicate a judgment or decree, such could not have been the legislative intent in enacting this statute, because the statute requires the court to investigate and be informed in regard to the pecuniary condition of the parties, and as to the party through whom the property was acquired, before attempting to make an equitable disposition of the property; and it makes special provision concerning such property as shall not be disposed of or regulated by order of the court.

In the divorce suit there was no foundation laid for introducing evidence on these points, and there are no admissions, direct or by implication, concerning them.

I think there is not enough in the judgment roll in the divorce suit to operate as a foundation of a title to real estate, and that judgment should be rendered in favor of the plaintiff.\*

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CIRCUIT COURT FOR MULTNOMAH COUNTY, FEBRUARY TERM, 1872.

### CAROLINE J. KING, v. C. W. HIGGINS.

**SUIT TO REMOVE CLOUD.**—In a suit brought to remove a cloud from title to real estate, it is necessary to state facts from which the court can properly draw the conclusion that the claim made by the defendant is a cloud upon the plaintiff's title.

**IDEM.**—**WHEN SUIT WILL BE ENTERTAINED.**—It is not every case where an instrument in the hands of another person is calculated to induce the belief that the plaintiff's title is invalid, that such instrument is the foundation of a suit. Nor is it, in all cases, necessary for the plaintiff to wait until he has been disturbed by legal proceedings, nor to first establish his title by a judgment at law.

**IDEM.**—One may maintain a suit to remove a cloud, notwithstanding it appears from his complaint that he has a legal title. The exception is, that if it appears on the face of the papers under which the defendant claims, that the legal title is in the plaintiff, the suit cannot be maintained.

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\*This action was commenced in Marion County, and the venue changed, to Multnomah County, Judge Bonham having formerly been counsel in the case.

**JUDGMENTS BY CONFESSION.**—Under a statute relating to judgments by confession, which requires the plaintiff to file a sworn statement, and enacts that the clerk shall indorse the judgment upon the statement and enter it in the judgment book, the two entries ought to be deemed to have the force of duplicate copies, each having the effect of an original.

**IDEM.—CLERICAL ERROR.**—Where the clerk indorsed the judgment on the statement, but by mistake omitted to enter it in the judgment book, it was held that the omission would not invalidate the judgment, except in favor of one who has been misled by the omission.

**COMPLAINT.**—In a suit to remove a cloud, where the complaint admits that the clerk failed to enter the judgment in the judgment book, the complaint should state what acts were done by the parties and by the clerk in relation to confessing and entering the judgment.

This is a suit to remove an alleged cloud from the plaintiff's title. The plaintiff avers that she is owner and in possession of the parcel of land known as lot 6, in block 221, in the city of Portland. She sets out a series of conveyances, from which it appears that both the plaintiff and defendant claim title from the United States through Wm. M. King, now deceased. The defendant claims title under a sale made by the administrator of the estate of Wm. M. King, who departed this life on or about the eighth day of November, 1869.

The plaintiff sets out her mode of acquiring title from said Wm. M. King, as follows:

"On the sixth day of August, 1855, said Wm. M. King confessed a judgment in favor of Thomas J. Carter, in the district court of the territory of Oregon for the county of Multnomah, for \$1,383. And on the first day of April, 1856, a writ of execution upon said confession of judgment was duly sued out of said territorial district court, and placed in the hands of William McMillen, the then sheriff, for service." The complaint goes on to show that this lot, with other property, was sold by said sheriff on the fourteenth day of May, 1856, to satisfy the execution. That Carter bought the property at \$1,000.52. That the sheriff executed and delivered to said Carter a deed in pursuance of the sale. That the deed was approved by the judge of said court, and duly recorded. And that afterward, on the fourth of February, 1857, said Carter by deed conveyed the premises to the plaintiff; since which time plaintiff has

continued in possession. The plaintiff also alleges, "That through inadvertence and mistake, the clerk of said territorial district court omitted to enter said confession of judgment in the judgment book," alleges "that said confession of judgment was duly entered in the lien docket of said court," stating the mode of entry.

The plaintiff's complaint also alleges "that the judgment roll of said confession of judgment remained to be seen in the proper officer's custody for a long time after the sale of May 11, 1856, and until after the approval of the sheriff's deed by the court, January 2, 1857, but has since been lost or abstracted from its proper custodian, and plaintiff is unable to tell the exact date of its loss or abstraction."

The complaint, after setting out the sale of said lot by the administrators of King's estate to the defendant, avers that the defendant bought with notice, and that the administrator's deed to the defendant is a cloud upon plaintiff's title.

The defendant demurs to the complaint, on the ground that it does not state facts sufficient to constitute a cause of suit.

*Chapman & Goodsell*, for the plaintiff.

*Shattuck & Killin*, for the defendant.

URROX, J., delivered the following opinion:

This is a suit by a plaintiff in possession, and if sustained, it must be as a suit to remove a cloud from the plaintiff's title. Much has been said on the subject of the power of the court to amend the judgment alleged to have been confessed by the late William M. King in favor of T. J. Carter. But it is not necessary to advert to that subject further than to say, that this cannot be considered a bill for that purpose. The complaint does not sufficiently describe that judgment to enable the court to make an amendment; it does not bring all the interested parties before the court; and it does not purport to set out the cause of action upon which the confession was made.

The allegations are insufficient to warrant an amend-

ment of that judgment in this proceeding, aside from any question as to the general power of the court.

Section 500 of the code provides that "any person in possession, by himself, or his tenant, of real property, may maintain a suit in equity against another who claims an estate or interest therein adverse to him, for the purpose of determining such claim, estate or interest."

It is necessary to consider the requisites of a complaint in this class of cases, and particularly what must be alleged in respect to the defendant's claim. It is not every idle assertion, made by one who has neither title nor color of title that will suffice to invoke the power of a court of equity to the relief of the plaintiff. It has been claimed that the enactment of this section has so revolutionized the practice in this class of cases, that a statement of the defendant's claim in the language of the statute is sufficient to constitute a case in equity; and the case of *Curtis v. Sutter* (15 Cal. 259) is referred to as supporting that position. The point decided in that case is, that an injunction was properly dissolved upon the coming in of an answer, which denied the title of the plaintiff and set up paramount title in the defendant. The opinion is expressed that, under the statute of that state, "it is unnecessary for the plaintiff to delay seeking the equitable interposition of the court until he has been disturbed in his possession by the institution of a suit against him, and until judgment in such suit has passed in his favor.

Chief Justice Field in that case intimates that a party was formerly thus restricted, and that the restriction was removed by the enactment of that section. If it is true that such restriction was universal before the enactment of that section, there certainly are grounds for the statement that the section "enlarges the class of cases in which equitable relief could formerly be sought in quieting title." It may be questioned, however, whether that restriction was universal before that enactment. (Story Eq. Jr. ss. 694, 700; *Petit v. Shepherd*, 5 Paige, 492.) Without pursuing the subject of what the law was before the enactment, it is safe to say, it cannot be fairly inferred from the

opinion expressed in the case of *Curtis v. Sutter*, that it is not now necessary to state facts from which the court can properly draw the conclusion that the claim is a cloud on the plaintiff's title, or, in other words, from which the court can infer that it works some injury that entitles the plaintiff to equitable relief. The complaint then under consideration stated the nature of the defendant's claim, and charged that the defendants were surveying and mapping the lands and offering them for sale. Section 500, above quoted, is part of the same act which requires in the complaint a statement of the facts that constitute the cause of suit; and it is not to be supposed that the object of this section was to establish a new and exceptional rule of pleading applicable only to this class of cases. It is not in every case where an instrument in the hands of another person is calculated to induce the belief that the plaintiff's title is invalid, that it is the foundation of a suit. (*Scott v. Onderdonk*, 4 Kern. 8.)

The defendant is right, I think, in his position that if the plaintiff does not show a valid judgment against Wm. M. King, she does not by her complaint show any right in herself, or any sufficient cause of suit. But the defendant states his case too strongly when he says: "If the supposed judgment was complete, the plaintiff has title, and no grounds for equitable relief can exist." The rule on that subject goes no further than this: if the legal title is in the plaintiff, and that fact appears on the face of the deed, instrument, or chain of title under which the defendant claims, or if it appear on the face of such deed, instrument, or chain of title that the defendant's claim is without foundation, the suit will be dismissed. (*Heywood v. City of Buffalo*, 4 Kern. 534; *Ward v. Dewy*, 16 N. Y. 519; *Vandorn v. Mayo*, 9 Paige, 388; *Story Eq. Jr. sec. 700*.)

It is no objection to the claim here set up that the plaintiff has a legal title, if it also appears that the claim made by the defendant and the chain of title upon which it is based present proof *prima facie* of the legal title in the defendant, and presents nothing on the face of the title papers to the contrary. Or if it is shown that there is an obstacle

to the plaintiff asserting her title in a court of law, which ought to be removed.

The proceeding, in the matter of the confession of judgment, was under the practice act passed January 7, 1854. (Compiled L. 1855, p. 117.) By that act, the clerk was required to keep a book for the entry of judgments, to be called "The Judgment Book." And for the confession of judgment without action the requirements were as follows:

"A statement in writing shall be made and signed by the defendant and verified by his oath to the following effect."

"It shall state concisely the facts out of which it [the judgment] arose, and shall show that the sum confessed is justly due, or to become due." "The statement shall be filed with the clerk of the district court in which the judgment is to be entered, who shall indorse upon it and enter in the judgment book a judgment for the amount confessed, with five dollars cost. The statement and affidavit with the judgment indorsed, shall thereupon become the judgment roll."

In judgments other than by confession, under that act, the judgment roll contained a copy of the judgment, the original entry being in the judgment book.

The defendant objects that the complaint should state the acts done, in the attempted confession of judgment; and it will be necessary to notice that objection hereafter; but the principal argument, on the hearing of the demurrer, was addressed to the question whether a valid sale could be made without an entry in the judgment book.

The statute requires the clerk to indorse the judgment on the statement filed, and enter it in the judgment book. The indorsement and the entry must be considered simultaneous acts, or at least, it cannot be contended that the entry of the judgment in the book need precede the writing of it on the back of the statement. The two entries may be considered duplicates; at least, the indorsement on the statement is not to be a mere copy, and it must be considered an original entry, under the language of the act. Doubtless the two entries ought to be deemed to have the force of duplicate copies, each having the full effect of an

original entry. If this is a proper construction of that statute, when the clerk had made one of these entries, the terms of the judgment were expressed, and I cannot think the judgment should be held void because of an omission, by mistake, to make the additional entry in the book, except in favor of one who has been misled by the omission. Equity considers that as done which ought to have been done. It is the act of entry that distinguishes the present case from *Blydenburgh v. Northrop* (13 How. Pr. 289.) There the clerk had made no entry of judgment. In *Van Beck v. Sherman* (13 Id. 472), the judgment was held void for defects in the statement. Nothing of that kind appears here. The case of *Shottenkirk v. Wheeler* (3 Johns. Ch. 275) is to the effect that equity will not set aside or disregard a judgment for errors, or for departures from the prescribed mode, when the objection would not be sufficient in a court of law. I do not think it sustains the converse of this proposition, that equity would never sustain a proceeding, defective through mistake, unless the same could be supported at law.

The case of *Neale v. Berryhill* (4 How. Pr. 16), was under a statute exactly similar in this particular to ours above quoted; and the mistake is the same that is alleged in this case, except that the clerk omitted in that case to endorse the judgment on the statement, but did enter it in the judgment book. After other parties had taken judgment against the same defendant, the court permitted the endorsement to be made *nunc pro tunc*. This, after third parties, had obtained judgments, could not be done on principles of justice, no matter how broad the statute of amendments, unless upon the idea that the proceeding had become a judgment before the rights of the third party intervened. I do not, however, deem that case, nor any of the cases cited, in which leave to amend was the point before the court, as of great weight on this subject, for the reason that this complaint ought not to be considered as an application to amend. It is said in *Gray v. Palmer* (28 Cal. 416), and in *Genella v. Relyea* (32 Cal. 159), that the entry of judgment in the judgment book is a mere ministerial



duty of the clerk. The point in those cases relates to the time when a judgment shall be deemed rendered. In each case a judgment had been announced, and "an order for judgment" entered in the minutes. And in each case it was held that the day of rendering judgment was that on which the judgment was announced and the order entered, and not a subsequent day on which the entry was made in the judgment book. Much stress was also placed on the case of *Lee v. Figg* (37 Cal. 328). The syllabus of that case is to the effect that "a judgment for money, by confession, upon a statement which does not sufficiently state the facts out of which the indebtedness arose," cannot be collaterally attacked. Chief Justice Sawyer, in the opinion filed, observes the "court had jurisdiction of the subject matter and the parties," and that "the judgment was entered in *open court* and regularly signed by the judge, as was the practice under the code of 1850." The case being a proceeding before a tribunal of general jurisdiction, and in open court, is not in point, under a statute which provides for entering a judgment by the clerk, and where the court has no jurisdiction but that derived from the statute and the acts of the parties. When the parties come before the clerk in the manner prescribed by statute, and he commences the performance of his duties in the manner prescribed, he obtains jurisdiction, and if he proceed regularly, so far that rights vest, the judgment cannot be disregarded for defects that do not raise a question of jurisdiction. I am of opinion that if it is shown that all the necessary steps, up to and including the indorsement on the statement, were regularly taken in good faith, that the failure to make the entry in the judgment book, will not of itself render the proceeding void.

Concluding that the statement was regularly made and filed, and the judgment indorsed upon it, the question arises whether the failure of the clerk to make the entry in the judgment book, the loss of the judgment roll and the subsequent conveyance by the administrator of the judgment debtor's estate, are sufficient grounds for equitable relief. I am not prepared to assume jurisdiction on a supposition

that the alleged judgment roll, if in existence, could not be read in an action at law, notwithstanding the failure to make the entry in the judgment book; nor on the ground that in case of its loss its contents cannot be established by parol in a court of law, as well as in equity. But if the complaint had set forth fully what acts were done, at the time of the alleged confession of judgment, showing that nothing essential was omitted except making the entry in the judgment book, I think these two causes combined with that of the sale under the order of the Probate Court, constituted ground for equitable relief, and are sufficient grounds for permitting an amendment of the complaint, although the demurrer must be sustained on another ground. The complaint admits that at the time of the rendition of the judgment some of the acts contemplated by the statute in relation to the confession of judgment were omitted; and the complaint is too vague in its statements as to what steps were taken in the proceeding. The demurrer will be sustained that the plaintiff may so amend the complaint as to state what acts were done in the attempt to obtain judgment.

**REPORTS OF CASES**

**ARGUED AND DETERMINED IN THE**

**Supreme Court of the State of Oregon**

**SEPTEMBER TERM, 1900.**

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## REPORTS OF CASES

ARGUED AND DETERMINED IN THE

### Supreme Court of the State of Oregon

SEPTEMBER TERM, 1869.

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GEORGE A. PEASE, Administrator, Respondent, v.  
JAMES K. KELLY and others, Appellants.

**VENDOR'S LIEN.**—A mortgage is a more certain security than a vendor's lien, and under our laws, the taking of a mortgage for the purchase money, is a waiver of the vendor's lien.

**IDEM.**—A vendor's lien exists in case there is no higher security.

**IDEM.**—Both the lien of a mortgage and a vendor's lien cannot exist at the same time.

THE complaint in substance alleges that Robert Moore in his lifetime, in 1852, sold and conveyed by deed to Daniel H. Ferguson, a tract of land, and water privilege at the Willamette Falls, for fifty thousand dollars; of which sum forty-five thousand remained unpaid, and a note for that amount was taken by Moore, secured by mortgage on the premises. In 1853, Ferguson sold the premises subject to the mortgage, to the Willamette Falls Transportation Company, who made extensive improvements thereon, and failed; leaving their work subject to the liens of mechanics and material men, in addition to the incumbrance of this mort-

gage. In 1854, Moore assigned this note and mortgage, by written assignment to O. C. Pratt, to secure the payment of a sum of money, loaned by Pratt to Moore. In 1855, Pratt assigned by written assignment to Leander Holmes, and, at the same time, Moore executed a second assignment of the note and mortgage to Holmes, but, at the same time, and as a part of the same transaction, took back an agreement from Holmes to pay him (Moore) certain sums of money, and especially \$9,000, which sums were to be secured to Moore by a new mortgage on the land in question, so soon as Holmes should get the legal title, and discharge the premises from certain mechanics' liens, which were pending against the property, amounting to about \$9,000.

*J. K. Kelly and Mitchell & Dolph, for appellants.*

A vendor's lien, recognized by the courts of some of the states, and rejected by others, is a dangerous principle, and one opposed to the prevailing policy of this country, which discourages secret liens. (*Bayley v. Greenleaf*, 7 Wheaton, 78; 5 Curtis, 216; 1 Lead. Cases in Equity, 363; *Simpson v. Mundee*, 3 Kansas, 182.)

Taking an express security on the land itself for the whole amount unpaid, as by a mortgage, will merge the implied lien. (*Brown v. Gilman*, 4 Wheat. 255; 27 Ill. 422; *Fish v. Howland*, 1 Paige, 30, 31; and others.)

A vendor's lien will not be enforced against a *bona fide* purchaser without notice (7 Wheaton, 50; 1 Leading Cases in Eq. 371.)

*Logan & Shattuck, J. B. Upton and Bronaugh & Bybee, for respondent.*

Even if it be held that Moore's assignment of the \$45,000 note and mortgage to Holmes was full, so as to divest Moore at law of all interest in and control over those writings, yet, if \$9,000 of the *purchase money* of the land, intended to be evidenced and secured by those instruments, remains actually due to Moore, under the agreement be-

tween him and Holmes, at the time of assigning the note and mortgage; and if the defendants had notice, actual or constructive, of that fact at the time they became the purchasers of the land, then Moore's estate still retains in equity a vendor's lien against the land for said \$9,000 debt, unless Moore did some act amounting to a waiver of such lien. (4 Kent, 152; 1 John. Ch. R. 308; 5 Ohio, 35; 18 Ark. 142; 1 Paige, 23 and numerous other cases cited.)

The taking of the *distinct* security for the purchase money, is a waiver of this lien, but the taking of a mortgage on the land is not. (17 Ohio 500.)

The rule *caveat emptor* applies to Kelly's purchase at sheriff's sale, of the interest of the Willamette Falls M. & T. Co. in the land. (2 Kent, 78; 16 Cal. 559; 9 Wheat. 616, 648, and other cases.)<sup>1</sup>

BOISE, J. In this case, Moore took a note and security on the land for the purchase money. A mortgage is a more certain and definite security than a vendor's lien. The lien exists if there is no higher security, but we think that the taking of a mortgage, which is an open and public lien, is a waiver of the vendor's lien, and we think that both liens cannot exist at the same time, and such seems to be the well established doctrine of the cases. (*Brown v. Gilman*, 4 Wheat. 255; *Fish v. Howland*, 1 Paige, 30; *Hunt v. Waterman*, 12 Cal. 80; *Camden v. Vail*, 23 Cal. 633; 1st Leading cases in equity, 365; 27 Ill. 422.)

This view of the matter necessarily disposes of all the questions in the case, and it will not be necessary in disposing of the case, to consider the numerous other points which were discussed on the argument.

The judgment will be reversed.

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<sup>1</sup> The briefs in this case are very full, and embrace very many points of interest to the bar. Only such points are referred to here as belong to the views taken by the court.—*REK.*

R. H. DEARBORN, Respondent, v. JAMES J. PATTON  
AND OTHERS, Appellants.

*Appeal from Douglas County.*

**LIEN OF JUDGMENT.**—A transcript of a judgment in a justice's court, was filed in circuit court, in 1861, and became a lien on real estate for five years, under the law of 1855. In 1862, the statute made it a lien as long as an execution might issue, repealing the law of 1855, and in 1864 it was enacted that a lien should extend to ten years and if no execution had issued thereon, it should then expire, and process was provided by which execution might issue after ten years, and that would continue the lien.

The section 3 of the repealing act, p. 944 of the code, passed 1864, provides that "no rights vested or liabilities incurred at that time, shall be lost or discharged;" *Held*, under these statutes, that the judgment lien is an incident to a judgment, and is a liability incurred, and was saved from the effect of a repealing statute.

**PARTNERSHIP.**—Effect of docketing a judgment in the partnership name.

THIS suit was brought by R. H. Dearborn, administrator of the estate of R. E. Stratton, deceased, to foreclose a mortgage on land in Douglas County, given by James Patton to said Stratton, and dated on the twenty-fourth of February, 1862. John Smith and D. C. Underwood were made parties, defendant, because they were judgment creditors of said Patton. The appellant Smith, in a separate answer by him filed, alleges that in 1861, S. Marks & Co., obtained a judgment against said Patton in a justice's court, in Douglas County, for \$60.50, with interest, at two per cent. per month, and on the fifth day of July, 1861, a certified transcript of such judgment was filed in the office of the clerk of Douglas County, and such judgment then and there docketed in the judgment lien docket of the circuit court of said county, whereby said judgment became a lien on said land, and the appellant claims that the same lien still exists. The court below held that the judgment set up in the answer, was not a lien upon the mortgaged premises.



*Watson & Willis*, for appellants.

A judgment rendered by a justice of the peace, when filed and docketed in the circuit court, shall have the same lien as a judgment in the circuit court. (Stat. 1855, p. 304, secs. 78, 79; Code, p. 593, secs. 50, 51.)

At the time of docketing this judgment, the law continued the lien for five years.

In 1862, this law was repealed, and the general laws in sec. 267, fixed the same time for the continuance of a lien.

In October, 1864, before the expiration of five years of the lien of this judgment, sec. 267 was amended, extending the lien to ten years. (Code, p. 206; *Daily v. Burk*, 28 Ala. 330; ——— *v. Tullis*, 2 Minn. 572; *Wood v. Williams*, 1 Greene, Iowa, 272-4-5.)

Where one statute is repealed and another enacted at the same time, the second statute continues the first. (*Lisbon v. Clark*, 18 N. H. 234; *Wright v. Oakly*, 5 Met. 400; *Fulbertson v. Spring*, 8 Wis. 667.)

*Williams & Willis*, for respondent.

The repeal of the law of 1855, in 1862, destroys Smith's lien (2 Ohio, S. R. 36; 3 Parsons on contracts, 275; 1 Peters, 443), unless preserved in the saving clause. (Code, p. 944, sec. 3, p. 497, sec. 9.) The law creating judgment liens is not retrospective, nor does it continue liens of judgments prior to its passage. (Code, p. 206, sec. 4.)

If there was a lien on the property, it was under the old statute of 1855, and expired by limitation in five years, and this time elapsed before this suit was commenced.

The judgment was not docketed as the law requires.

The judgment is not so plead as to constitute a defense. (Code, p. 160, sec. 65; 36 Penn. 458.)

The appellant's lien is statutory, and must be clearly within the provisions of the act. (1 Wash. on real property, 477, 478; 7 Conn. 556.)

The lien was lost by the judgment being taken into the District Court before an execution had been issued thereon.

The law in force at the time of the making of a contract, enters into and makes a part of the contract. (16 Johns, 251; 16 Mass. 13; 31 Ill. 83.)

BORNE, C. J. The statute of 1855, p. 304, secs. 78, 79, provides that judgments in justices' courts, when a transcript was filed in the circuit court, and the judgment docketed in the judgment lien docket, should become a lien on the real estate of the judgment debtor. This judgment in question therefore became a lien on the land in question, on the same being docketed July 5th, 1861, which lien would have continued for five years from that time, had that statute remained in force until the same was superseded by our present statute (p. 206, secs. 266, 267), and it is claimed that the statute of 1855 was repealed by the statute of 1864 (Code, p. 944, sec. 3), and the lien thereby destroyed. Section three provides that no rights vested or liabilities incurred when the repealing act takes effect shall be thereby lost or destroyed. We hold that a judgment lien on real estate is an incident to the judgment, and is a liability incurred, and that the lien was therefore saved from the effect of the repealing statute.

The next question is, did our present statute, providing for judgment liens, extend liens created under the statute of 1855, which existed at the time the present statute took effect?

The present statute provides that liens of this nature shall continue while an execution may issue on the judgment. (Code, sec. 266.) Section 292, p. 216 of code, provides, that whenever, after the entry of judgment, a period of five years shall elapse without an execution being issued on such judgment, thereafter an execution shall not issue except as provided, which requires a proceeding in court to revive the judgment for that purpose.

Section 267, p. 206, provides, that "whenever, after the entry of judgment, a period of ten years shall elapse without an execution being issued on such judgment, the lien thereof shall expire." These provisions—1st, that the lien shall continue while an execution may issue; 2d, that no

execution shall issue after the lapse of five years, without a legal proceeding to revive the judgment; and, 3d, that when ten years shall elapse without an execution being issued on the judgment, the lien shall expire — do not appear to be consistent with each other, and, I confess, leave the question, as to when a judgment lien expires, in confusion. But this court, in the case of *Murch v. Moore*, (2 Oregon R. 189), have construed this statute of 1864, sec. 267, p. 206, and held that that section extended judgment liens, not having expired at the time the statute took effect, from five to ten years, and we recognize this case as authority here.

The judgment lien is created by statute, and, without any provision limiting it as to the time it should run without being foreclosed, it would run indefinitely. It was first limited to five years, and when that limit was extended, and the lien preserved, continued to run and bind the land to the time limited by the second statute, which by the construction given to section 267, would be ten years from the date of the judgment, when no execution is issued; and when execution is issued, then during the time the judgment is kept alive, so that an execution may issue thereon; and every issue of an execution, it would seem extends the lien for five years.

There is another point made by the respondents in this case: it is insisted that the judgment was not properly docketed, it being in the name of *S. Marks & Co. v. James Patton et al.*, not setting out the names of the partners constituting the firm of S. Marks & Co.; and it is claimed that such an entry in the docket is not legal notice to subsequent purchasers. In this case the name of the judgment debtor is correctly described, and it is his land that is to be affected by the lien. The record, therefore, is not uncertain as to the land affected. It shows that the land of Patton is subject to a lien by a judgment to S. Marks & Co., and I think the estate affected by the lien is as clearly pointed out as though the individual names of the plaintiffs had been spread on the record of the docket entry.

Judgment is therefore modified.

ROBERT McCALLA, Respondent, v. MULTNOMAH  
COUNTY, Appellant.

*Appeal from Multnomah County.*

**COUNTY LIABLE FOR NEGLIGENCE OF ROAD SUPERVISORS.**—Road supervisors are agents for the county, and the county is liable for a supervisor's negligence in not repairing a bridge.

**BRIDGE.**—The county is responsible, under section 347 of the code, for negligence in allowing a bridge to be out of repair, whereby injury accrues to any person traveling over it, who is himself not guilty of negligence; and negligence is a question for the jury.

THE plaintiff in this action seeks to recover damages received by the minor son of the plaintiff, caused by said minor having fallen through a bridge on a county road, within said county of Multnomah. The complaint alleges that the said bridge belonged to the county, and that the same was out of repair through the negligence of the county, and in consequence of such negligence said child became injured. The defendant moved for a nonsuit, on the ground that under our state laws there is no liability attaching to a county for injuries sustained by individuals from defects in roads and bridges. The court below overruled said motion, and the case was tried by a jury and damages recovered.

*Kelly & Reed* and *Page & Thayer*, for the appellants.

By common law counties were not liable. (Ang. on Highways, 286, *et seq.*)

Liability under statute cannot be extended beyond statute measure. (17 Conn. 475; 8 Met. 388; 7 Cush. 490.)

No statute in Oregon requiring counties to keep bridges in repair. (Code pp. 866-31.)

Such duties belong to particular officers. (11 N. Y. 392; 21 Cal. 113, etc.)

No notice given to supervisor of defect in bridge.

*Caples & Moreland*, for the respondent.

County bound to repair bridges. (Code p. 366, sec. 870; 3 Hill, 612; 5 Selden, 163.)

A duty to repair involves an obligation to pay damages resulting from a neglect to repair. (16 N. Y. 158; 7 Conn. 86; 9 Iowa, 227; 39 Barb. 329; 13 Iowa, 181; Ang. on Highways, secs. 290-300.)

Boiss, C. J. The question presented to this court for determination is: Are the counties in this state liable for injuries to persons occurring by reason of bridges on county roads being out of repair? This question must depend on the construction of our statutes on this subject, "that all county roads shall be under the supervision of the county court of the county in which such road is situated." It is the duty of the county court to appoint supervisors in each road district; and the county court also has power to remove supervisors on failure to perform their duties, and they are made responsible to the court, and are the agents of the county. (See Statutes, 868, sec. 19.) On failure to perform his duty, a supervisor is liable to an action by the county for the use of the county; and as being an agent of the county, and acting under its authority and direction. We think the county would be liable for his negligence in not repairing a bridge, provided there is any liability in such cases. It is contended, that at common law there would be no such liability; and, that a person injured by a bridge out of repair, has no remedy, however clearly it be shown to have been occasioned by the negligence of the road supervisor. This may be true at common law, but the statute of this state (page 285, sec. 347) provides: "An action may be maintained against a county, or other of the public corporations mentioned in section 346, either upon a contract made by such county, or other public corporation in its corporate character, and within the scope of its authority, or for *an injury to the rights* of the plaintiff, arising from some act or omission of such county, or other public corporation."

We think that when the county erects a bridge on a public highway, to be used for travel, they are responsible under this statute for negligence in allowing the same to be

out of repair, whereby injury accrues to any person traveling over it, who is himself not guilty of negligence. What would be negligence in the county, or in the party injured, are questions for a jury, to be determined in each particular case, and in this case they were found favorably to the plaintiff.

Judgment affirmed.

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WALTER MOFFITT and A. MEIER, Respondents, v.  
STEPHEN COFFIN, Appellant.

*Appeal from Multnomah County.*

COVENANT, CONSTRUCTION OF.—A covenant in deed was in these words:

"The said party of the first part, for them and their heirs, the said premises, in the quiet and peaceful possession of the said party of the second part, their heirs and assigns, against the said party of the first part and their heirs, lawfully claiming, or to claim the same, shall and will warrant, and by these presents forever defend," Held, not to be a covenant for quiet enjoyment, and that it does not warrant against assigns of the grantor.

IDEM.—An express covenant cannot be construed so as to extend its obligations by implication.

THIS action was brought by Walter Moffitt and A. Meier, plaintiffs, in the circuit court of Multnomah County, against Stephen Coffin to recover damages for the alleged breach of a covenant of warranty, made by Coffin to the assignors of plaintiffs, for certain real estate in the city of Portland, in a deed by Coffin and wife, from which real estate, consisting of town lots, said plaintiffs were evicted by a person claiming the title from Coffin prior in date to the title of plaintiffs. The warranty is as follows: "And the said party of the first part, for them and their heirs, the said premises in the quiet and peaceful possession of the said party of the second part, their heirs and assigns, against the said party of the first part and their heirs, lawfully claiming or to claim the same, shall and will warrant and by these presents forever defend." The court below overruled a demurrer to complaint, and

upon motion struck out the defendant's answer, to which exception was taken, and from the judgment for the plaintiffs, defendant has appealed.

*O. P. Mason*, for the appellant.

An express covenant takes away all implied covenants. (7 Mass. 68; 8 Mass. 201; 11 Johns. 122.)

An express covenant of warranty against the defendant and his heirs cannot be construed so as to extend to any other persons than those named. (2 Bac. Ab. 576, 677, 582, 584.)

Damages can only be recovered in such cases for the purchase money and interest. (4 Kent, 475, 476, 477.)

*Lansing Stout and Kelly & Reed*, for the respondents, claim: That the covenant herein is a covenant for quiet enjoyment. (Rawle, 167, 168.)

When a party covenants against himself and his heirs, he covenants against the acts of himself and his heirs. (17 Ill. 185.)

What damages should be allowed. (Sedg. on Dam. 179-186, note 1; 9 Johns. 324; 13 Barb. 267.)

BOISE, C. J. The point here to be decided is, whether or not this covenant guarantees the grantees of Coffin by this deed, in the quiet enjoyment of the premises, against the former assignee of Coffin to the same premises. The language of the covenant is, "against the said party of the first part and their heirs." Assigns are not mentioned, and therefore not included; for this covenant must be construed, like any other contract, by the ordinary construction of its language. It is an express covenant, and therefore nothing can be implied to extend its obligations. It is not in the form of any usual covenant, and I think has very little significance. If the word *assigns* had been inserted in the covenant, it would then have been a covenant for quiet enjoyment. We think, therefore, that no recovery can be had on this covenant in this case.

Judgment is reversed.

THE OREGON CENTRAL R. R. CO., Respondent, v.  
AARON E. WAIT, Appellant.

*Appeal from Clackamas County.*

**RIGHT OF WAY.—JOINDER OF DEFENCES.**—In an action to condemn land for a railroad, the defendant has his choice, either to rely on what the statute (Code, p. 670, 345), denominates a legal defense, or waiving that, plead the value, or resulting damages, or both; but he cannot on the same trial, contest the plaintiff's right to take the land, and try the question of damages.

**DAMAGES.**—Exception taken was this, "that the plaintiff below was allowed to prove on trial, that the construction of a railroad across the land of the defendant, would be of more benefit than damage thereto, excepting the value of *the land* actually taken by plaintiff," and the instruction of the court therein, excepted to was thus, "if the benefits to the lands of the defendant, are equal to the damages, then all that you should assess is the value of the land taken:" *Held*, these are not errors.

**COSTS.—TENDER.**—A tender of one hundred dollars was made on the day of trial by plaintiff, which the defendant refused to take, and failing to recover by verdict, more than fifty dollars, the defendant was adjudged to pay all costs subsequent to the tender: *Held*, that under sec. 49, p. 671 of Code, this was error, the tender not having been made before the commencement of the action.

**FENCE.**—Who is to build the fences along a railway?

THE Oregon Central Railroad Company, alleging a due incorporation, with its place of business at Salem, Oregon, averred that it needed a right of way over certain lands owned by A. E. Wait, defendant, and described the claim across which the line of road was desired, and the direction thereof. Plaintiff desired an appropriation of thirty feet on each side of the center line of road; and prayed an assessment of the damages therefor, alleging an inability to agree with the owner of said land for such right of way. The defendant Wait, answered on the fifteenth of March, 1869, denying knowledge sufficient to form a belief as to the legal incorporation of plaintiff, and averring that the land, actually sought to be appropriated, was over ten acres, and that the damages, which he would suffer by such passing of plaintiff's railroad over his land claim, would be



twelve hundred dollars. The reply joined issue upon the questions of amounts of land and damages. On the nineteenth of March, on motion, that part of the answer substantially denying the incorporation of plaintiff, was stricken out, and this was excepted to by defendant. On the twenty-second day of March, the cause was called for trial, and on the same day, the plaintiff's counsel in writing, tendered to the defendant a judgment in his favor for one hundred dollars, which was refused. After verdict for fifty dollars, the clerk taxed the costs, etc., in the action, accruing after such tender of judgment, against the defendant, in the sum of \$38.75, and on an appeal, the court below confirmed such taxation, and from the several rulings defendant appealed, alleging error as to each ruling.

*Wait & Kelly*, of counsel for the appellant, set forth as the errors relied upon.

1st. In requiring the defendant to elect to withdraw a part of the answer, and in striking out that part of the answer (set forth above).

2d. In overruling the objections of defendant thereto, and in allowing the plaintiff to give evidence, tending to prove "that the construction of a railroad across the land of the defendant, would render the remaining land more valuable, and that the railroad would be a benefit to the land not appropriated, and that such benefits would exceed all damages to the defendant's property, except the value of the land actually appropriated by plaintiff.

4th. In sustaining the decision of the clerk, taxing all the costs against the defendant, which accrued after tender of judgment.

6th. In declining to instruct the jury, without addition or qualification as follows:

"The verdict of the jury in this action, should secure to the defendant compensation for all the damages resulting from the appropriation of the land sought to be appropriated, irrespective of any increased value thereof, by reason of the proposed improvement by the plaintiff."

Upon the first error, counsel claim that, as a jurisdictional question, the denial of the legal incorporation of the plaintiff should have remained in the answer and cited 7 Mass. 353; 21 Pick. 535; 1 Bibb. 262; 7 Porter, 37; 5 Monroe, 261; 3 How. U. S. 762, etc.

That it was in fact a plea in bar—and cited 11 Mass. 313, 119; 7 Pick. 62; 3 Met. 235, 417; 15 Wend. 315, 13 N. Y. 309; etc.

Upon the other question—counsel claimed, that *before* sixty feet of land in width across the farm of defendant could be rightfully appropriated, the defendant was entitled to all damages necessarily resulting therefrom, including expense of fencing, crossways, and the inconvenient or unsightly condition in which the remainder of the land is left—and cite Gen. Laws, pp. 99, 665 and 671.

They claim that the judgment of the court appropriates the property, and the compensation for the property must precede the appropriation, and that any benefits from the railroad are prospective and cannot be deemed compensation.

That the property of which defendant has been deprived is the strip of land before mentioned—an enclosure against all other owners, persons, and animals—the right to use the whole farm without obstruction, and without the expense of constructing crossings, and without a severance, which renders the farm undesirable and comparatively worthless; and that these have all been taken, and without compensation first made therefor.

They claim that the court, by its rulings, denied to defendant the cost of fencing against the railroad, and the judgment of the court presumes the defendant has been paid that cost.

What damages are to be assessed? (Redfield on Railways, pp. 263, 483, 489, 287, 291; 47 Maine, 207; 10 Ind. 123; 31 Cal. 371; 23 Vt. 613; 22 Ill. 222; 15 Ohio, 39.)

They claim an improper taxation of costs, against defendant.

*Mitchell, Dolph & Smith*, for respondent, claim: 1st. The defense, denying the incorporation of plaintiff, could not be

set up in conjunction, with an averment of the value of the land, or damages. (Gen. Laws, sec. 45, p. 470.)

2d. It was in the nature of a plea in abatement. (1 Pet. 387; 4 Wash. C. C. 662; 1 Mass. 480; 27 Conn. 282; 44 Me. 49; 39 Id. 571.)

A plea in abatement cannot be plead with a plea in bar. (2 Or. 49; 7 Barb. 368.)

Upon the second assignment of error, counsel claim, that compensation for private property taken for public use need not be made in money, but may be made in resulting benefits, (3 Allen, 137; 8 Barr. 445; 17 Wend. 649; 13 Barb. 169, etc.)

That the material inquiry is, is the property injured or benefited?

That the clause in the statute, "irrespective of any, increased value thereof," refers to the strip of land only, and not to compensation for resulting damages to other lands not taken.

The court charged the jury that "neither the plaintiff or defendant were required to fence the lines of the land sought to be appropriated, but either party had a right to fence when business or convenience prompted," and that such is the law in Oregon.

They claim the taxation of costs was in accordance with law. (Gen. Laws, sec. 511.)

WILSON, J. Appellant excepted to the striking out of his answer the denial of the incorporation of respondent, and claimed that, as a denial to a material allegation, it was not a plea in abatement, and not inconsistent with our laws, which gives to a defendant only the right to *demur* or *answer*—that it was a plea in bar of respondent's right to recover, going to the merits of the action, and cited authorities. Appellant further claimed that in this case it was also a jurisdictional question, and could not be waived by the court.

Respondent claimed that such pleading is prohibited by sec. 45, p. 670, of the Code, and that a plea in abatement cannot be pleaded with one to the merits.

We deem it unnecessary to marshal the authorities on this point, and decide from them, either as to the influence of this plea or the nature of it. Sufficient that many of the authorities cited declare it a plea in abatement, and as many more a plea in bar. Our code decides this question in our view. Sec. 45, p. 670, is in these words: "The defendant in his answer may set forth any legal defense to the appropriation of such land, or any portion thereof; or, omitting such defense, may aver the true value of the land in question, or the damage resulting from the appropriation thereof, or both." This section forms a part of the law on corporations, and we find no difficulty in construing it to mean this — legal defenses must be pleaded separately — if plead, then issues of merit cannot be joined with them. A defendant has his choice to either rely upon a legal defense, or, choosing to omit that, may plead value, or damages, or both. Evidently this plea amounted to a legal defense, and defendant could have relied upon it; but the law plainly declares, he could not first rely upon that, and failing, resort in the same answer to the merits. We think the court below was right in requiring defendant to select which defense he relied upon; and in case he did not so indicate, to strike out one of them, and there was no error here.

The second point in which error is alleged may, from the exceptions taken, be expressed thus: "that the plaintiff below was allowed to prove on trial, that the construction of a railroad across the land of the defendant, would be of more benefit than damage thereto, excepting the value of the *land* actually taken by plaintiff;" and that the court, based thereon this instruction: "If the benefits to the lands of the defendant are equal to the damages, then all that you should assess is the value of the land taken." In the constitution of Oregon in sec. 4, art. XI, is found this provision: "no person's property shall be taken by any corporation, under authority of law, without compensation being first made or secured, in such manner as may be prescribed by law." Under this power the legislature enacted a law relating to corporations, and among its provisions are these: After

stating that a company may appropriate lands for track, for buildings, a right of way over other lands in constructing these, and for side tracks, etc., in the latter part of sec. 24, p. 665, Gen. Laws, there is the following provision, "but no such appropriation of private property shall be made, until compensation therefor be made to the owner thereof, irrespective of any increased value thereof, by reason of the proposed improvement by such corporation, in the manner hereinafter provided." The manner of procuring an assessment of the value or damages, is found under title III, p. 670, and in case the owner and the corporation cannot agree upon the amount, the corporation may commence an action to estimate the same; and section 45, p. 671, designates what claims the owner may set up, viz: "the true value of the land in question, or the damage resulting from the appropriation thereof, or both." From these provisions, there can be no question as to the owner's right to recover the true value of land appropriated, in any event, and the respondent admits this. We think that sec. 24 is declaratory of this, that the land cannot be appropriated until compensation therefor be made, or, in the language of the constitution, *secured*, to the owner; and that this compensation is to be estimated irrespective of any additional value, which may be given to that designated strip by any buildings, or other improvement which may be put thereon by the corporation. It does not mean that the compensation shall be estimated irrespective of any additional value given to other lands of the same owner, adjacent thereto. The compensation is secured by the award of the jury in view of the whole case, and by the judgment of the court thereon. The issue was properly submitted by the court to the jury, that the damages are to consist of the value of the land appropriated, irrespective of any additional value to it, etc., and then, if such appropriation injures the other land of that owner, over and above the benefits or additional value of those lands, by the improvements by the corporation, an additional amount is to be awarded sufficient to cover such excess of injury over benefit, etc.

In this question are involved, we think, fences, cattle-guards disadvantage of crossings and all points of inconvenience and expense. The main objection seems to be that this is a compensation which cannot be tendered or paid in advance of the improvement; but the allowance by a jury covers all these questions and there can be no damage to other lands in case the corporation fails to build the road, forfeiting its charter and suffering the lands to fall back to the owner; in which case he receives his land again, additional to the damages paid, or secured in judgment.

Our law does not require that either the corporation or the land owner shall build fences along the track, but we think that is one of the questions involved in the issue submitted to the jury, and we can readily conceive of many conditions, where the fencing of a track would neither be useful or ornamental, and totally unnecessary. It might be considered as damages received, or secured, under the view of this proposition—if by the locating and building of a railway, the lands crossed by it are raised in value, a certain amount per acre, it would, under the construction of our constitution and laws, be unjust that the owner of such lands should claim and receive compensation for all the fences he may or may not be forced or find convenient to build, all cost of cattle guards, of crossings, of all inconveniences, and say to the company you have increased my property in value so many dollars per acre, but you shall not offset that against these inconveniences, and I will take the benefit in both ways. Such is not the spirit, or our construction of the law—roads generally are laid out, and under the provisions of the constitution, damages only are given for the excess of injury over resulting benefits—and in other instances the operations of the laws are in accordance with our construction. We think no error was made here.

The third point is, that the court adjudged costs, etc., against appellant which accrued after the tender by the respondent on the twenty-second of March; and we think there was error in this. Section 49, p. 671, Gen. Laws, provides, that all costs and disbursements of defendant shall

be recovered of the corporation, unless the corporation, *before* commencing the action, tender the defendant an amount greater than, or equal to, that assessed by a jury—in which case the corporation shall recover its costs, etc., of the defendant.

The tender in this case was made upon the day of trial long after the commencement of the action, and no benefit of tender under the law accrued to the respondent.

Section 511, Gen. Laws, cited by counsel for respondent, is applicable to cases generally, but the special law of corporations carries its special provision with it, which latter must govern. It was as though no tender had been made, and we must modify the judgment by reversing that allowance of costs to respondent. In other respects the case stands affirmed.

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ROBERT BROWN, Appellant, v. A. B. MOORE and D. M. FRENCH, Respondents.

*Appeal from Wasco County.*

**VARIANCE.**—In an action on attachment bond, one allegation was, that the plaintiff had actually contracted a sale of the grain, afterwards attached; and the evidence rejected was, that he had a conditional promise, that upon a certain contingency the buyers would take the grain, and that contingency afterwards happened. *Held*, without deciding whether the rejected evidence made out a ground for special damage or not, that it was a variance which the court might disregard. *Held* also, that if it was discretionary to admit the evidence, nothing short of an abuse of discretion could be assigned as error.

**SPECIAL DAMAGES.**—An allegation that the plaintiff could have earned five or seven dollars per day in hauling said grain under proposed contract, is not a sufficient averment to warrant special damages thereon. It does not show that he might not have earned an equal or greater amount, during the same time, elsewhere.

THIS action was based upon an undertaking entered into in a civil action to procure a writ of attachment. The complaint charges that the attachment was unlawfully issued.

and unlawfully levied upon about 100 bushels of oats, 100 bushels of wheat, 800 bushels of barley and ten tons of hay—one half of which belonged to plaintiff—that the property was detained, specifying the time, and the plaintiff was damaged thereby \$220. Several grounds for special damages are set forth, two of which are stated as follows: Shortly before the said levy, the plaintiff made an agreement with Robbins and Weaver, to take of him, at Camp Watson, between 10,000 and 12,000 pounds of said grain, at four dollars per hundred pounds, in coin, which would have yielded, after deducting freight, \$2.10 per hundred. That, after said attachment was discharged, the said plaintiff sold said grain for \$1.62½ per hundred, the highest price he could obtain for the same, and thereby sustained loss in the sum of \$52.25. That by means of the said plaintiff being prevented from freighting the said 10,000 or 12,000 pounds of grain to Camp Watson for Robbins and Weaver, according to the said contract made with them, the said plaintiff sustained great loss and damage, towit: damage in the sum of \$100. On these points the answer is as follows: “the price of grain when the plaintiff pretends to have sold his to Robbins and Weaver was about two cents per pound and no more, and the amount agreed upon for the delivery of grain at Camp Watson would not allow more than two cents per pound for the grain. Defendants deny that plaintiff had contracted his barley to said Robbins and Weaver. The defendants deny that the plaintiff necessarily lost any time on account of said attachment. On the trial, O. W. Weaver, a witness, testified that in July, 1868, the plaintiff contracted with Robbins and Weaver to deliver to them at Camp Watson, 130 miles distant, 100 bushels of oats at four cents in coin per pound, and that there was also an understanding between the contracting parties, that if the United States quartermaster would receive from Robbins and Weaver barley upon a contract, where Robbins and Weaver had undertaken to furnish oats, in that case, Weaver would receive from the plaintiff all the barley which plaintiff had raised, at four cents per pound; and that it was



afterwards ascertained, that Robbins and Weaver would have received plaintiff's barley at four cents per pound. On motion of defendant's counsel, this evidence was ruled out. The plaintiff offered to prove that he could have earned from five to seven dollars per day by hauling the grain in question to Camp Watson, and that it would have taken him about a month and eight or ten days to haul it. The court refused to admit the evidence. The judge instructed the jury that the plaintiff was not entitled to special damages, because of his alleged contract with Robbins and Weaver; nor for loss of profits, that he might have made in carrying the grain to Camp Watson. The plaintiff had a verdict and judgment for \$40.50.

*Kelly & Reed*, for the appellant.

*O. Humason*, for the respondents.

UPRON, J. The plaintiff appeals from a verdict and judgment in his favor for an amount less than that claimed by him, and assigns as error:

1st. The ruling out of evidence in relation to the delivery of barley at Camp Watson.

2d. Ruling out the plaintiff's testimony concerning the profits he could have made by hauling the barley to Camp Watson.

3d and 4th. In instructing the jury on the same points.

The first and third assignments of error present but one point. Without examining the question whether the facts stated in the pleadings in regard to the contract for the delivery of barley, and its non-fulfillment, are a sufficient foundation for special damages—it seems, from the record, that the evidence rejected did not correspond with the allegations of the complaint. The allegation was, that the plaintiff had actually contracted to a sale of the grain, but the rejected evidence was, that he had a conditional promise—a promise, that, upon a certain contingency, the buyers would consent to take the grain, and that that contingency afterwards happened. If the evidence would have laid a

sufficient foundation for the special damages, it was within the discretion of the court to disregard the variance between the allegation and the proof. (Secs. 94 and 95 of the Code.) But nothing short of an abuse of that discretion could be assigned as error on appeal—besides it is not clear that the facts offered in evidence would make a case for special damages. The second and fourth assignments of error relate to the special damages arising out of the loss of the business of hauling. The pleading is fatally defective upon this point. It is not shown that the plaintiff was thrown out of employment, or that the five or seven dollars per day that he could have earned with his team in the business of hauling was any more than he could have earned at other business. The allegations on this point, if true, do not show that he was specially damaged in this particular. (1 Chitty, Pls. ss. 395, 398, 399.)

Judgment is affirmed.

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JOSHUA B. POOL, Appellant, v. WM. G. BUFFUM, Respondent.

*Appeal from Jackson County.*

**WILL, EXECUTION OF.**—Construction given to section 5, p. 345, of statute of 1854, and of sections 4 and 5, code, p. 936.

**IDEM.**—The making by a testator of his mark to his will is a signing of the will.

**IDEM.**—If another person signs the testator's name to the will, unless it be done by the testator's direction, it was not necessary for that person to state that he "subscribed the testator's name."

THE matter controverted in this case was submitted to the circuit court for determination without action, under section 254 of the practice act, by a statement in writing, containing the facts. The case, stated by the parties, shows that James R. Pool, a brother of said Joshua B. Pool, a resident of Jackson County, in this state, died in California, October 28, 1868, leaving both real and personal property

in this state; that afterwards an instrument was admitted to probate in Jackson County, as the last will and testament of the said James R. Pool, a copy of which is given. It is attested as follows: "In witness whereof, I have hereunto set my hand and seal, this third day of August, in the year of our Lord, one thousand eight hundred and fifty-eight.

his  
"JAMES R. x POOL  
mark.

"NELSON WALLING; residence, Polk County, O. T.

"THOMAS B. JACKSON; residence, Yamhill County, O. T."

The case stated shows that the name of James R. Pool was placed at the bottom of said instrument by Thomas B. Jackson, one of the subscribing witnesses above named, and the mark in said name was made by James R. himself. The question submitted was whether the facts thus stated show a good execution of the instrument, as the last will and testament of James R. Pool, deceased.

*B. F. Dowell and O. Jacobs, for appellant.*

Every will shall be in writing, *signed by the testator*, or by some one under his direction, in his presence, and shall be attested by two or more witnesses, subscribing their names to the will in the presence of the testator. (Stat. of 1854, p. 355, sec. 5.)

Every man who shall sign the testator's name to any will by his direction, shall subscribe his own name as a witness to such will, and state that he subscribed the testator's name at his request. (Code, p. 936, secs. 4 and 5.)

That a fair construction of these two sections would exclude the idea that a will could be validly signed by a mark alone.

A respectable minority of state courts have decided that a signing by mark was not sufficient. (Redfield on Wills, p. 203-205, note 6.)

That the majority is the other way. Can the signature be treated as surplusage, and the *mark* in it made by Pool, held as a sufficient signature. (Redfield on Wills, vol. 1, p. 204; 21 Mo. 17; 20 Mo. 266.)

*J. D. Fay and Lansing Stout, for respondent.*

The act of making a mark with the intention of signing is a signature within the primitive and original meaning of the term. (11 Bur. L. D. 466.)

A mark intended as a signature is regarded in law as a full and complete signature. (11 Green Ev. sec. 674; 1 Sugden on Powers, 381, etc.)

Signatures by marks are treated as original signatures. (27 Barb. 556; 12 Cush. 332; 13 U. S. D. 703; 20 U. S. D. 533; 16 B. Monroe, 102; Redfield on Wills, 227.)

Substantial compliance with statute is sufficient. (2 Barb. 200.)

URRON, J. This appeal presents the question whether the instrument under consideration is valid as a will, notwithstanding, the subscribing witness, who wrote the decedent's name, did not state in writing that he subscribed the testator's name at his request.

Section 4, code, p. 936, provides: "Every will shall be in writing, signed by the testator, or by some other person under his direction, in his presence, and shall be attested by two or more competent witnesses, subscribing their names to the will in the presence of the testator."

Section 5 provides, that "every person who shall sign the testator's name to any will, by *his direction*, shall subscribe his own name, as a witness to such will, *and state* that he subscribed the testator's name at his request." It does not appear by the case presented, that the witness, Jackson, *stated* that he subscribed the testator's name at his request, nor whether he signed it "by his direction."

The case of *St. Louis Hospital Association v. Williams, Adm'r.*, 19 Mo. 609, is cited in opposition to the validity of the instrument. The statute of that state is identical in language with sections 4 and 5 above set out, and it was said in the course of the argument, that our act concerning wills was copied from a statute of Missouri. Decisions in other state courts, upon statutes in terms identical with our own, are of great assistance in construing the language used

whenever there is ambiguity in its meaning. In that case, SCOTT, J., who delivered the opinion, says: "The essential words of our act correspond with those of the statute 29 Charles, II, which relates to wills, the received construction of which is, that a mark is a sufficient signing, and that, notwithstanding the testator was able to write. (1 Jarman, 69.) But when a will is authenticated apparently, both by a mark and the name of the testator, our statute makes it material to ascertain whether the testator's name was put to the will by his direction. It is not necessary there should be an express direction. A direction may be proved by circumstances. The finding of the court is silent as to this material fact. It either did or did not exist. The judgment of the court, being for the will, would warrant the inference, that in its mind there was no direction of the testator's to put his name to the will, or in other words, that the act was unauthorized. We are of the opinion that the conclusion should have been drawn from the facts existing, whether the act of signing the testator's name was authorized by him or not. It should have been found one way or the other by the court trying the cause." "In viewing the law of a case, on the facts found, it is not the province of this court, from one or more facts found, to declare the existence of another fact. This judgment must then be reversed, in order that it may be found whether the name of the testator was written to his will by his direction."

In that case, the particular error committed by the court below, was a failure to find upon a question of fact. That court heard the evidence, and was required by law to find the facts from the evidence, and it was held, that the circuit court in failing to do so, committed an error, for which the case was sent back for a new trial. In the case before us, the parties stated the facts in writing. The court below had no occasion to weigh evidence or find conclusions of fact, and could not commit the error, for which the judgment in that case was set aside. That case affirms these two important positions:

1st. When the testator attests a will by his mark, it is a sufficient signing, and is a valid mode of executing a will.

2d. It is not necessary for the subscribing witness to state, that he subscribed the testator's name, "at his request," unless he signed it to the will, by the testator's direction.

The case above noted, and that of *Northcutt v. Northcutt*, 20 Mo. 265, are relied upon as decisive against the validity of the will in this case; but the latter is entirely consistent with the former, and places the necessity of the "statement" upon the statutory requisition, making it depend upon the fact, that the signing was "by the testator's direction." In this case, it is admitted that the decedent made his mark; that is, according to those cases, he signed the will, in the presence of the two subscribing witnesses. This then, is a good execution of the will, according to the opinion delivered by SCOTT J., unless it has been rendered null by ineffectual attempt of one of the subscribing witnesses to make the act still more formal and conclusive. The case stated shows, that the witness JACKSON, placed the name of the testator at the bottom of the will, but does not show whether the act was done by the testator's direction. According to the cases cited by the appellant, if it was not done by the testator's direction, it was not necessary for JACKSON to "state that he subscribed the testator's name." The facts here stated, disclose acts done, sufficient in themselves to make a valid will, if not impaired or vitiated by other circumstances occurring at the time, and the case leaves an uncertainty, whether or not such circumstances existed, or such other acts were done, as to render those, which otherwise would have been sufficient, ineffectual to carry out the known and admitted intention of the testator.

A technical right, when perfectly established, is as much entitled to protection as any other right. It is entitled to the protection of the law from the fact that it is a right. It is the duty of the court to respect the rules of positive law, whether technical or otherwise; but it is a distinguishing feature of a technical right, that it invokes no

implications in its favor. It is, therefore, altogether just and proper to require, that one who rests his cause upon a pure technicality should himself be technically correct, and be fortified against similar claims. In construing contracts or wills, effect should be given to the intention of the parties when ascertained, if it is possible to do so without doing violence to positive law.

The question here is, whether the circuit court committed an error in upholding the instrument in question, as a last will and testament. The case stated omits one fact, which, in the case first above cited, was deemed material. Without that fact, that is, without being informed, whether writing the testator's name was or was not done by his direction, it is not possible to say whether it was or was not the duty of the writer to do more than was done. It is not before us to say how the case would stand if issues were joined, and the witness Jackson was produced to show that the decedent did make his mark, or did direct the witness to write his name. The admissibility of the evidence would present a very different question from the one before us. It is admitted that the decedent did make his mark—there is no question of admissibility of the evidence to prove the execution. It is settled by the case as stated, that the decedent sought to execute the instrument as his will. If the decedent affixed his mark to the paper, it is a signing within the meaning of the statute, as construed in cases from Missouri, without his name being written at the place of signing. For aught that appears in this case, the writing of the name of the decedent by the subscribing witness may have been done while the will was being executed, or it may have been an independent or separate act, done after the instrument was complete. It may have been done at the decedent's request, or it may have been done officiously, under an erroneous impression that such a writing was a necessary formality, and without any direction from the decedent. If done at the time of making the mark and under decedent's direction, it would be a question not touched by any of the cases cited, whether an act that

amounted to a signing would lose its efficacy by a repeated signing, without the annotation required. If done without any direction from the decedent, the want of the notation would not vitiate the decedent's acts. If we are to hold that every one who writes the testator's name by the testator's request, is literally within the statute, we include every case where the testator takes no part physically in the act—cases where he makes his mark and another writes his name; and a class of cases where the party subscribing writes his name in a language or by means of an alphabet not in general use in the country where the act is done, and some other person writes the name in the ordinary alphabet, by way of explanation or interpretation of the characters used in the signature. In such a case, the writing of the name, though perhaps convenient, is not necessary to the validity of the will, and its being done scarcely raises an inference whether or not it was done by the direction of the testator, or party signing. If one should make a last will, subscribing his name in full, and another *without his request* should write the decedent's name again upon the instrument, for any reason, either because the name was in an alphabet not in common use, or that through sickness or for other cause, the name was so obscurely written as to make some explanation desirable, it would not be a case within the provision of the statute. So in this case, if the mark is a signing, and it is unknown whether the name was written at the same time, or after the occasion when the mark was made, if it is also unknown whether it was done under the direction of the decedent, what presumption is to be indulged; or what is the duty of the court in the absence of any legal presumption? Shall a court without proof assume that the writing of the name was done at the particular time, or under decedent's direction, when it is obvious to the court, from the agreed case here stated, that such an assumption will defeat the intent of the decedent? If we assume that the decedent knew the law, we must see that he had no reason to give such direction; and if the subscribing witness knew the law, he either received no



such direction, or he neglected his duty, and was guilty of a wrong in not noting the fact that "he subscribed the testator's name at his request."

Where one makes his mark, and another at his request writes the name, which one signs? If making one's mark is a signing within the law, it may be doubted, whether the writing of the name by another at the same time is a *signing* within the meaning of the statute—but it is not necessary to pass upon that question.

It does not appear from the case stated that the witness, Jackson, wrote or signed the testator's name *by his direction*, and it does appear that the testator himself made his mark, which is a signing according to the authorities cited by the appellant. There is enough in the case stated to justify the circuit court in sustaining the will. On appeal, error will not be presumed, but must affirmatively appear by the record.

The decree below should be affirmed.

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\*PETER A. WEISE, Appellant, v. SAMUEL SMITH, Respondent.

*Appeal from Clackamas County.*

**NAVIGABLE STREAM.**—How far the principles and rules pertaining to the navigation of tide waters and large streams, are to be applied to fresh water streams above the flow and ebb of the tide.

**IDEM.**—The common law rule, making the "ebb and flow of the tide the test of navigability" is not now applicable in the United States.

**IDEM.**—If a stream is capable in its natural condition of being profitably used for any kind of navigation, its use to that extent is subjected to the general rules of law relating to navigation.

**IDEM.**—Such a stream, generally useful for floating boats, rafts, or logs, or for any useful purpose of agriculture or trade, though it be private property, and not strictly navigable, is subject to the public use as a passage way.

**BOOMS.**—How far such stream may be obstructed by use, or by booms, etc.

**RIPARIAN RIGHTS.**—The right, to meddle with or touch upon the banks of such a stream, is founded upon necessity.

\*See 8 Am. Rep. 621.

**IDEM.**—The riparian owner has an absolute right to enjoy his lands, in all proper ways—the other party has an absolute right, as one of the public, to navigate the stream—neither can justly deprive the other of his rights and their incidents.

**TRESPASS.**—If there had been no necessity for fastening a boom to plaintiff's land, that act was a trespass—that necessity was a question for the jury.

**REASONABLE TIME.**—Keeping such boom fastened too long would be an obstruction—what was a reasonable time for removal of boom is a question for the jury.

THE complaint in this action alleges in substance, that Peter A. Weise, the plaintiff, is the owner of the land situated at the mouth of the Tualatin river, upon the southerly side thereof, and that Samuel Smith, the defendant, placed a boom fast upon the land of the appellant, and kept it across said river, to the damage of the plaintiff in the sum of five hundred dollars.

The answer sets up in substance, that the respondent was engaged in the business of floating saw logs in the Tualatin river, from points on the said river above plaintiff's land, to the sawmills, that are in the vicinity of Oregon City. That the Tualatin, although a navigable stream, for the purpose of rafting saw logs, cannot be used for that purpose without placing a boom where respondent's boom was placed. That placing said boom there was necessary, and that the defendant had a right to so place it. That it was so placed for public use free of charge—that the public had a right to use the river for the floating of logs. The evidence disclosed that the Tualatin river, immediately above its confluence with the Willamette river, that being where the boom was placed, was for a short distance navigable for large vessels; and from a point two or three miles above the place of the boom, it was navigable for small steamboats up the stream, a distance of twenty-five or thirty miles. That, although for a space of two or three miles above where the boom was placed, the river is not otherwise navigable, yet saw logs can be conveniently and profitably floated the whole distance from the highest point of navigation, down the Tualatin river into the Willamette river. But owing to the situation of the confluence of these rivers, which is a short distance above

the Willamette falls, unless a boom is so placed as to retain the saw logs on their reaching the mouth of the Tualatin, the logs would necessarily be swept over the falls by the current of the Willamette, and thus lost. It had been a practice of the people, who were engaged in transporting logs down that river, to obtain the logs by means of such a boom. While receiving logs into the boom its upper end was attached to a small island in the Tualatin, the property of the plaintiff, from which the line of boom passed down the Tualatin to its mouth, and into the waters of the Willamette, the lower end curving south and being made fast to the bank of the Willamette south of the mouth of the Tualatin. When thus used the line of the boom intercepted the most convenient course of the plaintiff's skiff, in which he was accustomed to pass to and from Oregon City, his ordinary market place. The boom was so constructed that, when not receiving, but merely retaining logs, the upper end could be detached from the island and made fast to the south bank of the Tualatin, in such a manner as not to leave the boom in the way of the plaintiff's skiff. On the occasion complained of, the defendant having attached the boom to the island, it remained in that condition about—days. There was evidence tending to show that during that time high water rendered it impracticable to make the change and remove the boom out of plaintiff's way. Judgment was rendered in favor of the defendant, and the plaintiff appeals, assigning as error:

1st. Admitting evidence to show that plaintiff had previously permitted booms to be placed and used in the same manner without objection.

2d. In instructing the jury that if the Tualatin was adapted to floating logs, and a boom was necessary for that purpose, the plaintiff's right was subrogated to a reasonable use by the public.

3d. In permitting the jury to determine whether the boom was extended an unreasonable time.

*Wait & Kelly*, for the appellant.

*Johnson & McCown*, for the respondent.

UPTON, J. It is conceded in the argument, that, to some extent, or for some purposes, the Tualatin river is a navigable stream from its mouth to many miles above the place in question. At the point of alleged trespass, or a short distance above it, the river is not navigable for boats, but for the whole distance, the stream is available as a means of conveyance for saw logs. One of the circumstances set up by the plaintiff, as a basis for additional damages, is that immediately at the place where the boom was stretched, the plaintiff had occasion to navigate the river with his skiff; and that, by the alleged wrongful acts of the defendant, that navigation was interrupted. The chief inquiry and point in issue, touches the relation and liabilities existing between riparian proprietors, and persons using the stream, for purposes connected with navigation. It is necessary to consider how far the principles and rules that have been applied to affairs pertaining to the navigation of tide waters and large streams, capable of floating ships of commerce, are to be applied to streams like the one under consideration. While it is conceded by the appellant, that the Tualatin river is to a certain extent navigable, it is claimed that it is "a fresh water stream above the ebb and flow of the tide," and hence the rules applicable to arms of the sea, and great rivers, where the tide ebbs and flows, are not applicable here.

It may be considered the settled law of the United States, that so much of the doctrine of the common law of England, as made the ebb and flow of the tide a test of navigability, is not now applicable in the United States. On the contrary, the maxim of Lord Mansfield, "out of the fact arises the right," is applied by the courts of this country. (*Morgan v. King*, 35 N. Y. 454; *Jones v. Pettibone*, 2 Wis. 308.)

It is held more rational to determine the question of navigability or unnavigability of a stream, from the fact of navigation or otherwise, than from a circumstance which

may or may not be conclusive evidence of its navigability. (*People v. Canal Appraisers*, 33 N. Y. 472.)

The case just cited, is a very full and thorough exposition of the test of navigability, and it is more than inferable, from the reasoning in that case, and in the numerous American cases there cited, that if a stream is in fact capable, in its natural condition, of being profitable used for any kind of navigation, its use is to that extent subjected to the general rules of law relating to navigation, applicable to the circumstances of the case. The large amount of lumber business done in the state of Maine, has undoubtedly led the courts of that State to give great consideration to the particular subject involved in this case, and they hold to the same rules on the subject of the use of small streams, that are announced in the case last cited. A stream, which, in its natural condition, is capable of being commonly and generally useful for floating boats, rafts or logs, for any useful purpose of agriculture or trade, though it be private property, and not strictly navigable, is subject to the public use as a passage way. (*Brown v. Chadbourne*, 31 Maine,—; 42 Maine, 558.)

"Though the adaptation of the stream to such use may not be continuous at all seasons, and in all its conditions, yet the public right attaches and may be exercised whenever opportunities occur." (Id.) "When a stream is inherently and in its nature capable of being used for the purposes of commerce, for the floating of vessels, boats, rafts or logs, the public easement exists, notwithstanding it may be necessary for persons floating logs to use its banks." (Id.) "The Penobscot river above the tide is not a navigable stream, technically speaking, although a highway, floatable for boats, rafts or logs, and as such, subject to the public use." (*Veazie v. Dwinell*, 50 Maine, 479.)

"No person has a right to permanently obstruct the channel of such stream by a boom across it, though he may do so temporarily, if necessary for the useful navigation of the stream." (*Davis v. Winslow*, 51 Maine 264.)

The court in this case remarks: "What is reasonable use, or due use, depends in every case on the subject matter, to which the case is to be applied, and the circumstances attending the subject matter at the time." Every person has an undoubted right to use a public highway, whether upon land or water, for all legitimate purposes of trade and transportation, and if in doing so, while in the exercise of ordinary care, he necessarily and unavoidably impede or obstruct another temporarily, he does not thereby become a wrong doer; his acts are not illegal, and he creates no nuisance for which an action can be maintained. If we concede the correctness of the reasoning in the above cases, it follows, that upon "a stream capable of being commonly and generally useful for floating boats, rafts or logs, for any useful purpose," and consequently "subject to the public use as a passage way," the persons lawfully using it can invoke in their favor all general rules of navigation that are in the nature of things applicable to the particular circumstances and kind of navigation. How far, then, may one, who has an undoubted right to navigate the stream, meddle with or touch upon the bank of the stream, which is private property? Whatever he has is founded upon necessity. If he has a right to meddle with the bank, it is only an incidental one. Although the riparian owner has an absolute right to enjoy his land, in all proper ways, the adverse party has an absolute right, as one of the public, to navigate the stream. Neither one can justly deprive the other of his rights. If the riparian proprietor could deny the navigator the right to come to land, in a case where the business of navigating could not be performed, without the privilege of landing, he could deny all use of the stream. He would thus overturn all that was contended for and adjudged in the cases above cited. While it is beyond question that the riparian owner is entitled to be protected from any unnecessary intrusion on his premises, it is equally certain that he cannot, solely for the maintenance of an abstract right, or an exclusive possession, deny to the public the

right of navigation. He takes his title subject to this right vested in the public.

If there had been no necessity for fastening the boom to the plaintiff's land, the act of fastening it would have been a trespass, for which the plaintiff ought to recover nominal damages at least; but, if the act was necessary in order to enable the plaintiff to exercise a right of navigation, no cause of action would lie for a bare intrusion, which worked no appreciable damages. Whether the necessity existed was a question for the jury.

It was said in argument "the respondent claims the right to obstruct the river as a public right." I think this was stating the respondent's claim too strongly; he claimed the right to attach his boom as a public right, and as necessary in order to use the stream, and it is true that the boom if kept attached too long became an obstruction, but he sought to excuse his act of leaving the boom attached a considerable time upon the plea that an unexpected rise of water rendered it impossible to detach it sooner. If he had a right to extend the boom to catch the logs, he of course had a right to keep it extended a reasonable time for that purpose. The question, what was a reasonable time for the removal of the boom was a question of fact, and was properly left to the jury. The record does not disclose that the plaintiff was injured, by admitting proof that the plaintiff had permitted booms to be placed on his land on previous occasions or that the court erred in that particular; for ought that appears by the record, it may have been properly offered in mitigation of damages.

Judgment should be affirmed.

BOWEN & CHAMBERS, Respondents, v. WM. EMMERSON, Appellant.

*Appeal from Baker County.*

**PLEADING.**—In an action for money due upon a contract, facts should be stated showing that a contract existed between the parties, and that it has been broken.

**IDEM.**—The complaint should state the promise and the consideration, or facts from which a promise or undertaking upon a sufficient consideration is necessarily inferred; and it should state facts showing that the time of payment has expired, or should show in what respect the contract has been broken.

**DEMURER.**—The objection "that the complaint does not state facts sufficient to constitute a cause of action," is not waived by failure to demur.

The facts are stated in the opinion filed.

*Kelly & Reed*, for appellant.

*L. O. Sterns*, for respondent.

UPRON, J. The objection, that the complaint does not state facts sufficient to constitute a cause of action, is not waived by failing to demur. (Code, sec. 70.)

The complaint states that, "on or about the eighteenth day of February, 1868, plaintiffs sold and delivered to the defendant 4,000 lbs. of flour, and that the same was worth \$212." It does not show that the defendant undertook or became obligated to pay for the flour within a designated time, or within a reasonable time, or when requested; nor that the time of payment had arrived before the commencement of the action. For aught that appears from the facts stated, the property may have been sold on credit, the time of which has not yet expired; or it may have been sold and delivered to the defendant upon the request and credit of another, with a full understanding that the defendant was not to pay for it. It is assumed in argument that complaints like the one under consideration are sustained, by adjudications in other states, under codes similar to ours; and particular reference is made to the state of New York. A



careful examination of the cases cited in support of this proposition will show that it is not correct. The decisions in some of the cases are based on special statutory provisions not contained in our code. For an instance, the code of New York, sec 162, provides, that "in an action or defense, founded upon an instrument for the payment of money only, it shall be sufficient for a party to give a copy of the instrument, and to state that there is due to him thereon, from the adverse party, a specified sum which he claims." Precedents are found, following the statute, which do not state facts only, but state conclusions. The same is true of other special provisions of statute. Cases predicated upon special provisions not contained in our code, furnish but little assistance in this investigation. Fortunately, our code contains but few special provisions on the subject of pleadings that amount to a departure from the general rule, that the complaint shall contain a plain and concise statement of the facts constituting the cause of action. Attempts to simplify by making special provision for particular cases, or classes of cases tend to complicate the system and to confuse, rather than simplify, the practice. They are generally a means of annoyance to the practitioner, and of delay and expense to parties. Every experienced pleader knows that there is nothing more difficult to the young practitioner, or that taxes more the memory of those who have experience, than to be compelled to conform to special statutes in pleading. Some of the cases cited purport to be based upon the general rule. The most prominent among them is that of *Allen v. Patterson* (3 Seld. 476). The opinion in that case, it must be conceded, is quite out of the general current of authority, and it is difficult to reconcile it with the numerous decisions in the same state, that announce and reiterate the rule, that the code requires facts to be stated, and not the conclusions that result from the facts. The opinion assumes, without argument and without citing any authority relating to the construction of any modern code, that the statement, that the defendant is indebted to the plaintiff in a certain sum, is

the statement of a fact, and, with equal brevity, it reverses the long settled rule, that "if the meaning of the words be equivocal, they shall be construed most strongly against the party pleading them." The statement that the defendant is indebted to the plaintiff, is substantially the conclusion to be found by the jury at the end of the investigation. (*Lienan v. Lincoln*, 2 Duer. 670; *Drake v. Cockraft*, 4 E. D. Smith, 34; *Seely v. Engell*, 17 Barb. 530; *Levy v. Bend*, 1 E. D. Smith, 169.)

It is not necessary in this case to determine to what extent the case of *Allen v. Patterson* should be considered law, because the complaint in this case does not show, by stating either facts or conclusions, that the defendant is indebted. The case of *Farron v. Sherwood* (3 Smith, 229) states the following rule, which seems entirely consistent with the enactments of the Code: "It was not necessary to state in terms a promise to pay, it was sufficient to state facts showing the duty from which the law implies a promise." A fault with the complaint in this case is that it neither states a promise to do any certain act at any specified time, nor states facts from which a duty to do so necessarily arises; or from which a promise is necessarily inferred. It is not probable that any method of pleading, in actions for money due upon contract, will ever be discovered, that is more simple and easy in practice, or better calculated to apprise the court and the parties of the grounds and nature of the action, or more likely to leave a clear and concise record of what has been done, than that which is now prescribed in the code. Notwithstanding this conceded truth, we sometimes meet with pleadings in this class of actions that neither conform to the common law, nor to the requirements of the code. In actions for money due on contract, the common law required a concise statement of the facts, and in some particulars, the employment of technical language—the code requires a *plain* and concise statement of the facts. In other words, the common law required the facts to be stated concisely, and sometimes in technical language; the code requires the facts to be stated concisely and in plain,

or ordinary language. In this class of actions, the pleader is required to state the facts, that show that a contract existed between the parties, that it has been broken, and in what particular, and the amount of damages the breach has caused. Facts only must be stated, as contradistinguished from the law, from argument, from conclusions, and from the evidence required to prove the facts. (*Coryell v. Cain*, 16 Cal. 571.)

The complaint does not in this case state facts sufficient to constitute a cause of action.

Judgment should be reversed.

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J. S. FELGER and WILLIAM PEARSON, Respondents,  
v. F. E. ROBINSON and W. F. HERNDON, Appel-  
lants.

*Appeal from Benton County.*

COMPLAINT.—An allegation that Mary's river was declared navigable for floating logs \* \* from Metzger's mill to the farm of William Wood \* \* and said logs were floated on said stream within said points, does not contain any claim of right to float logs over and past the dam at said mill.

CONSTRUCTION.—The right to float logs between certain points would not justify their doing damage at the terminus.

NAVIGABILITY OF STREAMS.—Any stream, on whose waters logs and timber can be floated to market, is navigable, and is a public highway for that purpose.

IDEM.—It is not necessary that the stream should be so available during the whole year to constitute it a navigable stream.

THE complaint in this case alleges that the plaintiffs are the owners of the real estate described therein, and that Mary's river, in its natural course, flows through the same, and is not a navigable stream; and that plaintiffs are the owners of a dam and mill on said premises, which said mill has been used by plaintiffs and their assignors for many years.

That on the first of January, 1869, the defendants put into the said stream, above plaintiff's dam, drift wood,

timber and logs, which floated down upon the dam and destroyed it, and made it useless, and that the mill was thereby rendered useless for about a month. There are other allegations in the complaint, with a view to charging consequential damages, but they are not material to the decision of the case in this court. The answer denies every material allegation in the complaint, and then, by way of new matter alleges, that Mary's river is a navigable stream, being made so by the action of the Board of County Commissioners of Benton county, about the year 1856, in pursuance of a general law of the then territory of Oregon. The answer also sets up as a defense, that said stream has been used for twenty years, for the purpose of floating logs down the same, by the inhabitants of the county, without objection, and that, therefore, the public have acquired a right to navigate the same for that purpose, by prescription. To this answer the plaintiffs demurred, and the court below sustained the demurrer to those parts of the answer, which set up the right to navigate said stream, under the authority acquired by the action of the Board of County Commissioners of Benton county, and the right by prescription, to which ruling exception was duly taken. The case then went to trial on the issues raised, between the complaint and answer, and the question as to whether the stream was navigable or not, was left to the jury, and the jury found a general verdict for the plaintiffs.

*Thayer, Burnett & Strahan*, for appellants.

What defenses may be set up. (Code, p. 157, sec. 72.)

Legislative bodies may declare streams navigable, and their action will not be slightly regarded. (Session Acts of 1856, p. —; 18 Barb. 277.)

The acts of the Territorial Legislature, unless disproved by Congress, are binding. (Organic Act; Laws of Oregon, p. 80, sec. 6.)

Under such act of the Legislature, the County Commissioners rightfully declared Mary's river a navigable stream, and appellants had a right to float logs there.

Shores of navigable streams, and the soil under the stream belong to the State as sovereign, and the public have an easement therein, or right of passage, as a highway. (3 Kent Com. 427; 3 How. U. S. 212; 31 Maine, 9.)

*Chenowith & Williams*, for respondents.

The answer showed no prescriptive right. (Ang. on Highways, 102.)

No act of the Legislature can authorize County Commissioners to take private lands without compensation. (6 Cow. 535; 6 Barb. S. C. R. 265; 17 Johns. 195.)

Legislation cannot interfere with the primary disposal of the soil. (Organic Act; Laws of Oregon, p. 70, sec. 6; p. 76, sec. 14.)

BOISE, C. J. The main questions for this court to determine, are 1st, was the ruling on the demurrer correct. The allegation in the answer is, "that said Mary's river was duly declared navigable for the purpose of floating logs by the Board of County Commissioners of the county of Benton, \* \* \* in pursuance of law, etc., from said Metzger's mill (the mill in question), to the farm of Wm. Wood in King's valley, said county, etc., and said logs were floated on said stream, within said points."

There is no allegation that, by said declaration of navigability, defendants were authorized to float saw logs over and past said dam, and the damage complained of is, that the logs broke said dam, and thereby caused the injury complained of. The right to float logs between certain points, would not justify their doing damage at the terminus. The same reasoning would dispose of the second point, provided there was a right by prescription between the same points, for, in the parts of the answer affected by the ruling on the demurrer, navigability is only claimed between Metzger's mill and Wood's farm, so we think the ruling on the demurrer can be sustained.

But the view which we have taken of the case renders these parts of the answer immaterial. We hold the law to be, that any stream in this state is navigable, on whose

waters logs, or timbers can be floated to market, and that they are public highways for that purpose; and that it is not necessary that they be navigable the whole year for that purpose to constitute them such. If at high water they can be used for floating timber, then they are navigable; and the question of their navigability is a question of fact, to be determined as any other question of fact by a jury. Any stream in which logs will go by the force of the water is navigable. Such is the rule in Maine, where small streams are used to great advantage in bringing logs from deep forests to places convenient for use. (*Moor v. Veazie*, 32 Maine, 348; *Treat v. Lord*, 42 Maine, 552; *Brown v. Scofield*, 8 Barb. S. C. R. 243.)

Such is now the settled law in those states that have adjudicated this question. And we think it the rule that best accords with common sense and public convenience, for these rapid streams, penetrating deep into the mountains, are the only means by which timber can be brought from these rugged sections, without great labor and expense; and by their use large tracts of timber, otherwise too remote or difficult of access, can be rendered of great value, as the country shall grow and timber become scarce. The question as to whether the legislature has authority to declare a stream navigable, is not material here. There is no doubt but the legislature has the authority to regulate the navigation of these streams, and make provisions for passing dams and booms, and it will undoubtedly express its authority in this respect, as this matter shall assume more importance. As there is nothing before the court in this case, except the ruling of the court on the demurrer to the complaint, the court does not have before it the merits of the case, to ascertain on what grounds the verdict was found, or whether in fact the jury considered the question of the navigability of Mary's river, and we are not at liberty to go beyond the record; but I will here say, that if Mary's river is capable of floating logs from along its bank to the Willamette river, or to mills on its own banks, then it is a navigable stream.

The judgment below will be affirmed.

W. H. and JOS. DELAY and LANSING STOUT, Appellants, v. W. W. CHAPMAN, Administrator, Respondent.

*Appeal from Multnomah County.*

**DONATION LAW.—HEIRS.**—Under the donation law of 1850, upon the death of a settler upon public lands before the expiration of four years continued residence, etc., all *his right* in such lands descend to his heirs, named in such law; and proof of compliance with the requirements of that law up to the death of the settler, entitles those heirs to the patent for the land; and such proof must be made by those heirs, or some one for them.

**IDEM.**—The right of such settler in such lands at his death was not an absolute fee—it was an estate which he could not convey or encumber by contract or devise, and was not available to his creditors, and not subject to his debts in any way; and this is the estate which under that law is cast upon the heirs.

**IDEM.—HEIRSHIP.—PURCHASE.**—Before a patent can issue in such a case, the heirs must make the proofs required—they must get the fee by their own act; and such an obtaining is by purchase, and not by descent.

**IDEM.**—The patent gives to them a different estate from the one possessed by their ancestor. They can encumber, alien or devise it.

**ADMINISTRATOR.**—In the estate thus acquired, or to be acquired, by the heirs by purchase, the administrator has no right or interest, and in this case has no right to defend the action.

THIS was originally an action at law brought by the plaintiffs, who are appellants here, to recover possession of certain lands patented by the United States to the heirs-at-law of Joseph and Sarah Delay, deceased. The defendant, as administrator of the estate of James L. Loring, filed an answer in equity, defending as such administrator, and setting up that, under the donation law, the patent should have been issued to the heirs-at-law of the said Loring, who, in his life time, claimed the premises under the law aforesaid, and who died in January, 1853, and praying that the patent might be canceled. The appellants having filed a replication it was tried on the issue thus made and the evidence of the parties, and a decree rendered in favor of the defendant in accordance with the prayer in his answer contained. From this decree the plaintiffs appeal to this court. The evidence adduced shows, that James L. Loring,

on the twelfth day of April, 1852, filed in the office of the surveyor general of Oregon notice of settlement upon the land in question, under the act of Congress, approved September 27, 1850, granting donations to settlers upon public lands, and on the twentieth day of April, 1852, made his proof as required by the act; and that in the month of January, 1853, Loring died, before completing the four years residence, etc. On the third of February, 1853, letters of administration were issued upon the estate of deceased to the defendant. Four years after the death of Loring, March 10, 1857, the administrator made final proof of the settlement of deceased. Before the death of Loring, Joseph Delay and his wife, claiming that Loring had abandoned the claim, settled upon the land in controversy, and made the necessary proofs of compliance with the act of September 27, 1850. It appears by the evidence, that after a contest between Chapman, as administrator, and the Delays concerning the land, a patent was directed to be issued to the heirs of the Delays, which was accordingly done.

*Page & Thayer, for appellants.*

A patent, having been issued to a person, carries with it the presumption that all previous requisites of the law have been complied with. (9 Cranch, 87; 18 Howard, 87; 13 Pet. 450.)

The code, as well as the old equity rule, requires the real party in interest to commence a suit.

That Chapman has no interest in the premises or in this suit. No title had vested in Loring—none could vest—for the grant was upon conditions precedent to be performed. (2 Bac. Abr. p. 291, secs. 6 and 7, Don. Law.)

That the heirs of Loring would take as purchasers, and not as heirs. (2 Paine C. C. R. 584; 19 N. Y. 384-90; 2 Denio, 23; 4 Mason, 489.)

The rule in Shelly's case does not apply:

1st. Donation act changed the course of descent. (Deady, J., *Fields v. Squires*, pp. 32-35.)



2d. The ancestor's estate was not a freehold. (Greenleaf's Cruise, vol. 4, p. 307; 4 Kent, 220.)

3d. Estate of ancestors and heirs are different. (15 B. Monroe, 282; 1 Curtis C. C. R. 419.)

The ancestor took only an equity. (5 Cranch, 191.)

The heirs, as purchasers, have an original title. (4 Kent, 216; Black Com. p. 248.)

*W. W. Chapman and Mitchell, Dolph & Smith, for respondent.*

An administrator has the right to the possession of the real and personal estate of the decedent. (Code, p. 334, sec. 10.)

Real and personal estate are chargeable with the debts and claims against the estate. (Code, p. 354, sec. 11 and 421, sec. 1,028.)

When personal property insufficient to satisfy same, the real estate is made subject thereto. (Code, 1855, p. 360, sec. 7; Id. p. 363, sec. 25; Id. 1862, p. 428, sec. 1,113.)

KELSA, J. The patent having issued to the heirs of Joseph and Sarah Delay, carries with it the presumption that all prerequisites of the law have been complied with by them. (9 Cranch. 87; 18 How. S. C. Rep. 87.) The defendant rests his right to the premises, and to have the patent canceled, on the ground that he is the administrator of the estate of Loring. If Loring had at the time of his death an estate in the premises that could be reached by creditors, or that was subject to be administered upon, then the defense is good, otherwise it fails. If there is a right in the heirs of Loring to the premises, and none subject to administration, *they* must be the parties in the suit to cancel and not the administrator. One of the rules governing equity proceedings is, that every suit shall be prosecuted in the name of the real party in interest, except that an executor or an administrator, a trustee of an express trust, or a person expressly authorized to sue by statute, etc., may sue without joining with him the person for whose benefit the

suit is brought. (Civil Code, sec. 379.) Loring having died before the expiration of four years, continued possession required by the Act of Congress, the rights of his heirs depend on sec. 8 of the Donation Law (Code, page 88.) That section provides: "That upon the death of any settler before the expiration of the four years continued possession required by this act, all the rights of the deceased under this act, shall descend to the heirs at law of such settler, including the widow where one is left, in equal parts; and proof of the compliance with the conditions of this act up to the time of the death of such settler, shall be sufficient to entitle them to a patent." The rights the deceased had at the time of his death were limited by the 4th section of the Donation Law (Code, pp. 85, 86), which provides: "That all future contracts by any person or persons entitled to the benefit of this act, for the sale of the land to which he or they may be entitled to under this act before he or they have received a patent therefor, shall be void." (1) It is further provided in the 4th section, that, "in all cases where such married persons have complied with the provisions of this act so as to entitle them to the grant as above, provided, whether under the provisional government of Oregon, or since, and either shall have died before patent issues, the survivor, and children or heirs of the deceased, shall be entitled to the share or interest of the deceased in equal proportions, except where the deceased shall otherwise dispose of it by testament duly and properly executed according to the laws of Oregon." The deceased, at the time of his death, had no estate in the premises that he could convey or encumber by contract or devise, being prohibited by the above provision. The creditors of the deceased, in his lifetime, could not reach the land in any manner to secure the payment of their debts.

It is claimed on the part of the defendant, that Loring had in the land, up to the time of his death, a conditional fee, or estate in fee, liable to be defeated on failure to comply with conditions subsequent. Strictly speaking, and

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<sup>1</sup> The provision above quoted, was repealed.

using words in their precise legal import, Loring did not have an estate in fee in the land liable to be defeated on failure to comply with conditions subsequent. Persons who have an estate of freehold subject to a condition, are seized, and may convey or devise the same, or transmit the inheritance, though the estate will continue defeasible. (4 Kent, 125.) It is a principle of law, that if the condition subsequent be possible at the time of making it, and becomes afterwards impossible to be complied with, either by the act of God, or of the law, or of the grantor, the estate of the grantee, being once vested, is not thereby divested, but becomes absolute without any act on the part of the heir. (4 Kent, 130; 2 Blackstone, 156, 157.) If the estate became absolute on the death of Loring (he being an unmarried man), then his heirs would take by descent, the law having cast the estate upon them immediately on the death of their ancestor. (2 Blackstone, 201, 202.) The 8th section of the Donation Law, provides that all the rights of the deceased under the act, shall descend to the heirs at law of such settler in equal parts; and also provides what proofs they, or some of them, must make before they get the fee. All the rights of the deceased, at the time of his death, in the premises, stopped far short of an absolute fee. Loring, as I have said, could neither encumber, alien, nor devise the land; nor could his creditors reach it for their debts. This is the estate which descended to the heirs of Loring, and nothing more.

It is claimed on the part of the plaintiffs, that the grant made by the fourth section, with the limitations contained in the eighth section of the donation law, creates an estate known in law as a conditional limitation; this position is also incorrect. A limitation marks the period which determines the estate, without any act on the part of him who has the next expectant interest. Upon the happening of the prescribed contingency, the estate first limited comes to an end at once, and the subsequent estate arises. A conditional limitation is of a mixed nature, partaking both of a condition and a limitation; of a condition, because it

defeats the estate previously granted, and of a limitation, because upon the happening of the contingency, the estate passes to the person having the next expectant interest, without entry or claim. (4 Kent, 127; 3 Gray, 147; 2 Blackstone, 155-6.) It is a principle of law in respect to real estate, that the fee must at all times be vested in some one—an abeyance of the fee is against the policy of the law. (2 Denio, 350; 1 Hilliard, Real Prop. 53, sec. 46-7.) The estate of the grantee under the act, previous to the completion of the prescribed four years' possession, is peculiar to the donation law.

It is provided in the eighth section, that proof of compliance with the conditions of the donation law up to the time of the death of such settler, shall be sufficient to entitle the heirs to a patent. This proof must be made by the heirs, or by some one of them, and until that shall have been done, the heirs will not be entitled to a patent. If the heirs of Loring are entitled to the land, they obtain it by purchase and not by descent; for the reason that they get the fee by their own act. There are only two ways of acquiring real property—one by descent, the other by purchase. If a person does not take as heir, he takes by purchase; no matter how he acquires it. (2 Blackstone, 241.) By the proof of the heirs, as provided in the eighth section, and the issue of the patent to them, they acquire in the land a new, inheritable quality which the ancestor did not own. They can incumber, alien, and devise the land. (2 Blackstone, 248.) This new estate, which is by the patent grafted upon the heirs of the ancestor, and which they could not take by descent from him, they must take by purchase, or as grantees. When proof is made under the eighth section by the heirs, then all the rights of the ancestor, in the land, clogged and hampered as it was in the ancestor's lifetime, descends to the heirs, together with all the estate in the land, and their title becomes absolute. A new inheritance is grafted upon them, of which they are the root, and not their ancestor. Certainly the heirs get an estate which the ancestor never had; hence they take by purchase and not

by descent. (15 B. Monroe, 314-15; 3 Washburn, Real Prop. page 6, sec. 4; Id. page 10, sec. 18.) If the heirs of Loring are entitled to the land, they acquire the title by purchase, and the defendant, as administrator, has no right, title or interest whatever in the land, and no right to defend this action.

The judgment of the court below must be reversed.

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AMELIA COWENIA et al., Appellants, v. D. B. HANNAH et al., Respondents.

*Appeal from Multnomah County.*

**TREATY.**—Article III of the treaty of 1846 between the United States and Great Britain, construed, that neither power intended in any way to dispose of the soil or embarrass the right of eminent domain.

**TITLE.**—That the only title during joint occupancy would be a mere possession, and would extend only to the land actually occupied.

**DONATION LAW.**—The act of 1850, called the donation law, makes no provision for one dying before the passage of the law—it only provides for persons *in esse*. Nor did that act enlarge possessory rights.

IN this case the appellants claim six hundred and forty acres of land in Multnomah County. They allege that a British subject, William Johnson, was residing on this land prior to the treaty of 1846 between Great Britain and the United States, fixing the northern boundary of Oregon territory and terminating the convention of 1818, and that the third article of the treaty of 1846 gives these appellants, who claim under him, Johnson, a title to this land against the defendants, who have a patent to the same from the United States.

Demurrer to complaint sustained.

*Stout & Shattuck*, for appellants.

Article 3 of the treaty of 1846 was intended to give the land then occupied by British subjects, in accordance

with regulations then existing in Oregon territory (4th sec. Don. Law). Congress considered the treaty as a *grant of land*.

The donation law respects such titles. (2 How. 591; 14 Peters, 353.)

First treaty was in 1818, and existed for ten years, and in 1827 was continued indefinitely, and the treaty of 1846 defined final position of rights.

*Wait & Parrish*, for respondent.

If the "possessory rights" of British subjects have not been respected, that fact gives them no right to the soil—such claims are adjusted in article 1, treaty of 1863.

Johnson would only in any event only have such property as he actually had enclosed.

What are possessory rights? (5 Wallace, 599; 6 Wallace, 663.)

British subjects had only an estate analogous to an *estate at will*.

The British subjects were here only by permission or license, and that would expire either by *removal of license*—by revocation—by expiration of the title of the licensor.

What is a license? (Wash. Real prop., p. 412; 11 Mass. 533; 7 Taunt. 374; 15 Wend. 380.)

The possessory rights of British subjects, pushed to the utmost extent, are only:

1st. Rights to the possession of the land actually occupied by them at the time of the treaty.

2d. Right to use the land at that time occupied, as they had been accustomed to use it.

3d. To maintain possessory action against trespassers.

A transfer of sovereignty does not disturb existing property rights. (9 Peters, 117.)

Possession can *never* confer title when it is permissive, but only when it is adverse. The legislature and judicial departments have sanctioned our construction of the treaty—by passing the land law—by extending the pre-emption laws—by judicial decision. (*Lounsedale et al. v. Parrish*, 21 How. 290.)

BOISE, J. The 3d article of the treaty of 1846 provides "in the future appropriation of the territory, south of the forty-ninth parallel of north latitude, as provided in the first article of this treaty, the possessory rights of the Hudson Bay Company, and of all British subjects, who may be already in the occupation of land or other property lawfully acquired within said territory, shall be respected." It is claimed that this language was meant to confer titles on the persons, named in this article as British subjects, having possessory rights to land within the territory; for, it is not a mere possession that is here asserted, but a fee simple title. If the treaty only conferred a mere right of possession, then, whenever that possession was abandoned by the occupant, it would cease. It would also determine with the death of the occupant; for a mere title to possession does not descend to heirs; and, if simply personal, cannot be assigned unless it be for a term. In determining this question, it is important that we look at the history of British occupation in this territory, prior to the convention of 1818, between the United States and Great Britain. The United States claimed the country drained by the Columbia river by right of discovery. Great Britain was also claiming the same right to it. The convention of 1818 by the third article provided as follows, to wit: "It is agreed that any country that may be claimed by either party, on the northwest coast of America, westward of the Stony mountains, shall, together with its harbors, bays and creeks, and the navigation of all rivers within the same, be free and open for the term of ten years, from the date of the signature of the present convention, to the vessels, citizens and subjects of the two powers; it being well understood that this agreement is not to be construed to the prejudice of any claim which either of the two high contracting parties may have to any part of the said country, nor shall it be taken to affect the claims of any other power or state to any part of said country; the only object of the high contracting parties, in that respect, being to prevent disputes and differences among themselves." This article was extended in

1827, and continued in force until the treaty of 1846, under which appellants claim title. I think it apparent from the language of this article, that it was the intention of the two nations, that neither should in any wise dispose of the soil, or in any way embarrass the right of eminent domain, during the continuance of the convention of joint occupancy, so that no title could be acquired, during that time, higher than a mere possession, and this possession would extend no farther than the land actually occupied.

The treaty of 1846, treated of these lands as they then were; and had the parties intended to raise these possessory rights to a higher title, it would have been so provided. I think these possessory rights would cease on being abandoned, so that the possessor became disseized by his own voluntary failure to occupy; or, on his death, as such rights would not descend to heirs; and further, I think that as Johnson died before the passage of the Act of Congress of 1850, September 27th, he was not one who could be provided for by that act, as that only provided for persons *in esse*. Nor do I think it was the intention of the Act of Congress of September 27, 1850, to enlarge the possessory rights, provided for in the treaty of 1846, but only to recognize them, to the extent that they had been granted, and to exclude those claiming under the treaty, from any benefit under the Donation Law; and all that class of persons, named in the treaty, would have been excluded without this provision, for they are described as *British subjects*; and none but native citizens, or persons who were naturalized, could obtain land under the act of 1850; and when a person becomes naturalized he is no longer a citizen of his former sovereignty, there is a change in his relations to his adopted country; and by the theory of our government he would cease to be a *British subject*. It was intended that such should not claim under the treaty, and also under the Donation Law; and a claim, under the latter, was a surrender of the possessory rights under the treaty.

The judgment will be affirmed.



JOHN FASSMAN, Respondent, v. CHRISTIAN BAUMGARTNER and ANNA SCHRANN, Appellants.

*Appeal from Benton County.*

**APPEAL.—JUDGMENT BY CONFESSION.**—Sec. 526 of the Code provides that no appeal shall lie, in cases of judgment or decree, by confession or for want of answer.

**APPEAL.**—By an attempted appeal from a decree for want of answer, this court acquires no other jurisdiction over the subject than the power to dismiss such appeal.

At the November term, 1869, of the circuit court for Benton county, the defendants, appellants here, withdrew their answers, and judgment [decree] was rendered upon the complaint as upon failure to answer. The defendants afterwards gave notice of an appeal, and filed the usual bond, but failed to file a transcript in the supreme court by the second day of this term. The respondent Fassman brought a certified copy of the bond and necessary papers, and moved here for an affirmance of the judgment, with ten per cent. damages.

*Strahan & Burnett*, for the motion.

*F. A. Chenoweth*, against.

**PRIM, C. J.** Section 526 of the Code declares that “any party to a judgment or decree, other than a judgment or decree given by confession, or for want of answer, may appeal therefrom.”

When a case is here upon a proper appeal, this court may take any action thereon authorized by statute. But this motion develops facts showing that this was an attempted appeal in a case in which the law admits of no appeal. The parties below were present in that court, and the defendants substantially failed to answer, and the decree was given for that reason.

There could be no appeal. This court could acquire no jurisdiction of the case, other than to dismiss the attempted appeal.

The plaintiff below might have treated the appeal as a nullity, and procured an execution at any time.

Motion is denied.

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HENRY BECKLEY, Appellant, v. M. M. LEARN,  
Respondent.

*Appeal from Douglas County.*

FERRY.—Under the law of 1854, sec. 40, p. 868, a ferry license becomes a limited franchise.

IDEM.—At the expiration of any term of license, the owner of the lands, embracing the ferry landings, might assert his right to a preference to the grant of license, with the same effect as he might have done at the time of the establishment of the ferry.

At the April Term, 1864, of the county court for Douglas County, a license was granted to M. M. Learn, to keep a ferry over Umpqua River, known as Trenton Ferry, for the term of five years. At the February term, 1869, of the same court, Learn applied for a renewal of his license for a term of five years. At the same time, Henry Beckley applied for a license to keep that ferry for five years.

The court found that Beckley was the owner of the land on both sides of the river, comprising the ferry landings, and that Learn had given no notice to Beckley of his intended application for a renewal of his license. The license was given to Learn, and Beckley's application rejected, and upon appeal to the circuit court, the judgment of the county court was affirmed, and Beckley appeals.

In 1864, when Learn obtained his license, and the ferry was established, one Mills was the owner of the lands on both banks of the river, but Mills failed to apply as such owner for the license. Mills in the meantime, had sold the lands and conveyed them to Beckley.

*Watson & Lane*, for appellant, claim that the owner of the land is entitled to a preference in obtaining a license, and cite 3d Kent 554 (10th Ed.); Oregon Statutes, p. 869, sec. 42; 2 Oregon Reports, 220; 1 Oregon, 35; 18 Iowa, 336; 29 Cal. 458; 5 Cal. 47.

That unless the owner of the land fails to apply, no other person can obtain a license (2 Oregon, 238), and if he fails to apply, a former licensee, can, of course, obtain a renewal, or an applicant can obtain a license. (Code, p. 868, sec. 40.)

That the court had no right to grant any one a license before the expiration of the former license, without ten days notice to the owner of the soil. (Code, p. 869, sec. 42, 43.)

*W. B. Willis*, for respondent.

If the owner of land once waives his preference for a license, he has no interest, except as a citizen at large. (1 Oregon, 38.)

Granting and renewing licenses are entirely different. In the grant of a license, there must be a petition showing, to the satisfaction of the court, the necessity of a ferry, there must be notices, etc. These are not required in a renewal. (Code, p. 868, sec. 43; 5 John, Ch. R. 106.)

If notice was necessary to Beckley, he has waived it by appearing in the Court below. (1 Oregon, 341; 2 Oregon, 89.)

Mills, the assignor of Beckley, had failed to assert his preference, and his assignee had no rights saved to him over those of a citizen at large.

THAYER, J. We think that in the enactment of the law of 1854, sec. 40, p. 868, of the Code, the Legislature materially changed the character of ferry licenses as to their term. What before had been a perpetual franchise, and was so held in *Cason v. Stone*, 1 Oregon, 39, after 1854, became a franchise, limited to a term of five years. Both laws gave to the owner of the lands embracing the ferry landings, at the *establishment* of a ferry, a preference to a grant of license

if he applied. Under the law before 1854, if he failed to apply, then, he lost his presence *forever*, since a perpetual franchise had been vested in another. Under the present law, we think he loses his right only during the term of a license granted to another, upon his failure to apply therefor, and that at the expiration of a term of license, he may assert his preference, to the exclusion of every other person, including the former licensee. Our law makes a difference as to manner of application of a holder of a license for its renewal, and that of a new applicant. The latter is compelled to give notice, etc., but a *renewal* can be obtained without petition, or notice to the owner. Learn was entitled to a renewal of his license, if found to be a proper person, until Beckley appeared as an applicant for the license; and when the court found him to be the owner of the land, and a competent person, then Learn's application should have been denied, and the license given to Beckley.

The judgment should be reversed.

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WILLIAM M. PITTMAN, Appellant, v. EMILY C.  
PITTMAN, Respondent.

*Appeal from Benton County.*

**APPEAL.—STATEMENT.**—A cause will not be dismissed, of course, for want of a statement, or because the statement certified here is defective.

**DECREE.**—An order, made in a divorce suit, assigning the minor children to the custody of one of the parties, is in the nature of a decree, and is a subject of review on appeal under sec. 525.

APPELLANT obtained a divorce below, from respondent, on the ground of harsh and cruel treatment, but in the decree the court awarded the two minor children to the respondent until ordered otherwise. From this portion of the decree, he took an appeal. Respondent moves to dismiss the appeal on two grounds: 1st, there is no statement, and 2d, that such an order is not a subject of appeal.

*Strahan & Burnett*, for the motion.

*Ohenoweth & Williams*, *contra*.

PRIM, C. J. The first question is upon the sufficiency of the statement, while it sets forth the facts, it does not contain the grounds upon which the appellant intends to rely. The law requires that the certificate of the attorney shall contain the particulars in which the judgment or decree is alleged to be erroneous. In addition to this certificate, by sec. 526, Sess. Laws, 1866, p. 12, if the appealing party desires a statement, it shall, when made, "contain *the grounds* upon which he intends to rely on the appeal, and so much of the evidence, as may be necessary to explain the grounds, and no more;" and shall be served on the adverse party. Our practice is not to dismiss cases for want of a statement, or for a defective one, since questions may arise in every case which require no statement for their full consideration here. The statement in this case is defective, and inoperative as such, but we overrule this point in the motion. The second question is, whether this case presents any judgment, order or decree, which we are permitted to review. Sec. 525, p. 280 of the Code, provides "a judgment or decree may be reviewed as prescribed in this title, and not otherwise. An order affecting a substantial right, and which in effect determines the action or suit, so as to prevent a judgment or decree therein; or a final order affecting a substantial right, and made in a proceeding after judgment or decree, for the purpose of being reviewed, shall be deemed a judgment or decree."

The appellant appeals from an order made, assigning the minor children of the parties in a suit for divorce, and made at the time of the decree. The pleadings in that suit show that an issue was made directly on the question as to the claim for and disposition of the children. That order gave them to the defendant below, with the usual provision as to the future power over them by the court.

The law of marriage and divorce gives to the court full power over that subject, and oftentimes, that is the only contested question in such cases. The order of the court, we think, disposes of the children as though it were a divorce; and, so far as the invoking of the power of the court in that suit is concerned, is a final one.

In that view, it becomes a subject of review here under the section cited.

The motion to dismiss is therefore overruled.

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**JAMES McDONALD, Appellant, v. DAVID EVANS,**  
Respondent.

*Appeal from Douglas County.*

**COSTS.**—Construction of sec. 539 of the Code, as to when a party is entitled to costs.

**IDEM.**—Costs can in no action at law be awarded to both parties.

THIS action was commenced in the county court of Douglas county to recover the possession of certain personal property, viz: six head of cattle. The defendant recovered a judgment, which was removed by appeal to the circuit court. The complaint contains the usual allegations for such recovery. The answer controverted each of the allegations of the complaint, and alleged affirmatively that the defendant was the owner of said property, and, in the prayer for relief, asked for costs and disbursements; but neither claimed the return of the property nor damages for the detention thereof. Upon trial the jury found that plaintiff was the owner of one of the cattle described in his complaint, and that the same was of the value of \$25. They also found that the defendant was the owner of the other five head of said cattle, and that they were of the aggregate value of \$150. The court rendered judgment in favor of the plaintiff for the possession of one of the cattle, and in favor of the defend-

ant for the others. The court below awarded to the plaintiff costs and disbursements to the sum of \$25, and full costs to the defendant to be taxed by the clerk.

*Watson & Lane*, for appellant.

Our statute provides for costs. (Code, p. 287 sec. 539.)

Costs allowed to defendant when the plaintiff is not entitled to them. (p. 287, sec. 541.)

A party entitled to costs is also entitled to disbursements. (Code, p. 288, sec. 543.)

*W. R. Willis, Esq.*, for respondent.

Plaintiff could recover but \$25 costs. (Code, p. 287, subdiv. 5, sec. 539.)

Both parties are actors or moving parties. (Steph. *Nisi Prius* 2482.)

Defendant was entitled to his costs and disbursements herein. (How. N. Y. Code, 494; 6 Hill 353; 2 Wend. 637; 12 Wend. 285.)

THAYER, J. The only question here is as to whether one or both of the parties is entitled to costs. Costs in every case are awarded by provision of statute—at common law they were not allowed.

After a close examination of the statutes we have not been able to find any authority, in any case, for awarding costs to both parties. Had the plaintiff in this case proceeded only to recover the possession or value of his property, and not resorted to his provisional remedy; in that event, having recovered the possession of property of the value of \$25 only, he would have been entitled to \$25 cost only, and the defendant would not have been entitled to any costs whatever.

The statute provides (p. 204, sec. 259) that, "in an action to recover the possession of the personal property, judgment for the plaintiff may be for the possession or value thereof, in case a delivery cannot be had, and damages for the detention thereof. If the property had been delivered to the plaintiff,

and the defendant claimed the return thereof, judgment for the defendant may be for a return of the property, or the value thereof, &c." Doubtless, under this provision, the defendant could recover any portion of the property proved on the trial to be his: provided, he claimed a return thereof in his answer. In this case he has made no such claim, and would be entitled to no such relief. In case, however, the plaintiff should retain the property after the termination of the action, defendant's remedy would be by action on his part. (5 Denio, 21.)

By the revised statutes of New York, both parties, under certain circumstances, may recover costs in the same action. (2 Denio, 188.) But it will be seen that costs cannot be awarded in that state, when the action in its nature is entire; and in no event will they be allowed, except under the provisions of the statute referred to.

In justice, the defendant, in the case at bar, might be entitled to costs, but unfortunately for him, we have no statute which so permits and this court cannot legislate. Under our statutes, costs are only allowed of course, to the defendant, when the plaintiff is not entitled to costs, p. 287, sec. 541. In this case, plaintiff being entitled to costs, this defendant cannot be. In a similar case in Massachusetts, costs were allowed to both parties. This decision, however, must have been made under some peculiar provision of their statutes, as it could not have been made under any common law provision for the reason before mentioned, that at common law neither party was entitled to costs. (*Burrill Low Dic.* title "costs.")

Judgment reversed.



THOMAS BANKS, Respondent, v. S. H. CROW,  
Appellant.

*Appeal from Douglas County.*

**JOINDER OF ACTIONS.**—A contract was alleged to have been made to convey to the plaintiff "a certain farm, a certain town lot, and twenty hogs" for the consideration of eight hundred dollars, and in an action brought thereon, the complaint averred that a deed had been executed for "a part only of the real property," and that there was a refusal to deliver the hogs, and that the plaintiff had been damaged thereby in the sum of \$180: *Held*, that the complaint set up but one cause of action.

**SALE OF LAND.—PAROL.**—Respondent was called as a witness to prove the contract: *Held*, it was error to admit parol evidence of the contract for the sale of land.

**SEVERABLE CONTRACTS.**—A contract to sell a farm, a town lot, and certain personal property for a gross sum, is not a severable contract.

**VARIANCE.**—If the plaintiff seeks to recover on a contract essentially different from the one set up, he should obtain leave to amend.

**WITHDRAWAL OF PART OF CAUSE OF ACTION.**—The verdict by the jury was, "We, the jury find that the town lot in the town of Oakland, Douglas County, Oregon, designated in the plaintiff's complaint, is the property of plaintiff, and further, we, the jury, find for the plaintiff ninety-four dollars;" *Held*, that the town lot had not been withdrawn from the case, and its sale forming a part of the parol agreement, rendered the contract void.

THE complaint charges that the defendant agreed with the plaintiff for the consideration of \$800, to sell and convey to the plaintiff a certain farm described in the complaint, a certain town lot also described, and twenty hogs designated—that the said sum has been duly paid to the defendant in gold coin; that defendant has executed a sufficient deed "to a part only of the real property," and has refused, and still refuses to deliver the hogs, and that the plaintiff has been damaged \$180 by the refusal to deliver the hogs.

The answer denies making the alleged agreement, and charges that the defendant agreed to sell the farm and the hogs to the plaintiff for \$800, and that he has fully performed and complied with the terms of the agreement, and has delivered the said hogs. At the trial the plaintiff appeared as a witness, and was asked to state the terms of the contract.

Objection was made that the contract, being for the sale of land, could not be proved by parol. The witness was permitted to answer, and this ruling being excepted to is assigned as error. Afterwards, in the course of the trial, the plaintiff announced that he abandoned all claim for damages as to the town lot, and he now claims that the error, if there was any, in admitting parol evidence of the contract, is waived or cured by the abandonment, and that the whole case as it now stands shows that the error does not affect a substantial right of the party.

*W. R. Willis*, for the appellant.

When the terms of an agreement have been reduced to writing, it is to be considered as containing all those terms, and no parol evidence of the terms can be admitted. (Code p. 317, sec. 682.)

If the consideration is single and entire, the contract is, and cannot be divided. (8 Johns. 258; 5 Wend. 164; 2 Parsons Con. 519; 22 Pick. 457-60.)

Part performance will not take it out of the statute of frauds. (10 N. Y. 282; 5 Cowen 162; 2 Johns. 221; 20 Pick. 134, etc.)

The plaintiff's remedy was an action to recover back the money paid, disaffirming the contract.

The price of the hogs and town lot being a part of an entire contract, cannot be fixed by parol evidence.

*Watson & Mosher*, for respondent.

An agreement void in part, is not necessarily void *in toto*. It is universally held that no one can receive or enjoy the goods or services of another, and then rely on the statute of frauds as an excuse for not paying for them. (13 Ind. 1-11; 28 Ver. 34.)

The contract was fully completed on the part of the plaintiff. Equity will not allow the statute of frauds to be assigned as a reason why it should not be performed as to the other. (22 Ill. 63; 7 Ohio, 157; *Suggett v. Corson*, 26 Missouri.)

The rigid rules of law as to the statute of frauds, and the indivisibility of contract, is greatly relaxed by modern decisions. (28 Ver. 497; 28 Ver. 558.)

.. UPTON, J. It requires no argument to show that parol evidence was inadmissible to prove the contract set up in the complaint. The position assumed by the respondent, is that the case may be treated as if no mention had been made of the town lot; that the contract being for the sale of a tract of land and certain personal property, and the land being conveyed, and thereby that part of the contract required to be in writing being performed, the statute of frauds does not apply. He cites *Irvin v. Stone*, 6 Cush. 508; *Rond v. Macher*, 11 Cush. 1; *Davenport v. Mason*, 15 Mass. 85; *Benedict v. Beebe*, 11 John, 145; *Wilson v. Ray*, 13 Ind. 1; *Pierce v. Paine*, 28 Ver. 34, and states the rule to be, "An agreement void in part is not necessarily void *in toto*, but a part, which would not be void if it stood alone, may be held valid if it can be separated from the part which is void." If we reject all that is said of the town lot, and treat of the farm and personal property only, this rule may be applicable to the case before us, especially if the farm was conveyed at the time of making the parol contract. A contract which is not severable, if void in part is void in whole. In the case supposed, one gross sum \$800, is to be paid for both the farm and the personal property.

But it is said the farm being conveyed, and it having become immaterial what part of the \$800, applied to purchase the personal property, since it was the surplus above paying for the farm, be it more or less, and was already paid over, nothing of the contract remains to be performed but the delivery of the hogs. From this it is assumed that the agreement to sell the personal property is severable, and stands as independently as if the agreement had been to sell the farm for \$700 and the hogs for \$100. In other words, the claim is that the land has been conveyed to the plaintiff by a deed, which is a compliance with the statute requiring

a writing; the personal property has been fully paid for, and therefore it can never be material to determine how much of the gross sum is apportioned to the one or the other; that in case of non-delivery of the personal property, the remedy is by an action for the damages occasioned by the failure to deliver, and the amount of damage is in no way dependent upon the price paid.

The case thus stated may be a stronger one, than where the land and personal property are bargained at the same time, the one at one price, and the other at another price; because, in the latter case, some advantage in purchasing both together, or an anxiety to obtain the land, may be the leading and main inducement to promise to pay the agreed price for the personal property, and that may be a reason why the contracts should not be deemed severable. But it is not rendered certain by the record in this case, that the deed was executed at the time of making the agreement for the sale of the land and the personal property. If the deed was not executed then, there was for a time an agreement that was in part void by the statutes of frauds, its parts were not then severable, and it was then material to know how much of the gross sum of \$800 should apply in payment for the hogs, to enable the purchaser to have the benefit of that part of the contract, without enforcing the part that was unquestionably void. Whether we conclude from this record that the deed was not, or was, made at the time of entering into the contract declared upon, the respondent's agreement is based upon the position, that the case stands here as if the town lot had not been mentioned in the complaint. In order to a fair consideration of that question, it should be observed that the lot was a matter upon which the jury was permitted to deliberate. The court charged the jury as follows: 1st. "If the jury believe from the evidence, that at the time the contract was made, the defendant then and there delivered a deed for the real estate mentioned in the contract to the plaintiff, and that a part of the purchase money was then and there paid to the defendant; and if they further believe from the evidence, that by virtue of said contract, the plaintiff was to

receive a number of hogs, the consideration of which was paid by plaintiff, and the hogs were then on the premises and could be identified by marks and numbers from all others; then they must find for the plaintiff." 2d. "If you believe from the evidence, *that the town lot was not included in the contract*, and it was so understood by the plaintiff and defendant, and formed no part of the consideration for the purchase money for the land and the hogs, then the lot must be regarded out of the case." 3d. "If the jury find that *the lot was not mentioned* at the time the contract was made, the plaintiff cannot recover."

Court refused defendant's request to charge: 4th. "If the jury find that the defendant delivered the hogs with the land, then the verdict must be for the defendant." 5th. "If the jury find that the contract for the price of the land and town lot, and the hogs mentioned in plaintiff's complaint was one entire contract, and for one and the same consideration, the plaintiff cannot recover here."

The jury returned the following verdict, "We, the jury, find that the town lot in the town of Oakland, Douglas County, Oregon, designated in the plaintiff's complaint is the property of plaintiff, and further, we, the jury, find for the plaintiff ninety-four dollars."

It is evident from this charge and verdict, that proper steps were not taken to divest the case of the peculiar character given to it by the allegation, relative to the town lot. The more satisfactory way to accomplish that, would have been by application to the court for leave to amend the complaint. By the authorities before cited, a party may be allowed to withdraw a distinct cause of action without a formal amendment, but what is alleged in regard to the town lot, was not set up as a distinct cause of action—in fact the complaint sets up but one cause of action, Code, p. 91, sec. 8, and it was not regarded by the court as a case where the variance between the allegations and proofs was to be disregarded as not affecting a substantial right. If it had been, the judge, instead of leaving it to the jury to say

whether the contract embraces the town lot, would have instructed that the allegations in regard to the town lot were deemed withdrawn, and that the jury were not to consider that subject. It is clear from the record, that the respondent relied upon the illegality of the contract, set up in the complaint, and that the case was submitted to the jury embarrassed with questions, connected with the alleged sale of the town lot, liable to confuse the case, and divert the minds of the jury from the issue that would have been properly before them, if the complaint had been amended by striking out what was alleged in regard to the town lot. Error will not be presumed, but that the case was thus improperly encumbered appears affirmatively in the charge and verdict. I think it would be inconsistent with safe or desirable practice, and against precedent, to disregard the void contract set up in the complaint, and allow the plaintiff to prove a legal contract, different in an essential particular from the one charged. I also think that the court erred in refusing to instruct that "if the defendant delivered the hogs with the land, the verdict must be for the defendant.

This action was for breach of a special contract to sell and deliver. There was some evidence tending to show that the hogs had been delivered in pursuance of the contract proved, and the question of delivery should have been left to the jury.

The judgment should be reversed.

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C. A. WILSON, Appellant, v. THE CITY OF SALEM,  
Respondent.

*Appeal from Marion County.*

Cours.—Bill of disbursements, how constituted, nature of objections thereto.

THIS case was an appeal from an allowance of disbursements to respondent, and invokes no questions other than those decided in *Crawford v. Abraham et al.*, 2 Oregon, 163, and requires only an extension of the rulings there.

*Williams & Willis*, for appellant.

*Mallory & Shaw*, for respondent.

WILSON, J. In preparing the bill of disbursements, which one party claims to recover of the other, each item is a *separate claim*, for which a separate allowance might be asked, and each item should be briefly, but particularly set forth, just as in a complaint. Each *cause of action* must be specifically set out, and must of itself, show a right to recover thereon; applied to this case, the reason is apparent. The opportunity must be given for the other party to object to the allowance, and by the rule in *Crawford v. Abraham et al.*, 2 Oregon, 163, he must object specially to each claim or distinct part thereof set forth. If this be not done, that item or part is admitted to be a proper charge.

The attendance of a witness is an item; the mileage of that witness is another, the necessity for his attendance a third, and to each, the party charged may or may not object. By our rule, in the case referred to, "when objections have been specially made to any or all of the items claimed, then it would be proper, if within the power of the claimant, to make a full showing as to the materiality," and we may add, to the necessity of each item so objected to. We there declared that the further showing should be in the form of an "amended verification." This term may have misled parties, and we would adopt rather an "*amended verified statement*." Each item or part thereof, objected to, should *only* appear in such amended statement, with all the facts necessary to show the justice of the claim, and to authorize the clerk or the court, to allow a judgment therefor. Here seems to have been the difficulty in this case. Perhaps a case would better illustrate what we desire to express. Suppose objections are made thus: That A. B. was not sworn as a witness, that C. D. did not attend as a witness *only*, but was a juror, etc., or for the alleged number of days, and that E. F. did not travel any distance as a witness, etc.

Then the amended statement should directly and fully exhibit the facts as to those points, and might be in a form substantially thus: "The reason why A. B. was not sworn was (setting it forth); but it was material to have such witness in attendance (setting forth the reason); that C. D. travelled — miles in coming to and — miles in going from court as a witness. That said witness came by special agreement, or by process served; and that E. F. was in attendance as a witness alone — days." And so, as to any item, to which objection may have been made. Then perjury could probably be sustained if the facts sworn to were untrue, since the particular attention of the affiant has been called to each fact.

The case now before us is somewhat uncertain in what may be termed its pleadings, but it answers sufficiently for our views, additional to those in *Crawford v. Abraham et al.*

We think attorneys can now understand the requirements of our rulings. We find that no sufficient showing has been made to sustain the allowance of some of the items to which the appellant objected, and without specifying them we shall direct a modification of the judgment below, reducing the disbursements allowed to \$151.90.

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SCHIROTT & GRONER, Appellants, v. PHILLIPPI &  
COLEMAN, Respondents.

*Appeal from Multnomah County.*

WRIT OF REVIEW.—THE STATUTORY APPEAL and writ of review are concurrent remedies.

IDEM.—The appeal involves a trial both upon the merits and upon the law; the review, only questions of law.

IDEM.—The expiration of a right to appeal as to time, does not extinguish the right to review.



PLAINTIFFS, in a civil action, in a justice's court, against one Morst, had procured his arrest. Respondents here, defendants below, executed an undertaking, and procured the discharge of Morst from arrest. After judgment against Morst, and after execution against his property and a return of none found, an execution was issued against his person, which was returned not served, as Morst had left the state. On the twenty-fourth of March, 1869, appellants brought an action against the respondents on the undertaking, and on the twenty-sixth day of April, 1869, the justice gave judgment for the defendants, assigning as ground therefor, no cause of action. On the second of June, appellants filed a petition for a writ of review, and an allowance was made. On the fourteenth of June, in the circuit court, respondents' counsel moved to strike out and quash the writ. The court below sustained the motion, and filed his reasons, to which ruling the appellants excepted and took an appeal here.

*Kelly & Reed*, for appellants, assign as error:

1st. That the court decided that a writ of review would not lie, but that plaintiff's remedy was by appeal.

2d. That the court decided that a writ of review would not issue at any time within six months from the date of the decision complained of.

3d. That the court decided that the writ ought not to issue upon the facts stated in the petition.

4th. That the court decided that an appeal was a plain, speedy, and adequate remedy for errors in law, appearing upon the face of the proceedings.

5th. That the court decided that an appeal, and a writ of review were not concurrent remedies, and the plaintiffs could not elect which they would pursue.

6th. That the court decided that a writ of review would not lie, after the time for taking an appeal had expired.

*O. P. Mason*, for respondents.

WILSON, J. In dismissing the writ below, that court seems to have decided these propositions, that appeal and

review were not concurrent remedies, that when an appeal could be taken a review would not be allowed, that after the time for taking an appeal had expired, when it might have been made available, it would be too late for a party to resort to a review.

By section 572, p. 294, of the Code, the writ, heretofore known as the writ of *certiorari*, is known in this code as the writ of *review*, and the next section declares "that any party to any process or proceeding before or by any inferior court, etc., may have the decision or determination thereof, reviewed for errors therein." This is substantially the law as it was in 1860. At the December Term, 1860, of the supreme court of this state, the same question was before that court, as is now here. In *Blanchard et al. v. Bennett et al.*, 1 Oregon, 329, the court held, "a *certiorari* may have been a proper remedy, and so may have been an appeal; the statute regulating appeals from justices of the peace allows appeals in all cases, etc., (Laws of Oregon, 1854, p. 295, sec. 185.) I therefore conclude that appeals lie in all cases from the final decisions of justices of the peace, and the remedy by *certiorari* is *concurrent*." When the writ of review was substituted for that of *certiorari*, it was subject to the same construction and application. The only difference in the law is found in sec. 575 of the Code, which was not distinctly found in the law of 1854. That declares that the writ of review "shall be allowed in all cases where there is no *appeal*, or *other* plain, speedy, and adequate remedy, and where the inferior court officer appears to have exercised such functions erroneously, etc."

When a party complains *only* of the errors in law appearing upon the record and proceedings, it is certainly not a plain, speedy or adequate remedy to force him to rely upon appeal, which, under sec. 536, subdiv. 3, p. 285, of the Code, requires the same proceedings as though the case had been commenced in the circuit court, involving witnesses and a multitude of costs and disbursements, instead of having the pure questions of law, governing the case, heard and decided with comparatively no trouble or cost.

The circuit judge, in allowing the writ, passes to some extent upon whether the causes alleged are errors of law or not, and if they involve more than legal questions, it might be proper to deny the writ and leave the party to his appeal, as the mode by which all the questions of law and fact may be retried. In review, everything is tried and decided from an inspection of the record, and an appeal cannot accomplish this without imposing a great incumbrance of other matters. Evidently the legislature intended this construction, for in sec. 116, p. 604, of the act relating to courts of the sec. 64, p. 595, which gives an *appeal* in *all cases* from such court, except in three cases mentioned, in these words, "No provision of this act in relation to appeals, or the right of appeal, in either civil or criminal cases, must be construed so as to prevent either party to a judgment, given in a justice's court from having the same review in the circuit court, for errors in law appearing upon the face of such judgment, or the proceedings connected therewith, as provided in title 1 chap. VII," which is the law in reference to review. Taking the two laws together, and the reasons which operate in allowing the writ of review, we think that a party may have a right to a writ of review for *errors* in law apparent upon the record, etc., at the same time that he might have a right of appeal, which would retry the merits of the case as well as review the questions of law; that review and appeal may thus be concurrent remedies; and it follows then, that the expiration of a right to appeal, as to time, does not extinguish the right to a review. The one cuts off all possibility of having the case reheard upon its merits; but if the law, apparent from the papers, forbid such a judgment, then the judgment may be reversed or modified as to the mere questions of law at any time during the limit assigned for review. We think the judgment should be reversed and remanded.

## L. HOWE, Appellant, v. DOUGLAS COUNTY.

*Appeal from Douglas County.*

**FEES.—MILEAGE.**—Construction given to secs. 14, p. 738; 15, p. 739; 33, p. 903; and 35, p. 905, with reference to fees and constructive mileage.

**DEEM.**—Single mileage for each precinct, only allowed for serving notices upon the judges of election.

**FEES.**—What mileage allowed in serving the panel of jurors with notices.

**FEES.—NOTICES.**—No mileage allowed for posting notices for collection of taxes.

**SHERIFF'S MILEAGE.**—Sheriff's mileage commences at his office at the county seat.

THE plaintiff, appellant, as sheriff of Douglas County, from August 1st, 1866, to July 1st, 1868, averred that he performed certain services for which that county was liable to pay him, and set forth his claims thus:

Writing 84 notices for collection in each precinct, for the years	
1866-7 .. . . .	\$ 21 00
Posting the same .. . . .	42 00
Mileage to and from, posting the same .. . . .	445 20
Mileage to and from each precinct, to collect taxes for the years 1866-7 .. . . .	142 00
Serving venire of the 3 panels of jurors for May term C. C.	
1868 .. . . .	45 00
Writing notices of same .. . . .	7 75
Mileage on same .. . . .	67 60
Return on same .. . . .	7 75
Mileage for serving subpoenas on 32 witness before grand jury	83 40
Mileage in serving 42 notices on judges of election, at the June election, 1868 .. . . .	331 00
Mileage in posting 42 notices of election for June election, 1868	331 80
<hr/>	
Total .. . . .	\$1536 00
And admitted a payment of .. . . .	291 60

The answer denied any services for the county, except as stated in answer, thus putting in issue each averment of the complaint. It admitted service of venire of one panel of jurors and alleged payment therefor in the sum of \$15. For serving said venire for May term of court, 1868, writing notices of same, return and mileage, the defendant paid plaintiff all he was entitled to, \$50.25. For subpoenaing 32

witness for grand jury full payment is averred in the sum of \$43. For serving 42 notices upon judges for June election, 1868, a payment is averred in the sum of \$98.80, which defendant alleges "was accepted in satisfaction of service" by plaintiff.

For serving 42 notices of election, a similar payment, 98.80, and acceptance is averred, and the defendant declared that all the mileage for serving said notice of election, and upon judges, did not exceed 1,976 miles, and that the amount paid therefor, fully discharged the same.

No replication was filed.

Upon the trial, the issues tried were submitted to the jury for special findings, and their verdict was as follows:

We, the jury, find that the plaintiff actually traveled as follows:

	<i>Miles.</i>
For collecting taxes for 1867 .....	315
For serving notices upon judges of election (total) .....	307
For serving notices on one panel jury, May term, 1868 .....	204
Posting notices (tax) 1867 .....	309

Total number of miles actually traveled in performing all the above mentioned services .....

1,134

We, the jury, find that the plaintiff traveled, actually and constructively, as follows:

For collecting taxes for the year 1867, and serving notices on judges of election for 1868 .....	4,484
Serving notices on one panel of jury for May term, 1868 .....	1,412
Posting tax notices for 1867 .....	4,420

Total number of miles as actually and constructively traveled in performing the above service .....

10,316

(Signed)

WM. VICKERS, Foreman.

Upon this verdict, the court found the law to be with the defendant, and gave judgment against the plaintiffs for costs, etc.

Plaintiff appealed from that judgment, setting forth as the ground of error, in his notice of appeal:

"1. The court erred in refusing to admit the evidence offered by the plaintiff as to the writing and posting of

notices for the collection of taxes, as appears by the bill of exceptions filed and made a part of the record in said cause.

"2. The court erred in rendering a judgment against plaintiff, in favor of defendant, for its costs and disbursements.

"3. The court erred in not rendering a judgment in favor of plaintiff, against defendant, for the sum of \$740.60."

*Willis & Watson*, for appellant.

*Strahan & Burnett*, for respondent.

WILSON, J. As the appellant filed no bill of exceptions, we must confine our examination of this case to the second and third grounds alleged to have been error; and, in fact, from the verdict of the jury, it seems that the only issue tried was whether the appellant was or was not entitled to constructive mileage for certain alleged services. As in the case of *Crawford v. Abraham*, 2 Oregon, 163, this court is to give a construction to certain sections in the code, and thus establish a certain rule, which shall operate alike in the different counties of this state. We are aware that great differences of opinion exist as to the true meaning and operation of such sections, and that the different county courts have applied the law in their varying discretions.

This case exhibits but a few of the questions that have arisen in the different districts under the fee bill, and we regret that we cannot now give a full construction to that law, which should cover all those matters. The sections mainly calling for construction here are these:

Sec. 14, p. 738: "Every officer or person whose fees are prescribed in this act, who shall be required to travel in order to execute or perform any public duty, in addition to the fees hereinbefore prescribed, shall be entitled to mileage at the rate of ten cents per mile, in going to and returning from the place where the service is performed."

Sec. 15, p. 739. Mileage for any service by sheriffs, shall in all cases be computed from the county seat or place

of holding court in the county in which the officer performing the service resides, etc.

Sec. 31, p. 903. That the sheriff of each county shall be tax collector thereof.

Sec. 32, p. 904—*Proviso*. The sheriff, before entering upon the duties of collector of taxes, shall execute an additional bond in such sum as the county court of the county may direct.

Sec. 33, p. 905. It shall be the duty of the sheriff upon receipt of the tax roll from the county clerk, immediately thereafter to give notice by posting up written or printed handbills, three in each precinct within his county, to the effect that he, or his deputy, will attend at the usual place of voting in each election precinct in his county, for the purpose of collecting taxes, etc.

Sec. 35, p. 905. The sheriff shall be allowed three per centum on all taxes collected by him, etc.; which percentage shall be paid by the county.

It will be seen that sections 14 and 15 cited, undertake to declare the persons to whom mileage shall be allowed and the rate thereof, and the manner of compensation thereof as to the beginning and ending of travel. There is no general provision found elsewhere in the Code applicable to the mileage of a person whose fees are not named and fixed by chap. 18; in which these two sections are found. Other laws either provide specially for such compensation, or by their silence, lead to the conclusion that none was to be given.

By section 31, cited, a new duty is imposed on the person who may happen to be sheriff; he is made tax collector—is compelled to give a new bond, wholly different from his official bond as sheriff—and nothing is said in chap. 18, commonly called the fee bill, as to any fees as such tax collector. His office was created at the same time with the passage of the fee bill, but made no reference to it, and under said section 31, he has to perform certain duties invoking the necessity of traveling. That duty, however, abridges the necessity for far more extended journeyings, in

that, by posting such notices as are required, the tax payers are obliged to wait upon him in paying their taxes, instead of his waiting upon them. Section 35, as cited, provides the compensation which the tax collector is to have, and the act of which it is a part undertakes to fully define the duties and liabilities of such officer. We think it was intended by the Legislature that the allowance of compensation should cover all the expenses and labor he might incur or perform in collecting taxes. He is not in such capacity a person included in and provided for in sec. 14 of chap. 18. The Legislature provided that by a less amount of travel, he could obviate the necessity of a greater, and by a gross amount of percentage indicated their intention of making that a full compensation. Upon the first and last points in the special verdict, we think the court below found correctly as to the law.

The question as to posting notices of elections does not seem to have been submitted to the jury, probably from inadvertence; for, if the duty of serving notices of appointment upon judges of the election, could carry mileage, certainly that of posting notices of the election in each precinct is equally meritorious. Our decision, however, of the one, will be an indication of the construction on that point, upon which county courts may hereafter act.

Sec. 14, giving the right to mileage, applies its privileges to witnesses and sheriffs alike. Their fees are contained in the same act, and in similar cases, should have similar allowances. This court held in *Crawford v. Abraham*, our rule to be thus: "The claim for disbursements must be for the number of miles actually traveled, and in the number of days in actual attendance as a witness only," and as a rule still further delineating the rights of a witness, that "in two or more cases between the same parties, at the same term, a witness would be allowed but single mileage and attendance, etc." The full force of those rules does not apply here, but the intention there manifested is plain, that the claim must be for the number of miles actually traveled, and serves some purpose in guiding our findings here.



Sec. 14 we think means this, if in executing a public duty an officer, of that class of persons provided for, must necessarily travel any distance, he is to be allowed ten cents per mile for his actual going to and returning from the place where he executes that duty. And we think that section 15, read in connection with section 14, provides in the case of the sheriff, that no matter where he may be when a process is put into his hands, he may in estimating his mileage count from the county seat. This evidently arises from the fact his office is there by law, and he is supposed to be present there ready for any business connected with that office. That is his official home and the Legislature intended his official travel should begin there.

Applying this construction to the case under consideration, the notice to the judges in each precinct is required. It is one act in which the county is the sole party made liable. In fact the notice to be served is but a single paper on which the returns must be made. While in the precinct the sheriff is where the three persons live who are to be served, and it is supposed he executes his duty speedily and carefully. He travels but once, with a single paper in his possession, sent by but one party, and following the spirit of our ruling, as cited, we think the law does not intend to pay him for labor which he does not perform. The services of no one can be required without just compensation, but unless plainly provided for, that which requires no service, no outlay of labor or expense, is not a claim upon which we ought to give an unusual construction to the law. We think the sheriff could claim his mileage for serving the notice belonging to, or necessary to be served in each precinct from the county seat, to the residence of the farthest one named in such notice, to be served. No evidence is here to show other than the truth of the finding of the jury, as to the actual number of miles traveled by appellant, and certainly the amount alleged to have been paid him by respondent, more than covers the claim due upon verdict.

The jury very properly found that the appellant served a venire of but one panel of jurors, and found the miles actually traveled in executing that service, and from that finding we think the court paid appellant all he should be entitled to receive. The construction of the statute must be made in subordination to the rules so long known and well established, and to that construction the court must bring an exercise of common sense and reason. Suppose the sheriff has a venire for a panel of jurors, in a single process of paper, and it turns out, as may happen, that ten jurors live in the same part of the county, say fifty miles from the county seat. At furthest, three days are sufficient to serve them and make return. He may travel enough additional miles in going to each juror to make the whole distance traveled 120 miles. For this he receives an allowance under our construction, of twelve dollars, besides the serving of venire on each juror. If he were entitled to have a mileage for each man served, as is claimed in this case, the number of miles so claimed, could not be less than 1,000; and then his three days' labor would realize him about \$35 per day. We know hardships may arise on either hand; but we find no analogous case in the statutes in which any other officer or person has such extensive rights as are claimed by appellant. On the contrary, the constitution of Oregon and the Legislature, have sought to obtain services in almost every other office at low rates therefor. Were we to give the construction claimed by appellant, the counties of large territory in this state would become hopelessly involved, and such result is manifest in this case.

The jury found that the sheriff actually traveled, in executing the duties specified in items two and three, 511 miles, which, at ordinary rates, would call for an allowance of \$51.10, exclusive of the fee for serving. We may fairly presume that those services could have been made within nine days. Under the second part of the verdict, upon the same claims and the number of miles is 5,896, calling for an allowance of \$589.60, exclusive of service; in the one case about six dollars per day, and in the other about sixty-six.

The Legislature has left it to some extent uncertain as to the proper construction of sections fourteen and fifteen taken together; but we incline to that view which is most in consonance with equality and right, and with the intention manifested in the economical character of our constitution and laws. If the Legislature had expressly provided for, or made it apparent, that the better construction should have been in favor of the constructive mileage claimed by appellant, we should then have been constrained to hold differently.

Under our construction we think the court below was correct in its holding the law to be with the defendant; and we affirm this judgment.

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T. CROSSMAN, Respondent, v. HENRY LANDER, Appellant.

*Appeal from Douglas County.*

**COSTS.**—The pleadings show a charge and a denial of wrongful entry upon premises in order to remove a house, a claim and denial that the house was built upon lands to which at that time, the parties were conflicting claimants under the homestead law: *Held*, that these allegations put the question of title directly in issue, and under sec. 531, subdivision 1, of the Code, would give costs to the plaintiff, though he recovered less than fifty dollars by the judgment.

**IDEM.**—If the house was not real property, the defendant should have made such a case in his pleading.

CROSSMAN brought this action to recover damages from Lander, for an alleged trespass averring that Lander entered upon respondent's premises wrongfully, and removed therefrom a house. The appellant's answer admitting the entry, denies its wrongful character, and claimed property in the house, averring that he built the house upon premises, to which these parties were contesting claimants under the land laws of the United States. The replication denied

a contest, and averred that appellant never was a claimant of those premises.

Upon trial below, the plaintiff had a verdict for \$20. The court gave judgment therefor, and for costs and disbursements of \$40.70 for plaintiff. Appellant claims that he was entitled to judgments for costs, etc., and that there was error in this respect.

*W. R. Willis*, for appellant.

*Chadwick & Webster*, for respondent.

**WILSON, J.** The law applicable to this case, and under which each of these parties claim to be right, is found in section 539, subdivision 1, of the Code. "In an action for the recovery of the possession of real property, or where a claim of title or interest in real property, or right to the possession thereof arises upon the pleadings, or is certified by the court to have come in question upon the trial." If a case exhibits either of these conditions, the plaintiff is entitled to costs, and this would carry a recovery of disbursements.

The single issue raised by appellant is, that no claim of title or interest in real property, or right to the possession thereof, arises on the pleadings. The answer admits an entry upon the premises, but denies that the same was wrongful, and the issue of the right to enter upon real estate is clearly made. The answer further avers that the house in question was built upon the land by defendant, at a time when the two parties were conflicting claimants to the same parcel of land under the homestead law.

The reply puts this question of title to the land as conflicting claimants in direct issue, and carrying with that question all matters properly connected with the land. Whatever is annexed to the freehold is real estate, and a controversy concerning any such article involves a question of title under the Code.

Title embraces the right of the possession, and everything but the mere naked possession, 8 Barb. 569. If the

defendant was not a conflicting claimant of the title to the land, then the claim he made to the house had no pretended existence, and was not even a shadow of one. So far as the pleadings show, the house in question must be supposed a part of the premises, and if defendant sought to make the question turn upon the quality of property, whether the personal or real, the answer should have made a case, showing that the building was one which did not belong to the premises as a part thereof. An outgoing tenant by law may remove certain buildings and appurtenances, but to entitle him to a defense when sued in trespass for their removal, he should show his right. Evidently, there is nothing in the pleadings separating the house from the lands, but in reality a distinct setting up of a title to the house, and a right to enter upon another's real estate, and a question, to some extent, of a title to the land itself. Under a like law in New York, the court held that such cases are within the section. (8 Barb. 569; 6 Wend. 539.)

We affirm the judgment below.

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STATE OF OREGON, Respondent, v. WILLIAM ELLIS, Appellant.

*Appeal from Clatsop County.*

FROM the judgment and sentence passed upon appellant, in the court below, on a verdict of guilty of an attempt to commit rape, he appealed to this court, and the notice of appeal contains no specification or assignment of error. Appellant moves the court to dismiss the appeal for that reason.

*Hill & Mulky*, for appellant.

*E. D. Shattuck*, for respondent.

WILSON, J. The requisitions of the Code in reference to appeals in criminal, materially differ from those in regard to

civil causes. On the part of the state, the grounds for appeal are limited to two causes. Notices are to be served differently. No bond in appeal other than a bail bond is required. The effect of the appeal is changed in some respects. And the reasons for dismissal are limited, and nowhere does it require that the notice of appeal shall contain an assignment of errors. The Legislature evidently intended to provide all necessary regulations in appeals for criminal matters in the enactment of the Chapter XXIII of the Criminal Code; and when a party has complied with all necessary provisions found there, we think he has a right to be heard here. In order that certainty may be obtained in this class of cases, under the authority of the statutes, this court will order as a rule, that after the appealed case is in this court, the appellant shall, if required by respondent, make and file here an assignment of the errors relied upon, within such time as the court may indicate. The motion is denied.

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**HENRY FAILING and others, Respondents, v. A. M. OSBORNE, Appellant.**

*Appeal from Lane County.*

**CONDITIONAL AGREEMENT.**—The parties having entered into an express agreement, to be liable in a certain contingency, no agreement to assume other similar liabilities can be implied. The specification of a particular contingency, excludes all ideas of liability upon a different contingency.

**COVENANT OF WARRANTY.**—The plaintiffs stipulated on the sale of land, to refund the purchase money, "if it should be adjudged that they had no legal right to sell, and if said defendant by reason thereof, be legally compelled to give up possession of said premises:" *Held*, that the defendant had no greater right under this contract, than one who takes under a covenant of general warranty. That there must be an ouster; either actual or constructive, before a cause of action arises.

**EQUITABLE RELIEF ON SALE OF LAND.**—The cases in which courts of equity interfere to give relief, where the land exceeds or falls short of that which is specified in the deed or contract of sale, are those in which the sale of land has been made by the acre or foot, or where there has been fraud or wilful misrepresentation.

This action was to recover \$1,000, upon a promissory note made by the defendant on the twenty-first of December, 1866, payable to the plaintiffs. The defendant answered that the plaintiffs, having judgment against one J. L. Brumley, had caused execution to issue and to be levied on a tract of land in Lane County, known as "Brumley's Ranch;" which tract was offered for sale on the execution, on the fifth of December, 1866, and was by the sheriff struck off to one Woodward, who failed to complete the purchase; that the defendant, at the plaintiff's request, took the place of Woodward, and completed the purchase undertaken by Woodward, taking the land at \$4,000, paying \$2,000, and giving his two promissory notes of \$1,000 each, one note payable April 1, 1868, and the other April 1, 1869, that the plaintiffs knew that the title to a part of the land was not good, but represented to the defendant, that the title was good, and represents that the tract contained 1,200 acres, that, through the plaintiff's representations the defendant was induced to take a title under said sheriff's sale, by an assignment from Woodward, of the sheriff's certificate of sale, under said judgment; that the tract contained only 1,040 acres, and that the title to a large part of that failed, to defendant's damage, in the sum of \$2,500. The defendant asks to have the same off-set against this note, and asks that the other note, due April 1, 1869, be delivered up to be cancelled. The replication denied the affirmative allegations in the answer.

The transcript contains the evidence taken on the trial of the cause. The evidence, which is somewhat voluminous, relates to several disputed questions of fact; some of which, under the view taken of the case by this court, are not material. Among other things, it was shown on the trial, that at the time of the execution of the two promissory notes, one of which is the basis of this action, and at the time of transferring to the defendant, the sheriff's certificate, originally intended for Woodward, the plaintiffs made a written promise or agreement to the defendant Osborne, which was

subscribed by their attorney, and accepted and offered in evidence in this case by the defendant, in the words following, viz.: "In consideration of a sale of lands, say about 1,200 acres in Lane County, made December 5th, 1866, by virtue of sundry executions against J. L. Brumley, and the certificate of sale having been, this twenty-first December, 1866, assigned by Woodward, the purchaser, to A. M. Osborne, and inasmuch, as since said sheriff's sale, and before the assignment, a rumor has come into circulation, that the legality of said sheriff's sale may be contested, and the said Osborne having given his notes for \$4,000, purchase money. Now it is agreed by H. W. Corbett, Henry Failing, Smith & Davis, Canfield, Pierson & Co., S. A. Wood, and Jones, Tobin & Co., the creditors, at whose instance said executions were issued, in consideration of the foregoing, that if it shall be adjudged that said creditors had no legal right to sell said premises, and that, if said Osborne shall, by reason thereof, be legally compelled to give up possession of said premises, then said creditors shall refund the purchase money paid by him, with interest from the date of being so compelled.

"S. ELLSWORTH,

"Att'y for said creditors."

"Dated December 21, 1866.

The court below rendered a judgment for plaintiffs, and defendant appealed.

*Williams & Willis*, for appellant, claims that by said instrument, plaintiffs agreed that they had good right to sell said land to Osborne, and that he should hold and quietly enjoy the same (Rawle on Covenants, 529, 30, 32, 33; 8 Cushing, 419; 18 Cal 660; and very many other authorities cited.)

If the legal title to the land was not in Brumley, no execution obtained by any of his creditors, could be levied upon it. They could not claim lawfully what was never vested in him. (15 Mass. 215, note "a.")

Plaintiffs fraudulently procured defendant to accept that title by sheriff's sale, knowing that the title to the land was not good.



*Judge Shattuck* and *S. Ellsworth*, for respondents, claims neither the plaintiffs or their attorney, made any misrepresentation as to title or quantity of land of their debtor, but if they had, no liability would attach to them. *Caveat emptor* applies with full and peculiar force to judicial sales. (Story on Sales, sec. 169; 5 John. Ch. 84; 23 Pick. 265; 3 N. Y. 79, etc.)

There was a special agreement in writing, which includes all the terms of the agreement between the parties.

Lands were sold in bulk; and vendor, even if owner, is not liable for deficiency in quantity. (3 Selden, 210; 26 Wend. 169; 6 Cow. 481, etc.; 8 Allen, 384 as to representations of price or value.)

UPTON, J. The defense relied upon in this case, is substantially, that the plaintiffs being interested in procuring a responsible bidder for the premises levied upon, falsely represented the title to be good, when they knew it to be bad as to part of the land, and that they represented the parcels constituting the tract, as containing 1,200 acres, when, in fact, they contained but 1,040 acres. The written agreement offered in evidence by the defendant, as made at the time of, and as part of the transaction, contains a recital that "a rumor has come into circulation, that the legality of said sheriff's sale may be contested." The defendant was put upon inquiry whether the sheriff had a "legal right to sell said premises." Under this state of facts, the parties entered into an express agreement that, upon certain contingencies, the plaintiffs would "refund the purchase money," then about to be paid by the defendant. If the property did not belong to Brumley, the creditors had no legal right to sell. A rumor had arisen, and come to the knowledge of the contracting parties, that that question might be contested, and they stipulated that "if it should be *adjudged* that said creditors had no legal right to sell, and if said Osborne, by reason thereof, be *legally compelled* to give up possession of said premises," they would refund, with interest. It seems to have been distinctly settled what risk each party would take

The defendant Osborne, assumed the responsibility in case of a contest to defend until judgment should be had, and until he should be legally compelled to surrender possession. If he could defend successfully, he could claim nothing from the plaintiffs. If unsuccessful, he had recourse upon them for the purchase money and interest, but not for the costs of the action. The parties having entered into an express agreement to be liable to a certain extent, or upon a certain contingency, no other agreement in regard to the same matter, can be implied, and the particulars being expressed, excludes all ideas of liability upon the contract to a greater extent, or upon a different contingency. The recitals show that the risk of title was a subject under consideration, and it was settled by express agreement, what, and how much, liability each party undertook to assume. The liability assumed by the plaintiffs, was similar to that assumed by a grantor, who enters into a covenant of general warranty, in those states where the purchase money and interest is held to be the measure of damages. The legal effect given by construction, to the formal words of general warranty in those states, is precisely what the parties have expressed in words in this instrument. The evidence does not tend to show that the plaintiffs resorted to artifice or intentional deception, and it is shown that the plaintiffs had peculiar means of knowing the condition of the title, not equally open to the defendant. It cannot reasonably be contended, that, under the terms of this instrument, the defendant had any greater rights than those of a grantor under a deed of general warranty. He claims to recover \$2,500 damages, and to have the damages set off to that extent, against the promissory note. The time has not arrived, when he can claim damages on account of failure of title, because by the terms of the agreement, no such right accrues to him, until he is turned out of possession. There must be an ouster, either actual, by being put out, or constructive, by surrendering to the paramount title, before the purchase money can be claimed. (*Abbott v. Allen*, 2 John. Ch. 519.) The point in regard to the alleged

mistake in the number of acres, is settled by authority too firmly, to be open to argument at the present day. It is not alleged that any deception was practiced in regard to the quantity, but simply that the tract was represented as 1,200 acres when in fact, it contained but 1,040 acres, that is, the tract contained but thirteen fifteenths of what the parties supposed at the time of the contract. "The case in which courts of equity interfere to give relief, when the land exceeds or falls short of that which is specified in the deed or contract of sale, are those in which the sale of the land has been made by the acre or foot, or where there has been fraud or wilful misrepresentation, on the part of the party against whom relief is sought, to induce the other party to believe the quantity of land conveyed, was different from what it really was." (*Morris Canal Co. v. Emmett*, 9 Paige, 168.) In this case, several different donation claims make up the one tract sold, and there is nothing in the allegations or proof, to show that any of these were sold by the acre.

Judgment should be affirmed.

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JAMES H. FISKE and CLEMENTIA V. FISKE, Plaintiffs and Respondents, v. JAMES KELLOGG and W. J. BRADBURY, Defendants and Appellants.

*Appeal from Clackamas County.*

**PROBATE SALE.—INFANT HEIR A NECESSARY PARTY.**—*Held*, That a sale of a decedent's real estate to pay debts by virtue of an order of the probate court, under the statute (1855), is void as to an infant heir not made a party to the proceeding, and for whom no guardian was appointed. Such proceedings are hostile to the heirs, who are necessary parties, and the probate court must have jurisdiction of the persons (as well as the subject matter) in the manner provided for in the statute, or the sale will be void.

*Wm. Strong and David Logan*, for appellants.

*Mitchell & Dolph and S. Ellsworth*, for the respondents.

PRIM, J. This was an action to recover certain real estate, situate in Clackamas County, belonging to the estate of Lot Whitcomb, deceased. The respondents are husband and wife, and Clementia V. Fiske, the daughter, heir and devisee of the said Whitcomb.

The executors of the will of the deceased sold the land in controversy under an order of sale made by the probate court of Clackamas County, and appropriated the proceeds thereof in payment of the debts of the decedent.

At the time this order of sale was made, Clementia Fiske was a minor, had no guardian, and was not made a party to the proceeding. Appellants were in possession of the property and claim title under the sale made in pursuance of this order.

The principal question arising in this case is, as to the validity of the order of the court authorizing the sale of the land. It is claimed by respondents, that this order was void as to them, for the reason that Clementia V. Fiske, whose interest they represent, had no notice and was not made a party to the proceeding.

Appellants insist, that this being a proceeding in the probate court to convert realty into personalty, for the payment of the debts of the decedent, is not a suit, or in the nature of a suit, but a mere *proceeding in rem*, in which the executor is the sole *representative* of the estate, and therefore the *heirs are persons interested* in the estate, are not adversary parties to the proceeding. They insist that this position is sustained by several cases cited from other states, and one case at least, decided by the supreme court of the United States. This case relied on is the case of *Grignon's Lessee, v. Astor*, reported in 2 Howard, p. 319. That case arose under a statute in Michigan, and by looking into it, it will be seen that its provisions differ very materially from those contained in our statute of 1855, under which the proceeding now under consideration was had. The first section of The Michigan statute provided, "That upon representation of the insufficiency of the goods of an intestate to pay his

debts, the same being made to appear to the court, the said court was authorized to empower and license the administrator to make sale of all or part of the real estate of the intestate; and the administrator, by virtue of such license, should by deed convey the same title as deceased in his lifetime could have conveyed." The court held, that the language used in this section of the act vested in the court jurisdiction *to make the order of sale, upon facts stated in the petition* being made to appear. It further held, that the mode of proof and giving notice prescribed by a subsequent section pertaining to the exercise of jurisdiction after it was acquired, was directory merely.

We will now refer to a few sections of our statute of 1855, page 360:

Section 9. "If it shall appear, by such petition, that there is not sufficient personal estate in the hands of the executor or administrator \* \* \* to pay the debts outstanding against the deceased, \* \* \* and that it is necessary to sell the whole or some portion of the real estate, for the payment of such debts, the probate judge shall therefore make an order directing *all persons interested* to appear before him at a certain place and time therein specified, to show cause why such an order should not be made."

It will be noticed by the provisions of this section when a petition is filed by the executor or administrator containing the facts necessary to give the court jurisdiction of the subject matter, the probate judge is required to make an order, directing all the parties interested to appear and show cause why an order to sell the real property should not be made; while the Michigan statute provides that when such a petition is filed, and the facts therein made to appear to the court, the court is authorized to empower and license the executor or administrator to sell so much of the land as may be necessary.

Section 10. "A copy of such order to show cause, shall be personally served on all persons interested in the estate," \* \* \* or shall be published at least four successive weeks, etc. This notice can be dispensed with by all per-

sons interested in the estate signifying in writing their assent to the sale.

Section 12. "If any of the devisees or heirs of the deceased are minors, and have a general guardian in the county, the copy of the order shall be served on the guardian; if they have no guardian, the court shall, *before proceeding to act* upon the petition, appoint some disinterested person their guardian for the sole purpose of appearing for them, and taking care of their interest in the proceedings."

Section 13. "The executor or administrator may be examined under oath, and witnesses may be examined, by either party; and process to compel their attendance, etc., may be issued as in other causes."

Section 16. "If the probate judge shall be satisfied after a full hearing upon the petition, and on examination of the proofs and allegations of the parties interested that a sale \* \* \* of the real estate is necessary for the payment of debts, etc., \* \* \* he shall make an order of sale authorizing the executor or administrator to sell, etc."

We apprehend these references to the provisions of our statute are sufficient to show that there is an obvious distinction between our statute and the one referred to in the case of *Grignon's Lessee*. Our statute plainly recognizes an interest in the infant heir or devisee in the land sought to be sold to pay debts; and plainly provides that they shall not be deprived of it without appearing or an opportunity of appearing and being heard by their guardian.

The statute of New York, passed in 1813, contained provisions substantially the same as ours. The case of *Schneider v. McFarland*, 2 Cowen, 462, arose under that statute, and was a case precisely like the one under consideration. The case of *Grignon's Lessee*, and nearly all the cases cited in this case by appellants, were thoroughly reviewed by the court in deciding that case. The learned judge, in delivering the opinion of the court, says: "No amount of proof would justify an order of sale until the necessary measures provided by law were adopted to secure the appearance of the infant heirs or devisees, and to bring in the other parties in

interest." \* \* \* He further says: "The administrator is not therefore the *sole* representative of the real estate of the deceased in these proceedings. He is the moving party in behalf of the creditors. His object is by a special proceeding before a court of limited jurisdiction to turn the real estate into personalty with a view to the payment of debts. The heir has a right to contest his allegations, and show that no such necessity exists. The right is a most important one, and one which the statute effectually secures to him." Again he very properly says: "It is a proceeding by which the infant heir may be deprived of his inheritance, and to which he is an adversary and necessary party, with a right by his guardian to represent and defend his own interest. It is therefore as essential that the surrogate (here probate court) should acquire jurisdiction of the person of the heir, to conclude his right by an order of sale as it is of the property which is the subject of it." The case of *Bloom v. Burdick*, 1 Hill, 139, is to the same effect, and is referred to and approved by the court in the case cited above. (See also *Biglow v. Suarns*, 19 Johnson, 38; 33 Cal. 50.) In this case we hold that the sale of the real estate of Lot Whitcomb made by his executors under the order of the probate court was void as to respondent, for the reason that one of them, Clementia V. Fiske, was a minor, without any guardian at the time, and was not made a party to the proceeding. It is further insisted by appellants, that as said Clementia Fiske claimed title as devisee, she can only take under the terms and restrictions of the will. The language used in the will is: "After all my lawful debts are paid and discharged the residue of my estate, real and personal, I give and bequeath," etc. They insist this language implies a devise to the executors of the land in trust for the payment of debts, and also implies authority to them to sell the real estate for that purpose, without applying to the probate court for an order of sale. We think the language used in the will, will not bear any such construction. Section 29 of the act of 1855, p. 363, provides that: "If the testator shall make provision by his will, or designate the

estate to be appropriated for the payment of his debts, \* \* \* they shall be paid according to the provisions of the will, and out of the estate thus appropriated." And by section 30: "When such provisions have been made, or any property directed by the will to be sold, the executor or administrator with the will annexed may proceed to sell without an order of the probate court." In this case, the will does not provide or designate what estate shall be appropriated for the payment of debts, nor does it direct any property to be sold, but merely provides generally, that "after all of his lawful debts are paid and discharged," what shall be done with the residue of his estate, both real and personal. We are unable to see how this provision of the will could make any difference, as the statute then in force required all the debts of the decedent to be paid before any devisee or heir could take the real estate. We hold the executors had no authority under the provisions of the will to sell the real estate of the decedent for the payment of his debts without first duly obtaining an order of the probate court for that purpose, and any sale made by them without such an order was void as to respondents. The decree of the circuit court is affirmed.

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ALEXANDER STEWART, Respondent, v. RUFUS PERKINS, Appellant.

*Appeal from Baker County.*

AGENT.—P. being sued for the rent of an undivided interest in a water ditch, answered that he was in possession only as the agent of M. The jury found a general verdict for the plaintiff but also found a special verdict that P. was in possession as agent of M. It was error to hold P. personally liable to the plaintiff for rents due on the ditch.

The facts are stated in the opinion.

*Kelly & Reed*, for the appellant.

*I. D. Haines* and *S. Ellsworth*, for the respondent.



In 1865, W. H. Packwood, by a written lease, demised the fourteen twenty-fourths of the Clark Creek mining ditches to S. B. Morse for the term of three years, and afterwards sold his interest in the ditches to Alexander Stewart, the plaintiff. In December 1867 Morse employed Rufus Perkins the defendant to manage and attend to the ditches during his absence; he also instructed him how to dispose of the proceeds of the sales of water. Stewart, claiming that the proceeds of the ditches had not been paid to him in accordance with the terms of the lease, commenced this action against Perkins, as the person in possession of the demised premises, for the amount alleged to be due him. The defendant denied being in possession of the ditches except simply as the agent of Morse to whom he claims he is accountable for all moneys received.

The issues of fact were submitted to a jury who returned a general verdict in favor of plaintiff and assessed his damages at \$565.65, and under the direction of the court returned certain special findings of fact; and among the others appears the following:

"We find that defendant held possession of said ditches as the agent of S. B. Morse."

From these findings of fact the court found as a matter of law that the defendant was liable personally to the plaintiff for the rent of the ditches. The court also found that the general verdict for the plaintiff was inconsistent with the special verdict and should be modified to \$90.50 and rendered judgment for the plaintiff for that amount and costs. To all of which rulings of the court the defendant then and there excepted.

PRIM, J. The jury in this case to whom was submitted the issues of fact, returned a general verdict in favor of the plaintiff and returned specially at the same time that "the defendant held possession of said ditches as the agent of S. B. Morse." This special finding is inconsistent with the general verdict and should control it. The code provides that "when a special finding of facts shall be inconsistent

with the general verdict, the former shall control the latter and the court shall give judgment accordingly." (Code 192, sec. 218.) The court found as a conclusion of law that the defendant's possession of said ditches as the agent of Morse was sufficient under the statute to render him accountable and liable to the plaintiff the assignee of Packwood, for the rent of the ditches.

Sections 31 and 32, page 718, of the general laws of Oregon, are relied upon to sustain this view of the case. Section 31 provides that "every person in possession of land, out of which any rent is due, whether it was originally demised in fee, or for any other estate or freehold, or for any term of years, shall be liable for the amount or proportion of rent due from the land in his possession." Section 32 provides that "such rent may be recovered in an action at law, and the deed of demise, or other instrument in writing, if there shall be any, showing the provisions of the lease may be used in evidence by either party, to prove the amount due from the defendant."

The old common law doctrine was that a rent charge could not be apportioned by the act of the landlord, on the principle that the contract was an entirety, and could not be apportioned. The objection was "that it exposed the tenant to several processes of distress for a thing which was originally entire, and he ought not to be obliged to pay his rent in different parcels, and to several landlords, when he contracted to pay one entire sum to one person."

Sections 31 and 32 of the statute heretofore referred to, were copied from sections 22 and 23 of chapter 60, of the Revised Statutes of Massachusetts. They were adopted there, to remedy a supposed defect in the old law, and to authorize an apportionment of rent in certain cases where a reversioner wishes to sell his estate in different parts, to different persons, or to make provision for his children. The Supreme Court, the highest judicial tribunal of that state, has given a judicial construction to the two sections contained in their statute. In *Campbell v. Stetson*, reported in 2 Metcalf, 504, SHAW, C. J., in delivering the opinion of

the court, says: "These are part of a series of provisions respecting long terms, where a rent is reserved, and where the lands out of which such rents are to issue, are to be treated as real estate, and as such may be divided and subdivided by descent, partition, levy of execution and otherwise, with various detailed provisions in regard to terms, and the apportionment, and recovery of rents. But these statutes do not declare when, and by what acts, a right to rent shall be created, vested, and transferred, but only declare how it may be recovered when it is due; that is, apportioned and recovered in an action of debt. They are intended to prescribe remedies—not to establish rights." We think it is very clear that sections 31 and 32 had no applicability whatever, to such possession of real estate as Perkins had in this case. He was not in the possession of the ditches in his own right, as the sub-lessee or assignee of Morse, the original lessee of Packwood, but was simply there as Morse's agent, employed by him to manage and control them during his absence. The possession of Perkins was the possession of Morse, his principal, and under the plain rules of law, applicable to the relation of principal and agent, he was bound to account to him for the proceeds of the sales of water. To hold him personally liable for the rent due on the ditches to the lessor of his principal, would be contrary to every rule of common sense, as well as justice.

Therefore, we think the circuit court erred in holding that defendant was personally liable to plaintiff for the rents due him on the ditches.

Judgment reversed.

L. BESSER, Respondent, v. J. C. HAWTHORN, CINCINNATUS SHULTZ and MARY SHULTZ, Appellants.\*

*Appeal from Multnomah County.*

**PARTIES—SUBSEQUENT INCUMBRANCERS.**—The statutes of this state were silent until 1862 as to whether subsequent incumbrancers were necessary parties to suits of foreclosure. In the absence of any statutory provisions on the subject, the general equity rule laid down in equity pleadings is applicable, which is, that all incumbrancers, whether prior or subsequent, are proper parties, and if omitted, the decree will not bind their rights.

On the twentieth of June, 1859, one of the defendants, Cincinnatus Shultz, for a valuable consideration, executed to the plaintiff his note for \$500, payable in two years, with interest at three per cent. per month. To secure the payment of the note, Shultz and Mary his wife executed a mortgage upon the property described in the complaint, of which Shultz was then the owner in fee, which mortgage was duly recorded on the twenty-second day June, 1859. Shultz had purchased this property of James B. Stephens, on the seventh day of June, 1859, for \$400, for which he had given his note, and to secure which, he had executed a mortgage upon the same property, which was also duly recorded on the twentieth of June, 1859. The wife of Shultz did not join in the mortgage.

In October, 1859, Stephens commenced a suit to foreclose his mortgage, making Shultz a defendant, but he did not make the said Mary or this plaintiff parties. On the twenty-third of November, 1859, he obtained a decree of foreclosure and sale, and judgment for the amount of his note and interest. And on the thirty-first of December, 1859, he purchased the block at sheriff's sale under said decree, for \$620, and received a sheriff's deed on the twenty-second of June, 1860. Stephens and wife conveyed the property to Mary White on the twentieth of December, 1860, and Mary

\* The opinion in this case has been filed since the insertion of the note on the page *Ante*.

White and her husband conveyed it on the thirtieth of October, 1866, to the defendant, J. C. Hawthorn.

The plaintiff filed his bill in this suit on the thirtieth of January, 1867, against Shultz and wife and J. C. Hawthorn, to foreclose his mortgage. Shultz and wife made default, but Hawthorn filed his answer, setting up substantially, that the plaintiff being a second mortgagee, was barred by the foreclosure of the first mortgage, he having failed to redeem within the time limited by statute. At the hearing, the court below decreed a sale of the premises, and that the proceeds be applied, first, to the payment of the principal and interest of the defendant Hawthorn, the note given to Stephens for \$400; second, to the payment of principal and interest of the note held by plaintiff; third, the residue to the defendant Hawthorn.

*J. H. Reed*, for the appellant.

*Mitchell, Dolph & Smith*, for the respondent.

PRIM, J. The principal question arising in this case results from the omission of the second mortgagee as a defendant in the foreclosure of the first mortgage. The statute in force in this state prior to 1862 was silent upon the necessity of making subsequent incumbrancers parties to suits of foreclosure. The general rule, as stated in Story on Equity Pleadings, sec. 193, was, "that all incumbrancers, as well as the mortgagor, should be made parties, if not as indispensable, at least proper parties to such a bill, whether they are prior or subsequent incumbrancers." This rule, we think, was undoubtedly applicable in the absence of any statutory provision on the subject. In the argument of the case, counsel seem to differ very radically as to the effect of a subsequent incumbrancer not being made a party in the foreclosure of a first mortgage. It is claimed by respondent, that if he should be omitted, he would in no way be bound by the decree; while it is insisted by appellant that he would be bound by it, and could only attack the pro-

ceedings on the ground of fraud or collusion. The rule seems to be well settled and uniformly supported, that subsequent incumbrancers must be made parties, and if omitted, the decree will not bind their rights.

In the case of *Hains et al. v. Beach et al.*, in 3 Johnson's Ch. 461, the same question raised in this case was before the court for decision, and the chancellor, in delivering his opinion, said: "It was the duty of Gardner [the first mortgagee] to have made the younger mortgagee a party to his bill; and all incumbrancers existing at the commencement of the suit are entitled to be parties, for they have an interest to be affected, and ought to have an opportunity of paying off the prior incumbrances. The rule, therefore, has been well settled and uniformly supported, that the subsequent incumbrancers must be parties and if omitted, the decree will not bind their rights." The chancellor then proceeded to cite a large number of English cases sustaining this rule.

Section 64 of the act of 1854, page 204, in providing what shall be the force and effect of deed obtained under decrees of foreclosure, provides that "such deeds shall be as valid as if executed by the mortgagor and mortgagee, and shall be an entire bar against either of them, and against all parties to the suit in which the decree for such sale was made, and against their heirs respectively, or all persons claiming under such heirs."

By this section of the statute, the deed is binding *only upon parties to the suit and their heirs*. Then we think it may be legitimately inferred from this provision, that it is not binding on persons having specific liens against the property at the time of the commencement of suit, and not made parties. It will be further observed that this section provides that such deeds shall vest in the purchaser the same estate and no other or greater than would have vested in the mortgagee, if the equity of redemption had been foreclosed; and it "shall be as valid as if executed by the mortgagor and mortgagee." Then in this case, if Shultz and Stephens had conveyed all their rights without foreclosure to Haw-

thorn; who now claims under the foreclosure sale, he would in that event become the owner of the prior mortgage, and of the equitable right of redemption, subject to the payment of the amount due on the second mortgage owned by Besser, the plaintiff in this suit. Then the sale under the decree in the foreclosure suit, brought by Stephens upon the first mortgage was wholly inoperative as to the rights of Besser, the second mortgagee, for the reason that he was not a party to that suit. The only right therefore, which Hawthorn acquired under that sale, as against Besser, was the right to the prior lien upon the premises, to the extent of the amount of money due on the Stephens note and mortgage, at the time of sale, in the same manner as if Stephens had assigned that mortgage to him without foreclosure. But as against Shultz, the mortgagor, he acquired the right of redemption, subject to the payment of the amount due on Besser's mortgage, which was a specific lien on the property. Therefore, we hold that Besser's right to foreclose his mortgage, was not impaired, and that his mortgage remains a valid and subsisting lien on the premises, it being of record. (*Vanderkemp et al. v. Shelton*, 11 Paige, 28.)

The decree of the circuit court was correct, and therefore is affirmed.

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DAVID B. SIMPSON, JESSE DAVIS, W. C. MOONEY  
and LUCIEN EVERTS, Plaintiffs and Appellants, v.  
G. W. BAILEY, O. F. CLARK, H. K. SCHOOLING  
and O. F. THOMPSON, Defendants and Respondents.

*Appeal from Umatilla County.*

COUNTY SEAT, LOCATION OF.—CONSTITUTION.—*Held*, that the act of the legislature changing the location of the county seat of Umatilla county, is constitutional; and that the proceedings of the county officers in pursuance of said act valid. The object of art. 4, sec. 20, of the constitution is to prevent matters wholly foreign, and disconnected from the subject expressed in the title of the act from being inserted in the body of the act.

THIS is a suit in equity to restrain the defendants, who are the county officers of Umatilla county, from tearing down the old county building at Umatilla landing; and from incurring additional debts and liabilities in behalf of Umatilla county; because the indebtedness of said county, already exceeds the constitutional limit. Plaintiffs also seek in this suit to test the validity of the act of the legislative assembly, approved October 13, 1868, authorizing the removal of the county seat of Umatilla county; and to compel the county officers of said county to remove their offices back to Umatilla city.

Section 1, of the act in question provides for an election to locate the county seat and among other things that "the present location, Umatilla landing, shall be one candidate and Upper Umatilla some where between the mouths of Wild Horse and Birch creeks, the other candidate to be voted upon at said election."

Sec. 2 provides that "the county clerk shall plainly write the above named candidates upon the poll books of said county, as in other cases of like practice," and the candidate receiving the majority of all the votes cast shall be the county seat.

Sec. 3 provides that the county court shall convene within one month after the election, and appoint "three competent persons to locate the site for the erection of new county buildings, and shall immediately select some point between the said mouths of Wild Horse and Birch creeks on the Upper Umatilla as in their judgment shall best subserve the interest of the whole county, and shall give an appropriate name to said new county seat."

Sec. 4, provides for removal within a year; sec. 5, for expenses; sec. 6, repeals inconsistent acts; and sec. 7, that the act shall take effect immediately.

This bill came on for hearing before the circuit court and was dismissed, and the plaintiffs appealed.

*Mitchell, Dolph & Smith*, for the appellants.



*Kelly & Ellsworth, or the respondents.*

PRIM, J. It is contended that the act of the legislature authorizing the removal of the county seat of Umatilla county is unconstitutional, and that all the proceedings under it are void, for the reason, it is claimed, that several distinct subjects of legislation are embraced in the act, and whereas only one subject is expressed in the title.

Art. 4, sec. 20, of the constitution, provides that "every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

The title of this act is, "an act to change the location of the county seat of Umatilla county." It is true that this act provides for the submission of the question of the change of location to the voters, the selection of the new site and the removal of the county buildings; but we apprehend that those are all matters properly connected with the "change of the location," which is the subject expressed in the title of the act. If the construction contended for by appellants should prevail, the title of a bill would necessarily be nearly as long as the act itself. Such a construction we apprehend was never contemplated by the convention in adopting this provision of the constitution. The object of the provision evidently was to prevent matters wholly foreign and disconnected from the subject expressed in the title from being inserted in the body of the act. This restriction is a very important one, and well calculated to prevent imposition being practiced upon unsuspecting members, by procuring their votes for bills with fair titles, which contain objectional matters unconnected with the subject expressed in the title. By this act, the change of location of the county seat was made to depend upon the vote of the electors of the county. This act was authorized by art. 1, sec. 21, which provides that "laws locating county may take effect or not upon a vote of the electors interested."

A further objection is made to this act of the legislature, because it authorizes the appointment of three commissioners by the county court, to select the particular site upon which to erect the county buildings. This, it is claimed, was delegating legislative authority, but we think this point is not well taken; for it had already been decided by the electors of the county, that the county seat should be located at a point on the upper Umatilla, somewhere between Wild Horse and Birch Creeks, which were only a few miles apart. The land between these two points was owned by different individuals, and the business of the commissioners was to select the particular site or piece of land somewhere between these points, upon which to erect the county buildings, and make an arrangement with the owner thereof, to obtain the title. Suppose the legislature should pass an act, locating the county seat of Marion County, at the city of Salem. Salem is quite a large place, and its corporate limits are quite extensive; the city is laid off into blocks and lots, and these are owned by different persons. Would it be necessary, in order to make the act valid, for the legislature, after locating the county seat at Salem, to go on in detail, and provide that the county buildings should be erected upon a certain block, in a certain part of the city. We think not. In such case, the county commissioners would be authorized to select the best site they could, anywhere within the city limits. For these reasons, we hold that the act of the legislature, locating the county seat of Umatilla, and the proceedings of the defendants under the same, were valid. The decree of the circuit court dismissing the bill, is affirmed.

CANYON ROAD CO., Respondent, v. B. F. LAWRENCE,  
Appellant.

*Appeal from Douglas County.*

**APPEAL.**—An undertaking must be filed within the time prescribed, to wit, within ten days after the service of the notice of appeal is given, or the appeal is not perfected, and will be dismissed on motion.

A MOTION was made in this case to dismiss the appeal, for the reason that the said appeal has not been perfected, since there was no undertaking filed, as was required by law; and a cross application to file an undertaking, supported by affidavit, is also made. The record discloses these facts: the notice of appeal and the accompanying certificate of errors was filed August 17, 1870, and service acknowledged on the same day, and the undertaking was filed Sept. 3, 1870, that is, a greater period of time than ten days elapsed between the service of the notice of appeal and the filing of the bond.

*Watson & Willis, for respondent.*

*L. F. Mosher, for appellant.*

McARTHUR, J. It is unnecessary to refer directly to the facts in the affidavit. Sec. 527 of the code of civil procedure, prescribes the manner in which appeals shall be taken and perfected. Subdivision two of that section provides, that within ten days from the service of the notice of appeal, the appellant shall file with the clerk the required statutory undertaking. We are of opinion that the provisions of the statute in regard to the time within which the undertaking on appeal is required to be filed, should in all cases be strictly complied with. The true construction of subdivision 2 of section 527 of the code of civil procedure, is that the appeal shall not be considered as perfected or effectual for any purpose, unless an undertaking be filed within ten days after the service of the notice of appeal.

If this be the construction, it is clear that the failure to file the undertaking is fatal to the appeal. The consequence attached to the failure is, that the appeal shall not be effectual and this consequence can only be enforced by giving full effect to the provision as to time. This rule is laid down in *Elliott v. Chapman et al.*, 15 Cal. 383.

Appellant's counsel in the argument of this motion urged that, by virtue of subdivision 4 of sec. 527 of the code, this court could permit the undertaking filed to stand, upon imposing terms, and thereby remove the effect of the statutory provision, limiting the time within which an undertaking on appeal should be filed, and in support of this position, referred to a decision of this court, which, by virtue of subdivision 4 of sec. 527, permitted a party to make a deposit in lieu of a defective undertaking, filed within the time limited by the code. We are of opinion that the case referred to, is not parallel with the case now under consideration. In the case at bar there is no question as to the power of the court to allow an amendment. No undertaking was filed within the time limited by the statute, and the consequence is that there is nothing to amend. It is not the case of a defective undertaking, but of no undertaking at all. In construing the statute, we must look to the language used, and endeavor to ascertain the intention of the legislature. It is an established principle that provisions as to time are to be construed as directory, but such a construction is improper where a consequence is attached to a failure to comply. In such a case, the consequence can be avoided only by strict compliance with the statute. In considering the application and affidavit, the court finds, that while the attorney observed all the diligence which the law requires in this matter, and perhaps more, yet the facts set forth in that affidavit conclusively show negligence and laches on the part of the defendant in the court below, who, it is presumed knew the law, and rested under sufficient knowledge of the requirements of the statute. Every presumption of negligence, laches, or mistake, is raised against the actor

or moving party in any proceeding whatsoever, and when such party has been guilty of either, he is seldom, if ever, viewed with favor by the law or the courts. Besides this, there are many cogent reasons why the court should adopt plain, positive, and pointed rules in relation to this matter of undertakings, in order to close the door against fraud. If so, after a judgment is obtained, an appeal is desired for any cause, the appellant need only serve his notice of appeal in order to effect the purposes which the statute declares shall only be effected by filing the undertaking. If this court adheres to loose dicta in this matter, a defendant can, after his notice of appeal is served, rest perfectly secure in the assurance that, upon what he may urge as a mistake this court will exercise its discretionary powers, and permit an original undertaking to be filed during the term, and the party, plaintiff in the court below, who has taken the pains and gone to the expense of securing a judgment, is not only subjected to unwarrantable delay, but, in many cases, may be compelled to sit quietly by and behold the property, out of which his judgment could be made, rendered valueless through natural causes, or placed beyond the reach of process through fraudulent design. Leave to file the undertaking cannot be granted, and the appeal must be dismissed.

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DANIEL S. STIMSON, Respondent v. ESTES and  
STIMSON, Appellants.

*Appeal from Multnomah County.*

**REFeree, Power of.**—It is the intention of the statute that trials before a referee proceed in the same manner as trials before a court, and that referees are clothed with the same authority in directing the manner of a trial, and in deciding motions which may arise during its progress.

THE facts are stated in the opinion.

*Mitchell & Dolph*, for the appellants.

*C. A. Dolph* and *W. Lair Hill*, for the respondents.

BOISE, J. This is an action to recover on an account for labor performed for the defendants of the reasonable value as alleged of one hundred and eighty-nine and .80 dollars, and for superintending the performance of certain street contracts in the city of Portland, under an agreement with the defendants, by the terms of which plaintiff was to receive for such service in superintending said street contracts, one-third of the profits accruing from street contracts, which profits plaintiff alleges in his complaint to have been two thousand eight hundred and one and .79 dollars.

In their answer the defendants deny plaintiff's claim for service, but admit that the plaintiff superintended the street contracts as alleged, and that he was to have one-third of the profits thereof as alleged, but defendant says that the profits of such contracts were only six hundred and eighty dollars; and defendants further allege that they bought lot one in block seven with a part of the proceeds of said contracts for the joint benefit of plaintiff and defendants, and ask to have the purchase price thereof allowed in settlement.

Plaintiff in his replication denies the purchase of the lot with his knowledge or consent.

The case being at issue was referred to Geo. H. Durham, Esq., and he directed to hear the same and report the evidence and his findings of the facts and conclusions of law.

On the trial before the referee the plaintiff introduced his evidence and rested. Defendants then introduced their evidence in reply to plaintiff's evidence, and also evidence to support their answer and rested.

Plaintiff was then recalled and examined to rebut some new matter contained in the testimony of the defence, after defendant had cross-examined this witness the plaintiff rested his case.

Defendants' counsel then stated as follows (from the report): "We now offer Mr. Pennoyer as a witness."

Plaintiff's counsel objected on the ground, that both defendants and plaintiff had rested their cases. (Referee goes on to say); "In ruling on the objection, I stated that if defendants wished to introduce testimony to impeach the rebutting witness of plaintiff, they had a right to do so, and the evidence would be admitted; or if they would show that by any accident or mistake, they had omitted anything necessary to their defense it would be admitted on such showing, otherwise it would not. They refused to state what they expected or wished to show, merely stating that they wished to ask what they had a legal right to." The referee than refused to open the case on this statement.

The question now presented to this court is, ought the court below to have set aside the report of the referee because he refused to receive and reduce to writing the testimony so offered by the defendant's counsel.

The counsel for the defendants rely on the statute, page 194, sec. 274, which provides (on trial before referee): "If evidence offered by either party, shall not be admitted on the trial, and the party offering the same, except to the decision rejecting such evidence at the time, the exception shall be noted by the referees, and they shall take and receive such testimony and file it with the report."

This matter involves the consideration of the manner of conducting a trial before a referee, as to his discretion in controlling the order of the trial. In a trial before a court, the rule is that plaintiff shall first introduce his proof, and when he has rested, the defendant shall introduce his proof, and when he has rested, the plaintiff may introduce testimony to rebut any new matter shown by the defendant—and when plaintiff has closed his rebutting testimony, the defendant cannot open his case again, except by leave of the court, and if the court allow it, it is a matter of discretion, and the order refusing the motion to reopen, is not subject to exception.

If during a trial, while a party is producing his testimony, and before he closes his case offers testimony which is refused by the court, such party may except to such refusal,

and his exception must be allowed, and the testimony offered should be embodied in a bill of exception, so that the superior court can judge of its competency, on an appeal. And I think it was only the intention of the statute to extend this practice to trials before referees, so that their errors might be brought before the court in the same manner as the errors of an inferior court are brought before the appellate court; and that it is the intention of the statute that trials before referees shall proceed in the same manner as trials before a court, and that they are clothed with the same authority in directing the manner of the trial, and deciding matters which may arise during its progress; and that in such trials the order of producing proof is the same as in trials before a court. In fact, that the referee sits as the court in all respects. I think this is clearly indicated by section 223, of the code, where it is provided that "The trials by referees shall be conducted in the same manner as a trial by the court."

The construction contended for by the counsel for the appellants would take from the referee all control of the trial in respect to the order of the proofs and would be at variance with general practice. I think the words of the two hundred and twenty-fourth section of the statute, "If evidence offered by either party shall not be admitted," only refers to evidence offered in the course of a trial conducted as a court in the usual and established mode—and not to evidence offered out of order, and which it is in the *discretion* of the court to *refuse*.

The judgment will be affirmed.



WILLIAM and CATHARINE O'HARA, Respondents, v.  
THE CITY OF PORTLAND, Appellant.

*Appeal from Multnomah County.*

**NEGLIGENCE.—LIABILITY OF THE CITY OF PORTLAND.**—*Held*, that section 127 of the charter of the city of Portland, exempts the city from liability for any injury to the person, growing out of the defective condition of any street or sidewalk.

THE facts are stated in the opinion.

*Wm. F. Trimble*, for the appellants.

*Stout & Reed and Caples & Moreland*, for the respondents.

**PRIM, J.** This action was brought in the circuit court of Multnomah county to recover damages sustained by respondents on account of an alleged defect in the sidewalk of a certain street in the city of Portland. The complaint alleges "that defendant is a municipal corporation duly organized under the laws of this state; that among other things, it is by the charter of said city made its duty to keep the streets and sidewalks of said city in good order; that the people of said city accepted said charter imposing said duty, and undertook the performance thereof prior to the year 1868; that a certain street in said city, known as Fifth street, was and is much used and traveled by the citizens and others, so much so that the said duty of said defendant, as to said street, became at the time hereinafter mentioned a matter of public and general concern." It is further alleged that, "on or about the eighth day of July, 1868, Catharine O'Harra, one of plaintiffs, while traveling over the sidewalk of said Fifth street, was, on account of a defect therein, precipitated through said sidewalk, whereby she was injured," etc.

Each and every allegation of the complaint is denied in the answer, except that defendant is a municipal corporation, etc.

The trial resulted in a verdict for respondents in the sum of \$2,000, on which judgment was entered.

A number of questions were raised and discussed in the argument of this case, but the only one which we deem necessary to be decided by this court at present is, whether the city of Portland is liable, under the provisions of its charter, to any one for injuries to the person growing out of the defective condition of its streets.

Section 347 of the code provides, that "an action may be maintained against a municipal corporation \* \* \* \* for an injury to the rights of the plaintiff, arising from some act or omission of such corporation." This section of the code was adopted in 1862, and the legislature, in adopting it, evidently intended to authorize the maintenance of such actions as this against municipal corporations. But in 1864, two years afterwards, and prior to the happening of the injury complained of in this action, the legislature amended the charter of the city of Portland, by the adoption of section 127, which provides, that "the city of Portland is not *liable* to any one for any injury to the person \* \* \* growing out of the condition of any streets." (Special laws of 1864, p. 26.)

This provision of the charter, it will be seen, expressly exempts the city from any liability to persons for injuries received on account of streets being defective or out of repairs.

But it is urged, that this provision of the charter is unconstitutional, and therefore void. To sustain this proposition, section 21 of article 1 of the constitution of the state is cited, which provides, among other things, that "no law impairing the obligation of contracts shall ever be passed." How this amendment of the charter violates this provision of the constitution, we are unable to see; for it is not contended that there is any express contract on the part of the city to be responsible for the defective condition of its streets and sidewalks; and it certainly cannot be claimed that there is an implied contract to that effect, when in the very act of the legislature under which the city is incor-

porated it is expressly provided, that it shall not be liable for injuries to the person growing out of the defective condition of its streets and sidewalks.

The court being of the opinion that the city is not liable under this provision of its charter for such injuries as are set out in the complaint, it is ordered that the judgment of the circuit court be reversed.

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DALLES LUMBER AND MANUFACTURING COMPANY v. THE WASCO WOOLEN MANUFACTURING COMPANY et al.

*Appeal from Wasco County.*

**A CORPORATION CONFINED TO SPECIFIED BUSINESS.**—A corporation organized for the purpose of "manufacturing and selling lumber," can not hold a lien for labor performed in the construction of a building. Where such a corporation sued to enforce a lien for both lumber furnished and labor performed in the construction of a building, and the complaint failed to show how much of the gross amount was for lumber furnished, the judgment was reversed.

**MECHANICS' LIEN.**—**BUILDING.**—The defendants occupied several buildings as a woolen factory, on some of which the material was furnished and the labor performed; the mechanic's lien does not extend to all the buildings, but is confined to the building for which the material was furnished or on which the work was done.

**IDEM.**—**PLEADING.**—It should appear by the complaint that notice of the lien was filed in pursuance of the statute.

THE case is stated in the opinion of the court.

*Humason and Williams & Willis*, for the appellant. It is not alleged that the lumber was used in any particular building. (25 Ill. 349; Code p. 763, sec. 1.)

The complaint should specifically set forth the amount furnished for the particular buildings. (Houck on Liens, pp. 162, 164 and 139.)

The proceeding is *in rem*. (4 Abbot, 205; 2 E. D. Smith, 662; 4 *Id.* 721.)

The plaintiff's articles of incorporation do not authorize the plaintiff to engage in building. (2 Roberts, 278; 3 Comst. 431; 2 Kent 296.)

*Kelly & Beed*, for the respondents. It appears that the buildings were all connected with the woolen factory to be used for a common object. (8 Barr, 437; 4 E. D. Smith, 734; 1 Ogn. 170.)

If there is error in entering the decree the error can be corrected in this court.

THAYER, J. This is a suit in equity, brought to foreclose a mechanic's lien, in the circuit court for Wasco County.

The complaint alleges that plaintiff is a corporation duly incorporated under the laws of Oregon, for the object and purpose of *manufacturing* and *selling lumber*. And that defendant is likewise a corporation, that between the sixteenth of September and the thirteenth of October, 1868, plaintiff sold and delivered lumber to, and performed labor for, defendant, in constructing its dry house, dye house, and bleach house, amounting to the sum of \$1,368.05. That between the twenty-sixth day of June, and the thirtieth day of October, 1868, plaintiff sold and delivered lumber and other material to, and performed labor for, defendant, in the construction of its woolen factory, dry house, dye house, and bleach house, amounting to the sum of \$619.89, for which said several sums of money, defendant executed his promissory notes. That on or about the tenth day of November, 1868, said buildings were completed. That on the twenty-sixth day of January, 1869, plaintiff filed a *notice* of its intention to hold a lien for said sums of money due it, for said lumber, materials, and labor, amounting to \$1,987.94, and that said defendants Snipes, Curtis & Marlin, have incumbrances on said premises, subsequent to plaintiff's claim. The defendants filed a motion to have plaintiff make its complaint more definite, as to the amount of lumber and materials furnished for each particular building, which motion was overruled by the court, to which ruling defendant excepted.

Defendant Benjamin E. Snipes, filed a separate answer, claiming, among other things, that he had a lien upon the premises in question, extending to all the buildings and machinery, created on or about the month of July, 1869, amounting to the sum of \$8,000. None of the other defendants filed answers. The cause was heard before the said circuit court, sitting as a court of equity. And it was adjudged and decreed by said court, that the plaintiff recover of the defendant, the Woolen Manufacturing Company, the sum of \$2,246.32 in United States gold coin, with costs, and the same be adjudged to be a lien upon the entire premises, including all the buildings, and the lots of ground upon which the said buildings were situated, including one half acre of ground described, and that the said lien have precedence over all liens after the commencement of said building (except mechanics' lien) to wit: since about the thirtieth day of June 1867, and that said premises be sold to satisfy the same.

The defendants have brought appeal from the judgment, but it appears from the record that Snipes is the only defendant that filed an answer, and consequently, the only one entitled to appeal, or be heard in this court. No statement or evidence has been returned, and the only ground of error which this court is authorized to examine, must be shown from the records in the case. Upon the argument, the appellant has presented two grounds of error: 1st, that, the circuit court erred in overruling the motion to make the complaint more definite; and 2d, that the complaint does not state facts sufficient to authorize the relief granted herein, as against the defendant Snipes. The record discloses sufficient, we think, to permit an examination of both of these questions. It is claimed by the appellants that the plaintiff being a corporation, formed for the purpose of manufacturing and selling lumber, if authorized to take the benefit of the lien law for lumber furnished, cannot take the benefit of such law to secure a debt created for work and labor done in the construction of a building, or for other materials furnished, the same not being within the objects of its incorporation.

The only allegation in the complaint on this point is as follows: "That the plaintiff is a corporation duly incorporated under the laws of Oregon, for the object and purpose of manufacturing and selling lumber."

The public have an interest in the creation of corporations.

The object of every grant of corporate powers is to obtain a public benefit. The powers granted are the consideration which the public gives for the benefit received or expected. Every application of, or dealing with the capital, or any funds of the corporation, in any manner not distinctly authorized by its charter, is illegal and void. Corporations are created for public reasons alone, and the legislature is presumed in every instance to have carefully considered the public interest, and to have granted just so much power and so many peculiar privileges as those interests are supposed to require. It will not be contended that although the public have an interest in the creation of corporations, it has none in the precise extent of the powers conferred, and that no public policy is concerned in their being strictly confined to the exercise of such chartered powers. To speak of the powers of a corporation we are understood to refer to the privileges and franchises which are created in the charter, and which control and circumscribe the legal acts of the corporate body. Whenever it goes beyond the privileges and franchises therein mentioned, its acts become illegal and void. In the case at bar, so far as we can see from the complaint, the plaintiff only had the right to manufacture and sell lumber.

What portion of the judgment rendered against defendant was for work and labor done and performed, or for other materials furnished by plaintiff, is unknown to the court.

The blending of them together and taking a promissory note for the whole amount, does not necessarily, or by any means, vitiate plaintiff's lien, for the legal part thereof. But as the case now stands, and as it is presented by the proceedings before the court, this objection by appellant appears to be well taken. It is claimed by appellant that

plaintiff's complaint is defective in not stating the amount of lumber furnished for each particular building.

That the buildings being separate and apart the lien properly is on each building for the particular amount of lumber furnished for the same. For instance, suppose the main factory building had been completed before the dry house, dye house, or bleach house had been commenced and the defendant should purchase lumber for the purpose of constructing the three last mentioned buildings, and after commencing them, defendant should mortgage the main factory building, would it be right to allow the plaintiff's lien to extend to the main factory building and destroy the lien created by the mortgage, when no part of the lumber was used on that building?

This would be contrary to the spirit and meaning of the lien law. It was only intended to be a lien on the particular building constructed by means of the labor or materials furnished for that purpose.

Section 1, page 763, of the statute provides, "that any person who shall hereafter, by virtue of any contract with the owner of any building, or with the agent of such owner, perform any labor upon, or furnish any materials, engine or machinery for the construction or repairing such building, shall, upon filing the notice prescribed in the next section, have a lien upon such building."

The above section confines the lien to the building constructed or repaired. This question evidently refers to the particular building upon which the labor was performed, or for the construction or repair of which the materials were furnished, and to no other. It further appears by that section, that the labor must be done and performed, or the materials furnished under and by virtue of a contract with the owner of the building "or with his agent." This contract may be either verbal or written, express or implied.

It is claimed by the respondent, that the dry house, dye house and bleach house were as necessary to the factory as a mill-dam is to a mill, and he refers to 1 Oregon R. 170.

The defendant B. E. Snipes, in his answer, alleges, that

his lien is on the main factory building and machinery therein, as well as the other property and buildings. Plaintiff's complaint shows that a large portion of its demand was for labor, lumber and other materials furnished for constructing the other buildings, aside from the main factory building. Whether those out-buildings are as necessary to carry on the business of a factory, as a mill-dam is to a mill, the court is not advised. There is one thing certain, which appears from the pleadings in this case, that these out-buildings are separate and distinct from the main factory building.

The first section of the mechanic's lien law, already referred to, only gives the party a lien on *such* building as he performs labor on, or furnishes material for the purpose of constructing, and no other; there is nothing in the lien law in this state which raises the question of necessity. We therefore conclude that this objection is also well taken.

The appellant raises a question also, as to the sufficiency of the complaint, in reference to the allegation of the filing of the notice. The complaint alleges, that on the twenty-sixth day of January, 1869, plaintiff filed a notice of its intention to hold a lien, etc.

Section second, page 764, of the code, provides, that "any person wishing to avail himself of the provisions of this title, whether the claim be due or not, shall file in the county clerk's office of the county in which such building is situated, etc." It does not appear where the plaintiff in this case filed his notice. The section above referred to requires it to be filed in the county clerk's office of the county where the building is situated. This not having been alleged the complaint is defective for that reason. The rule of construction applied to the statute creating this lien, is that it is an extraordinary remedy, created by statute in derogation of the common law, and ought to be strictly construed. See *Parker v. Anthony*, 5 Grays, 289.

For these reasons the judgment of the circuit court must be reversed with costs.



This decision being made upon the insufficiency of the complaint, and respondent's counsel having made application to amend the same, the suit is remanded to the circuit court and the plaintiffs have leave to amend accordingly.

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STATE OF OREGON ex rel. J. J. WHITNEY, Appellant, v. S. A. JOHNS, Respondent.

*Appeal from Linn County.*

**APPOINTMENT TO OFFICE.**—The appointee of the Governor appointed to fill a vacancy in office occasioned by death or resignation, only holds said office until the first general election after the vacancy occurs.

**SUPPLYING IDEM.**—At that time the people may supply the office by election.

**TERM.**—The term of an office attaches to the person of the individual elected to fill the same.

**IDEM.**—Whenever a county judge is elected his term of office continues for four years, unless terminated by death or resignation.

THE facts are sufficiently set forth in the opinion of the court.

*N. L. Butler*, District Attorney, *Williams & Willis* and *Bellinger & Burmester*, for the appellant.

*R. S. Strahan* and *N. H. Cranor*, for respondent.

MCARTHUR, J. In June 1866 Burr Morris having received a majority of all the votes cast, was duly elected county judge of the county of Linn in this state. He was qualified, and in July, 1866 entered into said office and began to exercise the functions thereof. In September, 1866, Morris died and the Governor of the state of Oregon appointed E. R. Geary to fill the vacancy occasioned by the decease of the said Morris. In June, 1868, S. A. Johns, respondent herein, was elected county judge of said county and being duly qualified entered upon the discharge of the duties of said office in July of said year. On June 6, 1870, J. J. Whitney the relator and appellant having received a

majority of all votes cast for the competitors or candidates for the said office, and having received a certificate of election from the clerk of said county, filed in the office of said clerk the oath of office required by law. On or about July 4, 1870, Whitney demanded of Johns the possession of said office together with the books and papers thereunto belonging. To this demand Johns refused to yield. Whitney thereupon brought an action in the circuit court of the state of Oregon for the county of Linn, as provided by law, alleging Johns to be a usurper and intruder, and invoking the assistance of the law in order to oust Johns from said office, at the same time praying that the title, franchises, etc., of said office be adjudged to be in and belong to him. The court below, after due consideration, made and entered a judgment in favor of Johns. From that judgment Whitney appeals to this court alleging error.

The first question that arises for our consideration is as to the legality of the election of Johns in 1868. Section 14 of article 2 of the constitution of this state, declares, that "general elections shall be held on the first Monday in June, biennially." A general election is one at which the people may fill by election every elective office in the state not otherwise distinctly provided for by the constitution or the laws. Those offices are enumerated and set forth in section 3, p. 697, general laws. Section 11, article 7, of the constitution, fixes the time when such election shall be held. Section 16, article 5, of said instrument provides, that "when, during a recess of the legislative assembly, a vacancy shall happen in any office the appointment of which is vested in the legislative assembly; or when at any time a vacancy shall have occurred in any other state office, or in the office of judge of any court, the governor shall fill such vacancy by appointment which shall expire when a successor shall have been elected and qualified." After the decease of Morris, the then governor, acting within the scope of his constitutional authority, appointed Geary to fill the vacancy. It is contended that by virtue of this appointment, Geary had a right to continue in said office until July, 1870, the

term of the office of county judge being four years, and he being appointed to fill the unexpired term of Morris. It must, in this connection, be borne in mind, that a general election occurred in June, 1868, the same being the one at which Johns was elected. As has before been stated, the governor's act in appointing Geary was lawful and proper, but we are of opinion, that he has no power or authority to fill any vacancy by appointment, which appointment shall extend beyond the general election next following. The power reposed in the executive by section 16 of article 5 of the constitution is not absolute, but limited and qualified, and was only reposed in him for the purpose of filling vacancies in office, until such times as the people, the repository of all power, could act thereon and fill them, as at the recurrence of a general election. The persons so appointed merely hold office temporarily, so that public business may not be retarded or disturbed by the death or resignation of the elected incumbent. As to the appointing power of the governor; it appears from the constitution and from our system of government, that it was the manifest intention of the framers and founders thereof, to restrict the same within the narrowest limits. Indeed the weight of authority very decidedly supports this theory. (*Vide People v. Langdon*, 8 Cal. 15; *People v. Mizer*, 8 Cal. 524-5; *People v. Whitman*, 10 Cal. 46; *People v. Fil-ton*, 37 Cal. 621.) To hold that the power of the governor is so great, that he can prevent the people from selecting their officers at any time, when in so doing the fundamental law is not infringed, would be contrary to the spirit of our form of government. The court below (Boise, J.), in passing upon this branch of the case argued as follows: "Section 11, article 7, (of the constitution,) provides for the appointment of county judges by election. Section 14, article 2, fixes the time when such election shall be held. And when any officer is elected for a term of years, which term extends beyond two years (the period between the general elections) and the office to which he is elected becomes vacant, the power to fill such vacancy devolves on the original appointing power, (the

people,) unless they have delegated that power to some other authority. In this case it is claimed that the governor has that power delegated to him, by section 16, article 5, which provides: "The governor shall fill such vacancy by appointment, which shall expire when a successor shall have been elected and qualified." Why are the words used "shall expire when a successor shall have been elected and qualified?" The term of the appointee of the governor must, on the theory of the plaintiff, expire at the end of the term of four years from the time the deceased incumbent was elected, and they were not used to prevent an interregnum after the expiration of such term, for that is fully provided for in section 1, article 15. These words have no signification in this place in the constitution, unless they are intended to limit the term of the appointee of the governor, to such a time as the vacancy in the office can be filled by election. The people of Oregon by their constitution made their judiciary elective, and only gave the executive power to fill temporary vacancies, which should occur between elections. If the people had intended to part with this power of appointing county judges, they would have expressed it. It cannot be inferred. No inference or intentment is ever presumed against the sovereign. Such is the universal rule for the construction of statutes, for they emanate from the sovereign power which, in this state, is the people. They appoint the executive, and he only acts by delegated authority, and this authority cannot be presumed beyond the express words of the grant. And I think the power in this case only extends to the filling a vacancy until the next general election, when the people can regularly exercise their authority in electing officers. I think it is not reasonable to presume that, where the people have reserved to themselves the appointment of an officer, they would confer on the executive the filling of a vacancy in the office, which would extend the time of the appointee beyond a general election, and deprive the whole people of a county from electing their own local officer, when they could fill it as conveniently as they appointed the original incum-

bent. If it were not for section 16, of article 5, of the constitution, I think, there would be no pretense but what in case of a vacancy in the office of the county judge, it could be filled at the next general election, because it is a political axiom, that when an office becomes vacant the power that made the office can fill it again. If the people have surrendered that power, it should be by express and unequivocal words. The words are: "The governor may fill the vacancy until a successor is elected." Vacancy in an office means the want of an incumbent at the time. It has no reference to duration of time, and the appointment of a person to fill a vacancy *pro tempore*, does not invest him with a full term, unless the law so expressly provides. Vacancy in an office is one thing, and term is another. An office may be vacant and filled many times during a term of four years.

I am, therefore, of the opinion that the appointment of Geary continued only until the next general election after his appointment, and until his successor was elected and qualified. In the arguments and conclusions reached by the court below upon this branch of the case, as set forth above, we fully concur. It follows, therefore, that the election of Johns in June, 1868, was legal.

This conclusion being reached, the next question which is presented is: For what length of time was he chosen? The state constitution, section 11, article 7, provides, that "There shall be elected in each county, for the term of four years, a county judge who shall hold the county court at times to be regulated by law." We have already seen that in case of a vacancy in the office of county judge, caused either by the death or the resignation of the incumbent, the office may be filled by election at the first general election following the death or the resignation, and that the term of the appointed incumbent, the *locum tenens*, then expires. It is also clear that in newly organized counties the office of county judge, as well as each and every other county office, is filled by election at the first general election occurring after the act of the legislature erecting and organizing a new county. The appointees in no instance holding over. It

is also manifest that the county judge can not be regularly and quadriennially elected in each county throughout the state. In some counties they are elected at one general election, and in others at the next general election. If there was such a thing as a regular term of office disconnected from the person of the incumbent, the elections for county judges would be regular throughout the state, and occur every fourth year from the adoption of the constitution. We are of opinion that under section 11 of article 7, just cited, the term attaches to the person. It is in the nature of a personal franchise which may be terminated by the act of the party himself. He may exercise it for four years. He may resign it. Then he yields it up to the power which conferred it upon him, and the people, if they elect a successor, confer a like franchise upon that successor, and there is no constitutional or statutory prohibition to that successor holding the office for four years, and though such election should occur before the expiration of four years from the last preceding election, they confer the office for the full constitutional term. Hence we conclude that by virtue of the election in June, 1868, Johns became entitled to hold the office of county judge of Linn County, and enjoy all the franchises of that office for four years from the time of said election. The cases of *Coutant v. The People*, 11 Wend. 512; *People ex rel. Gallup v. Green*, 2 Wend. 267; *People ex rel. Aylett v. Langdon*, 8 Cal. 1; *The People ex rel. Ingersoll v. Garey*, 6 Cowen, 642; *The People ex rel. Davies v. Cowles*, 13 N. Y. 350; *The People v. Keeler*, 17 N. Y. 370; *Benton v. Watson*, 4 Tex. 400; *Roman v. Moody*, *Dulam's* (Texas) R. 512; Texas Digest, 386; *The People ex rel. Brodie v. Weller*, 11 Cal. 77, though not directly in point, are analogous in principle and fully support this conclusion. Counsel for the appellant have cited some very respectable authorities in support of a contrary theory to which, under some circumstances, we would defer, but in this case we cannot, for we are fully satisfied that the conclusion reached is in perfect accord with the spirit of our constitution and laws. The decision of the court below is therefore affirmed.

JOHN MURRAY et al., Appellants, v. SAMUEL H. OLIVER et al., Respondents.

*Appeal from Benton County.*

**USURIOUS CONTRACT.**—An agreement under the statute of 1854 to compound interest oftener than once a year, cannot be enforced; but held, that it does not vitiate the contract as to the principal sum secured and simple interest.

THE facts are stated in the opinion.

*Thayer & Burnett*, for the appellants.

If the language is ambiguous the plaintiff is entitled to that construction of the contract that will give it legal effect. (3 Cowen, 290; 2 Parsons on Con. pp. 12 and 500; Edwards on Bills, 360; 3 Story, 122; 25 Maine, 401.)

The statute of 1854 fixes no penalty for contracting for excessive interest. The contract is not void. (12 How. 79; 13 Maryland, 203; 9 Peters, 399.)

An agreement to pay compound interest is not usurious. (3 Ohio, 17; 4 Id. 373; 22 Barb. 124; 29 N. Y. 337; 8 Mass. 256.)

Note in hand of innocent purchaser is good unless the statute declares it void. (6 Wend. 615; 2 Hill, 499; Chitty on Bills, 104.)

Severable contract. (10 Pet. 360; 1 Wallace, 222.)

This being a suit in equity on a covenant to pay, the limitation of six years does not apply. (32 Miss. 224; 1 Cal. 497.)

*Chenoweth, Stout & Kelsay*, for the respondent.

I. The law in force when the note sued on was made, prohibited the making of any contract whereby the interest should be compounded oftener than once a year. (Laws of Oregon, 1856, p. 532, secs. 3-4.)

II. The compound interest demanded in this suit is usurious, being prohibited by statute. (3 Parsons on Cont.

p. 107; 6 Johns. Ch. R. pp. 314-315; 2 Cushing R. p. 92; 1 Wend. R. 522; 23 Pick. 168; 1 Bovier Ins. 300, 450-4; 3 Parsons on Cont. 108, note; 5 Abbott's Digest, p. 312, sec. 180.)

III. The contract sued on is entire and not divisible, and being illegal, is void. (See 1 Pars. on Cont. 456; 2 Peters, p. 541; 1 Wharton's Law Dictionary, 179; 2 Pars. on Cont. pp. 520-1-2.)

IV. This contract not being apportionable compound interest cannot be collected. (As to Statute of Limitation—18 Cal. 482; 9 Texas, 588.)

BOISE, J. This is a suit to foreclose a mortgage executed by the respondent, Oliver, July 26th, 1861, to one Ira Bristol, and by him assigned, for value, to the appellants, July 15th, 1862.

The complaint sets forth the note and mortgage upon which this suit is based, and the respondent Oliver demurs, and assigns as ground of demurrer, that the said note is usurious and void. The court below sustained the demurrer, and gave a decree for the defendants for costs.

The note which is claimed to be usurious is as follows:

"\$200.00.

"BENTON COUNTY, OREGON, July 26th, 1861.

"One year after date, for value received, I promise to pay Ira Bristol, or order, two hundred dollars, with interest at the rate of thirty per cent. per annum until paid, and interest to be paid semi-annually, and if not paid when due, the interest to be compounded at the same rate.

"L. H. OLIVER."

We think this contract divisible. There is an agreement to pay the principal and interest at the end of one year from date; then it is stipulated that the interest shall be paid semi-annually, and if not paid when due, the unpaid interest to bear interest at the same rate.

The statute of 1854, which was in force at the time this note was made, provided, that the parties to any note might



stipulate, that if the interest was not punctually paid, such interest should draw interest and become a part of the principal, but it provided that the interest should not be compounded oftener than once a year; but that statute did not provide any penalty or forfeiture, in case interest should be compounded oftener. It would therefore result in rendering void the contract to pay interest semi-annually, and would not vitiate the contract to pay the principal sum with interest at thirty per cent. It has been held in England and in New York, that an agreement to pay interest upon interest which is to accrue subsequently, cannot be legally enforced; although it does not render the agreement void, so as to prevent the recovery of the principal. (Edwards on Bills and Notes, page 358; 5 Paige Ch. R. 98; 1 Barb. 632.) It would seem, then, that if in cases where the law does not allow the reservation of compound interest, in the original contract, that such reservation in the contract does not render the contract void, so as to prevent the recovery of the principal and simple interest; the contract, in this case, reserving interest to be compounded semi-annually. Where the statute provides that it shall be compounded but once a year, does not render void the note, so as to prevent the recovery of the principal and simple interest. It seems to me that the cases are parallel.

In many of the states, the rule in the English law has been relaxed, and compound interest can be reserved on the original contract. (*Pierce v. Rowe*, 1 N. Hamp. 179; *Kennon v. Dickens*, Com. and Nor. Rep. 357; *Greenleaf v. Kellogg*, 2 Mass. Rep. 568.)

It has been held in Ohio, that where there was an agreement to pay annual interest upon the original sum due, and afterwards the parties computed the interest upon the annual interest from the time such interest became due, and included the same amount in a new security, such interest was not usurious.

In the case of *Mowry v. Bishop et al.* (5 Paige Ch. Rep.), the chancellor says: "In this state" (New York) "it appears to be settled, that an agreement to pay interest upon

interest which may accrue after the making of such agreement, cannot be legally enforced, although it does not render the agreement usurious."

And I think the rule in this state, under the statute of 1854, should be, that an agreement to compound interest oftener than once a year, cannot be enforced, but does not render the agreement void as to the principal sum secured, and simple interest is stipulated by the parties.

Judgment reversed.

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HENRY HILL, Appellant, v. JAMES AND JOHN MELLON, Respondents.

*Appeal from Polk County.*

**VARIANCE.**—Variance to be material, must have misled the adverse party to his prejudice.

**IDEM.**—When misled, proof thereof must be made to the court below in order for a party to avail himself of the provisions of section 94 of the Code.

THIS action was originally brought in justices' court, Multnomah precinct, in Polk County, by Hill, to recover \$150, the value of a horse from the Mellons. The defendant James answered, admitting an indebtedness, but claimed an indebtedness from plaintiff on open mutual account of \$214.80, over and above the \$150, claimed by plaintiff. The cause was only tried upon the issues presented, and judgment rendered for defendants.

Plaintiff appealed to the circuit court, when referee was appointed to take the testimony and report the law and the facts. Report submitted at the April term, 1870, with judgment for defendant, in the sum of \$31.33. Objections were filed, and after argument, the court below modified the judgment of the referee, and reduced the same to \$11.23. Plaintiff appeals to this court.

*P. C. Sullivan*, for appellants. No appearance for respondents.

McARTHUR, J. It is insisted by appellant's counsel, that there was a total failure of proof in this cause in the court below, or, at least, that there was a fatal variance between the allegations in the answer, and the proofs submitted. The facts are here in the shape of a statement annexed to the record of the judgment. Section 96 of the Code, sets forth what is deemed to be a failure of proof, and the evident meaning of the section is, that if the proof falls within the scope and meaning of the allegations, variance in some particulars only is not to be regarded as fatal.

It requires no very critical or careful examination of the record and the statement to ascertain that the charge of total failure of proof cannot be maintained. There may, however, have been a variance between the allegations and the proofs, though whether that variance can be considered fatal, or even material, is questionable. The first clause of section 94 of the Code, provides, that "no variance between the allegations in a pleading, and the proof shall be deemed material, unless it have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." And the same section further provides that "whensoever it shall be alleged that the party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled, and thereupon, the court may order the pleadings to be amended upon such terms as shall be just." A party failing to take advantage of the law in these particulars at the proper time and in the proper place in the court below, is himself at fault. The appellant made no application to the court below to enforce the statutory provisions existing in his favor, and it would certainly be a very novel position to assume it to be the duty of the court to apply these provisions, unless moved so to do by the party to whose advantage they would enure. Had an application been made and improperly refused, it would have been error; such, however, was not the case. We are clearly of the opinion that over this matter as presented in this case, this court cannot exercise supervisory control.

**HENRY BECKLEY, Appellant, v. M. M. LEARN, Respondent.**

**FERRY LICENSE.**—Under the statute in relation to ferry license, no person other than the owner of the land can secure a license, unless the owner of the land neglects to apply; and then only upon proof of service of notice. The same rule governs a case where the application is for the renewal of a license.

**THE facts are stated in the opinion.**

*J. F. Watson, for appellant.*

*Wm. R. Willis, for respondent.*

**THAYER, J.** This is an appeal from the judgment of the circuit court for Douglas County, affirming the decision of the county court upon writ of review.

The appellant applied to the county court of Douglas County, at the February term, 1869, for a ferry license over the Umpqua river, at a point where the road leading from Oakland to Scottsburg crosses the same known as Trenton Ferry.

The respondent applied at the same term of court for the renewal of a license formerly granted to him by the said county court, and which at the time of said application was about to expire.

The appellant stated in his petition for the license that he was the owner in fee simple of the land on both sides of the river at the place where the ferry was established; which fact was conceded, and also that both parties were qualified to receive the license.

The county court considered the two applications together, and awarded the license to the respondents, and the circuit court affirmed its action thereon.

The appellant claims that as he is the owner of the land before mentioned, he is entitled, as a matter of law, to be preferred in his application for the license; while the respondent claims that his application being for the renewal

of a license, the appellant's ownership of the land gives him no right of preference under the statute.

That such preference can only be claimed upon original application for a ferry license.

These are the only questions to be determined by the court.

The statutes of Oregon regulate the granting of such licenses, and the decision of this case depends mainly upon the proper construction of the statutes referred to.

Section 42, page 869, of the laws of Oregon, provides; "That unless otherwise provided by law, no such license shall be granted to any other person than the owner of the land embracing or adjoining such lake or stream where the ferry is proposed to be kept, unless such owner neglect to apply for such license.

"And whenever application shall be made for a license by any person other than such owner, the county court shall not grant the same unless proof shall be made, that the applicant caused notice in writing of his intention to make such application, to be given to such owner if residing in the county, at least ten days before the term of the court at which application is made."

It will be readily seen from the above section, that no person other than the owner of the land, can secure a ferry license, unless the owner neglects to apply therefor, and then only upon proof of service of notice in writing at least ten days, &c. &c.

It evidently was the intention of the legislature to give such owner of the land decided preference, if he should desire the privilege, and it has been held by reputable authority, that he would be entitled to such privilege, independent of statutory provision, though the supreme court under our territorial organization decided in the case of *Grant v. Dreio* (1 Oregon, 35), that the right of preference in favor of the owner of the land in such case, was derived wholly from the statute, and that decision has since been affirmed in this court in the case of *Mills v. Learn* (2 Oregon, 215—while we feel bound by these decisions, whatever views we might

otherwise entertain, yet, we are satisfied that there are strong equitable claims of preference in such cases, in favor of the owners of the land, and that the right to be preferred, in their applications for license was not intended by the legislature as a mere gratuity.

In the case of *Mills v. Learn*, *supra* the learned justice who announced the opinion of the court, attempted to demonstrate that the riparian rights of owners of the land, in such cases, had been extinguished. That they had received just compensation for such rights, in the laying out and opening the road landing across the stream, &c., upon which the ferry was proposed to be established.

This reasoning may be entirely correct, although somewhat speculative in adopting it. However, we are necessarily obliged to assume, that the right of preference reserved by that statute in favor of such land owner, constituted a material part of the "just compensation" received by them, for that would very naturally be taken into consideration in the adjustment of their riparian rights.

Again, the court, in the case of *Knott v. Frush* (2 Oregon, 287), directly held that there was a distinction between the ownership of lands embracing or adjoining streams to which ferry rights attach and a license to keep a ferry granted under the statute to a person other than the riparian owner. That in the former case the right descended to the heirs-at-law as incident to the land, in the latter case, the license was a mere personal trust, and terminated with the death of the licensee.

The respondent's counsel urges that as a ferry license may be renewed without notice or petition as provided in section 48, page 869, Laws of Oregon, therefore the owner of the land, upon application for such renewal, is not entitled to the right of preference. Should such owner neglect to apply, the county court would no doubt have the right to renew the license, as the owner would be presumed to know the time of its expiration, and his failure to present an application would be deemed a neglect.

Although not notified as provided in said section 42, we

cannot see that the provision in said section 43 extends further than this. We deny that because a person other than the owner of the land, has enjoyed the privilege of a ferry license during a specific period, he can claim a higher right to its continuance for another specific period as against such owner—such fact may dispense with notice and other formality for the reason that the same would in such case be unnecessary, but it certainly was not intended to have any greater effect than that. The licensee receives all he bargains for, in the enjoyment of the grant during the term specified in his license, and cannot claim any greater privilege on that account.

He accepted the grant upon the terms imposed by the county court. The tenure was limited, and according to the decision in *Knott v. Frush*, rather precarious, but the acceptance was his own voluntary act, and he has no right to complain so long as he has enjoyed the full benefit of it. The proprietor of the land may have been willing that such licensee possess the right for a limited time. But we cannot presume that he ever has consented to his perpetual use of it. We conclude, therefore, that the riparian owner of the land to which ferry rights attach, may assert a right of preference whenever the county court is free to grant a ferry license, whether it be an original application to establish a ferry or a renewal of a license before granted.

For these reasons the judgments of the circuit and county courts are reversed.

ANNA NEWTON, Appellant, v. LUCINDA SPENCER  
et al., Respondents.

*Appeal from Benton County.*

**DONATION LAW.—HEIRS OR SETTLERS.**—The heirs of those settlers who died prior to Sept. 27, 1850, cannot, under the donation act, inherit by virtue of the residence and cultivation of their ancestors.

The facts are stated in the opinion.

*John Burnett, W. W. Thayer and R. S. Strahan, for the appellants.*

*Williams & Willis, Jas. F. Watson and L. F. Lane, for the respondents.*

BOISE, J. The complaint in this case alleges that the plaintiffs are the heirs-at-law of Hiram and Nancy Allen, deceased. That Hiram and Nancy Allen were married about the year 1838; that in 1847 they settled on said land under the laws of the late provisional government of Oregon; and from that time continued to reside thereon until January, 1849, when said Nancy Allen died; that said Hiram Allen continued to reside on the land with these plaintiffs, who were then minors, until 1863, when he made proofs in the name of Nancy Allen, his deceased wife, and her children (the plaintiffs), of residence and cultivation under the donation law, and then alleges that through fraud, the said patent was afterwards issued to said Hiram Allen and Lucinda Spencer, who married said Hiram in July, 1850, and was his wife at the time of the passage of the donation law and until after the year 1853; and during the whole period, during which the residence and cultivation was completed on said land after the passage of said donation law. And plaintiffs ask to have said patent set aside so far as the same conveys a title to said Lucinda Spencer, and that the court decree to the plaintiffs the full possession and control of said premises.



To this complaint the defendants demur on the ground that the court has not jurisdiction of this suit; and that the complaint does not state facts sufficient to constitute a cause of action.

The principal question discussed in the argument was, as to the capacity of the heirs of a person who died prior to the passage of the donation law (Sept. 27, 1850), and who died on the land, claiming it under the late provisional government, to hold the land by virtue of the ancestors residence. The language of the fourth section of the donation law (under which the plaintiffs claim) is, that there shall be and hereby is granted to every white settler or occupant of the public lands, etc., "now residing in said territory, or who shall become resident thereof, etc." "Now residing," means, living in said territory. It cannot be said that a person who is dead is residing. The grant was to persons in being, and in case they die before their title has become complete under this law, it provides how the survivor of married persons, one of whom is deceased, and the heirs of such persons may perfect the title of the deceased married person, or ancestor, so as to perfect the title in themselves. But there is nothing in the law which provides for perfecting the title in the heirs of persons who died prior to the 27th of September, 1850, and claiming the land under the laws of the late provisional government of Oregon.

All there is in the act touching this subject, is the provision in the said 4th section; "And in all cases where such married persons have complied with the provisions of this act, so as to entitle them to a grant, as above provided, whether under the late provisional government or since, and either shall have died before patent issues." The words, "shall have died before patent issues," refer to that period of time which may intervene between the completion of the four years' residence and cultivation, ere the time of the issuing of the patent; and being a reference to the future, must have referred to a time subsequent to the passage of the donation law, in which the language was

written. I think the words, "whether under the late provisional government of Oregon, or since," have reference to residence and cultivation, under the laws of that government, and were inserted to enable the settler who had been on his claim under that government, to count the time of such occupation as a part of the four years continued residence, required to perfect his grant. Without this provision, the old settler, who was on his claim at the passage of this law, would have had to commence his time of residence after the 27th of September, 1850; and I do not think it intended to revive the claims of dead persons, who were once claiming the land without the authority of the United States; for, all the laws of the provisional government relative to the disposal of the lands were void, and could only have vitality by direct act of congress.

This question was before the court in the case of *Ford v. Kennedy*, where it was held that the heirs of settlers, in Oregon, who died prior to September 27th, 1850, cannot inherit by virtue of the residence and cultivation of their ancestors. (1 Oregon, 166.)

Judgment affirmed.

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JOHN H. HAYDEN et al., Respondent, v. RICHARD  
STEADMAN, Appellant.

*Appeal from Multnomah County.*

**COLLATERAL UNDERTAKING.—PLEADING.**—In case of a collateral undertaking under the statute of frauds, the plaintiff should declare specially.

**IDEM.**—The complaint must show that a contract was made between the parties, and that it was upon a consideration.

The facts appear in the opinion.

*John W. Whalley*, for the appellant.

*Aaron E. Wait*, for the respondent.

BOISE, J. The complaint in this case after designating the parties, says: That the said defendant is indebted to the said plaintiffs over and above all payments and offsets, in the sum of three hundred and ninety-two dollars and seventy-one cents, and interest thereon from October 29th, 1869, by balance due upon an account for bill of James Doherty, to the plaintiff aforesaid by said defendant; and for lumber sold and delivered by the said plaintiffs to the said defendant, at his special instance and request; then follows a list of items, among which items is the following, to wit:

"Oct. 31.

"For James Doherty's bill assumed by defendant \$215.94

"To interest on James Doherty's bill. .... 22.00"

The complaint then proceeds, "That the said defendant has paid upon the foregoing account, at currency rates, the sum of nine hundred and seventy-eight and .85 dollars, including fifty dollars paid upon said bill of James Doherty, and no more, etc.", concluding that there is still due, etc.

The defendant demurred to this complaint, and as a special ground of demurrer says, that he demurs to so much of said complaint as relates to the pretended cause of action as set up for a balance due upon an account for bill of James Doherty, to plaintiff, and says that the same does not state facts sufficient to constitute a cause of action.\*

To this question the attention of this court was particularly directed in the argument, and the other points were abandoned. The court below overruled the demurrer, and gave judgment for the whole amount, including this item.

\*It was held in the circuit court, that there being a general demurrer to the whole complaint, the defendant could not at the same time demur to a particular part for the same cause, *i. e.*, to one of two or more causes of action in the same complaint. That there being a cause of action, as to the lumber, well plead, the demurrer being to the whole complaint must be overruled; the court intimating the opinion that without amendment the plaintiff was entitled under the pleading to recover for the lumber only. The defendant's counsel appeared no further in the cause, and the plaintiff's counsel, at his own risk, took judgment for the amount named in the prayer. The appellant relied in this court on the position that his objection to the complaint could be raised at any time, after as well as before judgment, and the question whether he could demur to the whole complaint as not stating sufficient facts, and at the same time to a particular part of it on the same ground, was not raised in this court.

It appears from the complaint that this bill was originally a debt due from James Doherty to the plaintiffs, which they say the defendant assumed to pay. It was then an undertaking on the part of the defendant to pay the debt of a third person, and the action must, therefore, rest on a contract made by defendant with plaintiffs to pay it, which contract must be set out in substance in the complaint; and it must be shown that the contract was for a good consideration, not mere *nudum pactum*. (1 Chitty's Pleading, 297.)

The plaintiff must set forth everything that is essential to the gist of the action. (1 Jacob Law Dic. 156.) He must show that a contract was made between the parties, and that it was for a good consideration. In this case it does not appear that there ever was any mutual agreement between the plaintiff and defendant, by which the defendant agreed to pay this bill to the plaintiffs, and that the plaintiffs agreed to receive him as their debtor instead of Doherty. In cases of collateral undertaking under the statute of frauds, the plaintiff should declare specially. (Oliver's precedents 236, *note*.)

In this case the plaintiff's complaint does not come up to these requirements, and we think the demurrer was well taken.

Judgment modified.

WM. M. PITTMAN, Appellant v. EMILE C. PITTMAN,  
Respondent.

*Appeal from Benton County.*

**DISCRETION.**—In all matters of discretion the general doctrine is that nothing but an abuse of discretion by the court below, will warrant the interference of an appellate court.

**CUSTODY OF INFANTS.**—The law confers upon the court which pronounces the decree of divorce, the power to make such order for the care and custody of the infants, if any, as shall best subserve their interests.

**PRESUMPTION.**—The mere fact of awarding the care and custody of the infants to the party in fault, raises no presumption of error.

**ABUSE OF DISCRETION.**—If error has been committed or discretion abused, it must appear affirmatively. It will not be presumed.

THIS is an appeal from the decree of the court below, dissolving the bonds of matrimony between plaintiff and defendant, and awarding the custody of the two minor children to the defendant. The plaintiff appeals to this court, and relies upon two assignments of error for reversal of the decree.

I. That the court below erred in not finding the defendant (respondent), guilty of adultery.

II. That the court erred in awarding the custody of the two infants to the defendant (respondent).

*F. A. Chenoweth* and *R. Williams*, for appellant, cited code section 497, subdivision 1, also sec. 585; *B. Monroe*, 164; Paige Ch. 202; 7 Barbour, 640; Dayton on Surrogates, 680.

*John Burnett*, for respondent, cited 14 Cal. 512; 28 Missouri, 91; Code secs. 497, 498; 10 Georgia, 77; 13 U. S. Digest, 402; 14 Id. 858; and 4 Nevada, 416.

McARTHUR, J. In passing upon the points presented in this case, it must be borne in mind, that it was heretofore decided that the statement of facts annexed to the record of the judgment herein, did not meet with the requirements of the law, consequently, it will not be considered. The case will be determined upon the record; and, as there is

nothing disclosed by the record to warrant the first assignment of error, we will pass to the consideration of the second.

It is assumed by appellant's counsel, that inasmuch as the record shows that the defendant was the party at fault, the court erred in awarding the care and custody of the infants to said defendant. And it is sought to base this assumption upon what appears to be a finding of fact recited in the judgment entry. It is claimed also that the court below, having granted the decree of divorce, upon plaintiff's complaint and at plaintiff's instance, was bound, as a matter of law, to award to plaintiff (appellant), the care and custody of the infants. We do not think that these assumptions are warranted by law. Subdivision 1 of section 497, page 271, of the code, vests in the court the power to make such decree "for the future care and custody of the minor children of the marriage, as it may deem just and proper, having due regard to the age and sex of such children, and unless otherwise manifestly improper, giving the preference to the party not in fault." In carrying out this provision of the code, the court is called upon to exercise its sound discretion. In all matters of discretion, the general doctrine is, that nothing but an abuse of that discretion by the court below, will warrant the interference of an appellate court. The record herein discloses no such abuse. It must appear affirmatively, it cannot be presumed; for all legal presumption is in favor of the correctness of the findings and discretion of the court below. The presumption also lies that the court below discharged its duty; that its proceedings were regular, and its action founded upon proper proof.

After the decree of divorce was granted the infants became, as it were, the wards of the court, and it was the duty of the court to make such disposition of them as would be just and proper, taking into consideration their age and sex, and having in view their general welfare. With regard to the care and custody of the children, after a final decree for a divorce or separation, the object is not to gratify the wishes of the parents merely, but to protect and provide

for the children of the marriage, whose condition cannot fail to awaken the sympathy of the court. (Willard's Equity, 670.) The law confers upon the court which pronounces the decree of divorce, the power to make such order for the care and custody of the infants, as shall best suit their circumstances and best subserve their interests, and it would certainly be acting within the scope of its equity powers, to thereafter annul, or vary, or modify such order, upon proper application and for sufficient reasons. The mere fact of awarding the care and custody of the infants to the party in fault raises no presumption of error or of abuse of discretion. In some cases it would be both, in others neither. As has been before observed, there is no error discoverable in the record of this suit which this court can consider. The presumption is, that the court below examined into all the facts in relation to the fitness and qualifications of the parties for the purpose of making proper disposition of the infants, and acted accordingly; and as nothing appears which tends in the least to overcome the force of this presumption, or of the others above set forth, the decree will be affirmed.

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JOSEPH KAFKA, Respondent, v. DAVID SIMON,  
Appellant.

*Appeal from Multnomah County.*

**SET-OFF.—PLEA OF FORMER ACTION.**—The action was for merchandise sold to the value of \$432.40, and money advanced to the amount of \$107.80. The defendant answered, denying the allegations of the complaint, and stating that he had in an action against the present plaintiff, given him credit for \$343 of the claim now made: *Held*, that it was error to instruct the jury that the complaint in the former case did not allege that the then defendant had consented to the set-off; and that if there was no other defense than the former action, the plaintiff in this action was entitled to recover the value of the goods sold and delivered by him.

*Mitchell & Dolph*, for the appellant.

THE complaint alleges, in substance, that the plaintiff during the years 1867 and 1868, sold the defendant produce and goods of the value of \$482.40; and advanced him \$80.50 coin, no part of which has been paid.

The answer denies the allegations of the complaint and alleges as separate defenses:

1st. That defendant, during the years 1867 and 1868, sold plaintiff merchandise of the value of \$565; and that during the same years, plaintiff paid the defendant, partly in produce and partly in money, \$343, and no more; that said produce and money so paid defendant, is the same produce and money mentioned in the complaint in this action.

2d. That before the bringing of this action, the defendant had commenced an action against the plaintiff for the unpaid balance of his said account, in justice's court for Central Portland Precinct, Multnomah county; and in his complaint in that action, had given plaintiff credit for said sum of \$343 in currency, so paid in produce and money; and that plaintiff had filed his answer in said action, admitting such payment, and claiming a greater payment—(copies of the pleadings in the former action being attached to the answer)—and that judgment had been rendered in said court in favor of plaintiff in said action, the defendant herein, for the sum of \$166.50 damages, and \$14.50 costs. That said produce so credited is the identical merchandise sued for in this action.

It is evident from the pleadings in the former suit, that this plaintiff received credit in that action for \$343 claimed in this; that it was credited with his consent, because he filed an answer, in which he admitted that that amount had been paid in produce by him.

The court erred in refusing to instruct the jury, as requested, in writing, by the defendant.

"1st. That if the jury are satisfied that any portion of the plaintiff's account, set up in the complaint, was allowed the plaintiff as a credit in the complaint in the former action, the plaintiff cannot recover in this action for the same items.



"2d. That if plaintiff and defendant, during the times mentioned (in the pleadings) had mutual accounts, and the items set up in the complaint were received by Simon to apply on account, then, so far as the same were allowed Kafka in the former action, the plaintiff cannot recover for them in this action.

"3d. That the former action set up in this action is a bar to any recovery in this action."

"4th. If the produce furnished the defendant by the plaintiff was placed to his credit on account, with plaintiff's consent, and allowed in the former suit, plaintiff cannot recover for the same items in this action."

5th. The court erred in instructing the jury "that there was no question raised by the pleadings as to whether the produce received by the defendant was received upon account of goods sold by defendant to plaintiff, and allowed plaintiff in the former action; and that the jury had nothing to do with that question." To which charge, defendant, by his counsel, duly excepted.

6th. The court erred in instructing the jury as follows: The effect of withdrawing the answer was to leave the same matters to be determined in that case, as if no answer had been filed. It is not alleged in the complaint that a balance between the parties had been struck, or agreed upon, and it is not alleged that Kafka had agreed to set off his demand. But the record in that case does not show that the question was adjudged and determined in that action. If Kafka had a valid and subsisting claim against Simon for produce, sold and delivered,\* he could either plead it as a set off, or keep it as a foundation for a new action. If he had such a claim, he is not barred by that record from recovering for the produce so sold to Simon."

An agreement that goods furnished by the debtor shall go in satisfaction of the debt is equivalent to an actual payment to that extent. (Smith's Mercantile Law, 657, n. 2; *Hooper v. Stephens*, 4 Ad. & E. 71; *Hart v. Nash*, 2 C. M. & R. 337.)

The appellate court had no power to allow the answer in

the former action to be withdrawn; and the withdrawal of said answer could have no other effect than abandoning the appeal, leaving the judgment of the court below to be affirmed.

The statute (page 597, sec. 77) contemplates that an action appealed from justice's court, shall be tried in the appellate court upon the same issues made in the court below; and it must be too apparent to require argument, that the judgment of the appellate court must be a final determination of all the issues made and tried in the justice's court. Neither party can make new issues; neither party, it appears to us, can avoid the effect of the former adjudication upon the issues already made, except by a reversal of the former judgment upon the appeal in the same action.

So far as the subject matter in controversy has been once adjudicated upon, the parties are concluded by it. (*Gardner v. Buckbee*, 3 Cowen, 120; *Wright v. Butler*, 6 Wend. 289; *Ethridge v. Osborn*, 12 Wend. 399; *Gray v. Dougherty*, 25 Cal. 266; *People v. Supervisors*, 27 Cal. 655.)

*J. G. Wilson*, for the respondent. To sustain a plea of a former adjudication, it must appear that the actual point in issue between the parties had already been determined, and such determination must have been on the merits. (15 Iowa, 30; 14 Id. 379.)

It is immaterial whether parol evidence may or may not be admitted in a proper case, to show what transpired on a former trial, when the former pleadings are insufficient to embrace the matter in question.

The record shows that this cause of action was not a matter that could be determined in that action after the answer was withdrawn by leave of the court. Had the former action been for a balance alleged to have been agreed upon, the appellant's argument would hold good, and a judgment by default would be a bar.

But there is no allegation in the pleadings, in either action, that the parties had accounted together, or agreed upon a balance; nor that there ever was any agreement that

the merchandise sold by this plaintiff should be applied on account, or in payment.

The present action is an independent claim for goods sold, which Kafka had a right to plead as a set-off in the former action, or to reserve for the foundation of this action. Code, secs. 71 and 72.)

Kafka's answer being withdrawn, there is not a statement in the pleadings in either action to indicate an intention of either party to apply these goods in payment, or on account, or as a set-off. And it is not in the power of a plaintiff to compel a defendant to plead his set-off in such a case, or to plead it for him. To embrace the matter in his complaint, he should have alleged that the defendant had agreed upon a balance, or he should have shown by his pleading that there was an agreement that the goods sold should be applied on account.

The statement in the answer which was withdrawn, may be an admission that would be evidence in a proper case, but after the answer was withdrawn by leave, it was no longer a pleading in the case, and it is not alleged in any pleading in either case that the goods were applied in payment. The motion for leave to withdraw the answer was addressed to the discretion of the court. The record shows that Kafka's motion for a continuance had been denied, and the presumption in favor of the record is, that the leave was granted for good cause.

To hold that the then defendant could be compelled to litigate his set-off in that action, when he had obtained leave of the court, and had withdrawn his answer, and had allowed judgment to go against him for want of answer, would make the granting of leave a nullity, and would establish the doctrine that the parties can make a record without pleadings.

There is no issue in the present case which would warrant any evidence as to goods sold by Simon to Kafka, or any instructions asked with reference thereto.

The charge of the court below fully covered all questions arising on the subject of application of accounts or money, in payments of indebtedness, in the first instructions given; and it was not error to refuse to re-give them.

It is true that in the former action Simon made no allegation that there had been an accounting, or that the goods were sold to him on account, or that Kafka had consented that they should be applied on account, or should be set off. It is simply a complaint for goods sold and delivered, containing naked admission of part payment. It was not error to instruct that under that complaint the judgment was not a bar to this action.

THAYER, J. This was an appeal from a judgment recovered in the circuit court for Multnomah county, in which the respondent, Kafka, was plaintiff, and the appellant, Simon, was defendant. Plaintiff alleged in the complaint, that during the years 1867 and 1868 he sold to the defendant goods, wares and merchandise, amounting in the aggregate to \$432.40 in United States currency, and during the same time advanced to the defendant \$107.80 currency, no part of which had been paid. The defendant in his answer denied the allegations in the complaint and averred, that during said time, he sold to the plaintiff goods, wares and merchandise to the value of \$565; that plaintiff had paid to apply thereon in money and produce the equivalent of \$343 currency; also that the defendant, before the commencement of this action, commenced an action against the plaintiff for the unpaid balance of his said account, in a justice's court in Multnomah county, and that in his complaint therein he gave credit for the said sum of \$343 currency, the amount so paid, and in the action in said justice's court, recovered judgment for the sum of \$166.50, besides costs. That said Kafka appealed to the circuit court of Multnomah county. That when the appeal was perfected, Kafka obtained leave from the court to withdraw his answer, whereupon Simon obtained judgment for the sum of \$222 and costs. That the merchandise, produce and money for which this action was brought by Kafka was the same which was credited him by Simon in the justice's court, and on appeal to the circuit court, where the answer was withdrawn, and the defendant Simon claims that the same was a bar.

Plaintiff, Kafka, in his reply, admitted the recovery of the judgment in the justice's and circuit courts, and claimed that he had paid Simon more than \$343. That he had sold and advanced to him in goods and cash to the amount of \$542.20 currency. There was no denial in the reply of the allegation in the answer that the credit given by Simon in his complaint for merchandise, produce and money, was the same for which this action was brought, and it appeared that the only issue between the parties, in the justice's court, upon that point, was whether Kafka was entitled to be credited for more than \$343.

Simon claimed that he should be allowed in this action the amount he had credited Kafka in the former action in the justice's court, and on appeal to the circuit court. Several questions were raised upon the trial by Simon's counsel, which are presented by the bill of exceptions. The court has not deemed it necessary to examine any more than the following. After the jury retired they came in for further instructions, and the foreman asked the court as follows:

"If I am satisfied that the plaintiff has been allowed by Simon in the first suit for the produce, should the jury give the plaintiff a verdict for the same produce?"

The judge, in reply, charged the jury, that they had nothing to do with what Simon undertook to set off in the former case; that the complaint in that case did not allege that Kafka had consented to set off his claim, and that if there was no other defense than the former judgment, all they had to do, was to ascertain whether the plaintiff had sold and delivered to defendant produce, and if any, how much and what was its value, and to render a verdict accordingly. This charge was duly excepted to by Simon's counsel.

The jury returned a verdict for \$155.98 in favor of Kafka.

We think this charge was erroneous; that under the circumstances of this case, Kafka would have no right to recover upon a claim which had already been allowed him and of which he had received the full benefit. The circuit court

seems to have gone upon the theory, that unless the merchandise and produce for which this action was brought had been received by Simon under an agreement, that it should be received, in payment of the merchandise, etc., he had let Kafka have, it would be no defense, although Simon had actually allowed Kafka therefor in the former action. This is evident, from the fact that the court was requested to charge, that if the jury was satisfied, that any portion of Kafka's account had been allowed by Simon as a credit in the complaint in the former action, that Kafka could not recover in this action for the same items, and refused to do so. It is true, no doubt, that when there are mutual independent claims between two parties, that neither can sue the other and compel him to bring in his claims as a set-off or counter claim. But by examining the pleadings in the case in the justice's court, which were made an exhibit in Simon's answer herein, it will be seen that Kafka clearly admits that the produce, etc., was received by Simon in payment of his claim against Kafka.

The language of Kafka's answer in the former case in the justice's court is, that he denies that he has paid, on account of the merchandise, etc., no more than \$343, in currency; but says he has paid plaintiff Simon, in merchandise, produce and cash \$500, currency. This presents the following state of facts: Simon sues Kafka for a balance upon merchandise sold, admitting in his complaint that Kafka has paid him, to apply thereon in a certain manner, \$343. Kafka says, by his sworn answer, that he has not only paid him that amount, but more—to wit, \$500. The issue is tried; Simon gets a judgment for the balance of his account, after allowing the \$343. Kafka appeals, and after the case reaches the appellate court, obtains leave to withdraw his answer, and Simon takes judgment for such balance. After all this has occurred, Kafka claims the right to recover, in another action against Simon, the same amount allowed him in the former, and not allow Simon to claim the same as any defense. It is the opinion of this court, that Kafka, under the circumstances mentioned, is precluded from saying that the

merchandise, produce and money for which this action is brought, was not received by Simon to apply as payment upon the merchandise, etc., that he sold to Kafka.

For these reasons, the judgment of the circuit court is reversed and the cause remanded to the court below for a new trial.

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L. A. SEELEY, Appellant, v. DANIEL SABASTIAN,  
Respondent.

*Appeal from Clackamas County.*

RETURN.—The return of service of notice of appeal being imperfect may be amended so as to conform to the facts.

ORDER ENLARGING TIME.—An order enlarging the time within which the statement of facts is required to be made and served, must be made within the time prescribed by law for the performance of these requirements.

RESPONDENT'S attorney filed a motion to dismiss this appeal for the reason, that there had been no proper and sufficient service of the notice of appeal. Pending the argument upon said motion, appellant's attorney asked and obtained leave of court to file a cross motion, requesting permission to amend the return on said notice so as to conform to certain facts presented. Respondent's attorney also filed a motion to strike from the files the statement of facts accompanying the record, for the reason that the same was not served within the time prescribed by law.

*J. H. Stinson*, for appellant.

*Benton Killen*, for respondent.

McARTHUR, J. It was ruled in *Dolph v. Nickum* (2 Ogn. 202), that this court could and would, in furtherance of justice, allow the return of service of notice of appeal to be amended so as to conform to the facts.

In this case the return is to some extent imperfect, but it appears that it can be amended so as to meet the fullest requirements of the law, and at the same time conform strictly to the facts. From an examination of the record we are satisfied that by denying the motion, we would hinder rather than further justice, and as no sufficient reasons are urged to warrant a departure from the rule in the case cited, we will allow the motion. The return may be amended. Allowing this amendment, necessarily disposes of the respondent's motion to dismiss, therefore we proceed to the consideration of the motion to strike from the files the statement of facts. The record discloses that the decree in the court below was entered on Thursday, March 30, 1870; also that on May, 10, 1870, the judge made an order enlarging the time for making, filing and serving the statement of facts until May 20, 1870, and also that service thereof was made May 19, 1870. Section 526 page 280 of the code as amended in 1866 (see law of Oregon 1866 p. 159), declares, that when a party "wishes a statement of the case to be annexed to the record of the judgment, decree or order, he shall within twenty days after the entry of such judgment or order prepare such statement," and he "shall serve a copy thereof upon the adverse party." In this case it appears that after the expiration of the twenty days, within which the statement of facts is required to be made and served, an order was granted enlarging the time for making and serving the same, such order falling within the scope and meaning of that part of the section of the code above cited, which provides, that "the several periods of time above limited may be enlarged, upon good cause shown by the judge before whom the cause was tried." Inasmuch as the time prescribed by statute had expired before the enlarging order was made, it is insisted that the said order was *ipso facto* void, and that the statement of facts accompanying the transcript, should be considered a nullity and stricken from the files. A similar provision to the one cited exists in the laws of California (see section 340, Civil Practice Act), and the supreme court of that state in the



case of *Leach v. Allen* (2 Cal. 95), upon a point similar to the one presented in this case said: "If the appellant allow the twenty days to expire after taking the appeal, without framing a case, he waives his right to have the case stated, and a subsequent order of the court made without notice to the respondent allowing further time to make up the statement, is a nullity." In the case under consideration, no notice of the application for an order enlarging the time, was served. Under the practice in this state, it is questionable whether such notice would have had any legal force whatever, although upon this point we do not pass. *Bryan v. Maume* (28 Cal. 238) is an analogous case, and the same conclusion is substantially reached as in the case above. In *Lindley v. Wallis* (2 Ogn. 204) it was held by this court, "that the application for extension of time for completing and filing the transcript must be made *within* the time prescribed for the performance of these requirements." The analogy between that case and the one now before the court is perfect, and by a parity of reasoning, the only conclusion that can be logically reached is, that the order enlarging the time within which the law required the statement to be made and served, must be made within the time prescribed for the performance of said act, that is to say, before the twenty days have expired. It follows therefore, that the motion to strike the statement of facts from the files should prevail. It is so ordered.

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THOMAS HOWARD and WIFE, Appellants, v. E. M.  
BAMFORD, Respondent.

**OUTSTANDING WARRANTS.—HOW PAYABLE.**—Where there are outstanding warrants against a school district, the clerk may pay those first presented. It is not necessary that the money of each year be exclusively applied to pay for schools taught during the year in which it was levied.

**MANDAMUS.**—Where the clerk has money in his hands applicable to the payment of a warrant, which upon presentation he refuses to pay, the proper remedy is by mandamus.

The facts are stated in the opinion of the court.

*Baldwin & Hyde*, for the appellants.

The person legally liable is the person to be made defendant. (1 Chitty on Pl. pp. 34, 39, 123, 352, 353; 1 Smith's Leading Cases, 416, 719; 3 Barb. 475, 480.)

The answer is insufficient. (32 Cal. 450; 14 Id. 258; 23 Id. 388; 9 Id. 33; 21 Id. 215; see Code, p. 335, sec. 349.)

*O. Humason*, for the respondent.

BOISE, J. The facts in this case, as shown by the pleadings, are as follows:

The respondent, E. M. Bamford, was clerk of school district No. 1, in Grant county, in the year 1869. In that year the directors of said district employed one of the plaintiffs, Martha J. Howard, to teach a school in said district, for three months, agreeing to pay her therefor the sum of three hundred dollars, and she taught said school, and on the ninth day of July, 1869, the directors of the district, executed and delivered to her an order for three hundred dollars, on the said clerk, which order was for said services as teacher.

About the eighth of March, 1870, the respondent, as such clerk, drew from the county treasury, upon the order of the county superintendent of common schools, the sum of ninety dollars in coin and one hundred and seven dollars in legal tenders, and on that day another order in favor of R. B. Owens, issued in 1868, by said school directors, on the clerk of said district, was presented to the respondent, and the money in his hands belonging to said district, was paid thereon, which was prior to the presentation of the order to him of said Martha J. Howard—which last order was refused to be paid for want of funds.

We think that under this state of facts the clerk would not be responsible in this form of action. He would not be called on to pay out money which he did not have, and we

think that were there any out-standing warrants against a school district, the clerk may pay those first presented; and that it is not necessary that the money of each year be exclusively applied to pay for schools taught during the year in which it was levied.

Second: We think that had there been money in the hands of the clerk applicable to the warrant of the plaintiffs, and he had refused to pay it to them on the presentation of the warrant, their remedy would be by mandamus, and not in this form of action. The funds in the hands of the clerk are the property of the district, and do not, by the drawing and presentation of an order, become money in his hands, had and received to the use of the holder of the warrant. They remain public funds in his hands until he parts with the custody or sets them apart to the use of another and becomes his voluntary agent. The clerk of a school district is an officer, and the same rules must apply to and govern his conduct, as those which apply to county treasurers and the treasurer of state.

To hold that those officers were liable to an action for money had and received in every case where questions of doubtful appropriations arise, and from uncertainty they refuse to pay a warrant, would, we think, be a bad practice; that the usual and better mode is to proceed by mandamus.

Judgment affirmed.

WOOD, Respondent, v. FITZGERALD and WINGATE, Appellants; and MAYS, Respondent, v. FITZGERALD and WINGATE, Appellants.

*Appeal from Wasco Circuit Court.\**

**LIMIT TO INQUIRY.**—In contested election cases the law limits judicial inquiry to the votes returned upon the poll books.

**RESIDENCE.**—Though an employee of the United States or state government cannot “gain or lose a residence by reason of his presence or absence while employed in the service,” yet he can establish his domicile, and gain a residence, at such a point as he may desire, by taking the proper and appropriate steps to do so, independently of his employment.

**PARDON.**—A general, absolute pardon, relieves the person to whom it is granted, not only from imprisonment, but from all the consequential disabilities of the judgment of conviction, and restores such person to the full enjoyment of his civil rights.

**INEM.**—Article II, section 3, of the state constitution, does not operate as a restriction or limitation upon the effect of a pardon.

**XV AMENDMENT TO CONSTITUTION OF UNITED STATES.**—The fifteenth amendment to the federal constitution is a part of the supreme law of the land, and its effect is to annul those provisions of the state constitution, and those enactments of the state legislature, which restrict the exercise of the right of suffrage to white persons.

**RESIDENCE.—PRECINCT.**—Where an individual has established for himself a settled residence and a fixed domicile in any precinct in a county, there he must vote; where, however, an individual is a *bona fide* resident of a county, but has no fixed residence or domicile in any particular precinct therein, he may vote in any precinct in which he may find himself on the day of election.

**NATURALIZATION.**—By being naturalized an alien becomes instantly a citizen of the United States, and of this State, and as such has a right to vote for county officers at any election, at which such officers are to be chosen, occurring after his naturalization, if he has the necessary qualification as to residence in the state and county.

**COSTS.**—In cases of contest of election under title V of chapter 13 of the general laws, costs and disbursements cannot be recovered.

*\*Darragh, appellant, v. Bird, respondent; McFarland, appellant, v. Holland, respondent; Grant, appellant, v. Ruch, respondent; Wood, respondent, v. Fitzgerald and Wingate, appellants; and Mays, respondent, v. Fitzgerald and Wingate, appellants, were all contested election cases appealed from Wasco county. The case of Darragh v. Bird, was withdrawn. That of Grant v. Ruch, dismissed. The other cases were argued at length. For convenience the cases of Wood v. Fitzgerald and Wingate, and Mays v. Fitzgerald and Wingate were considered at the same time, and are reported together. In the case of McFarland v. Holland, the respondent prevailed. No report of this last named case is deemed necessary, as the points passed upon therein are embraced in the cases reported.*

THE facts are sufficiently set forth in the opinion.

*O. Humason* and *N. H. Gates*, for appellants.

*J. G. Wilson*, for respondents.

Counsel joined in one brief, citing constitution of Oregon, sections 2, 3, 4, 5, 6, p. 101; sec. 17, p. 103, and sec. 14, p. 110; Laws of Oregon, p. 696, 707, 708; sec. 13, p. 700; sec. 11, p. 699; sec. 18, p. 701; sec. 354, p. 237; 4 Cal. 175; 28 Cal. 123; 4 Barb. 504; 1 Kent, 86; 2 Kent, 431; 10 Iowa, 308; 19 Wend. 11; XV Amendment; Constitution IX and X Amendments; Reconstruction Act; McPherson's Manual, 1869, p. 448 and 457.

McARTHUR, J. At the regular biennial election, held June 6th, 1870, E. Wingate and E. P. Fitzgerald; and Edwin Wood and Robert Mays, were candidates for the offices of county commissioners of Wasco County. On June 14th, 1870, the board of canvassers, as provided by law, canvassed the votes polled at said election, and found that Wingate had received 314 votes; Fitzgerald, 316; Wood, 311, and Mays 303. Thereupon Fitzgerald and Wingate were declared to be elected, and certificates of election were accordingly issued by the clerk of Wasco County. On June 28, 1870, Wood and Mays commenced proceedings to contest the election of said parties, in the manner prescribed in title 5, of chapter 13 of the general laws. The cases were submitted at the same time, and the court below, after casting out what it adjudged to be the illegal votes polled and counted for each of the said parties, arrived at the conclusion that of the legal votes cast, Woods had received 311, Mays 303; Fitzgerald 301, and Wingate 298. Wood and Mays were accordingly adjudged to have been duly and legally elected, and to be entitled to the offices of commissioners of Wasco county. From this judgment Fitzgerald and Wingate appeal.

The first point presented is one of interest. On the trial of these causes it was insisted by appellant's counsel that

the votes of J. Ross, D. Lynch and William Sullivan should be added to the number polled for appellants; and it was as strenuously insisted by respondents' counsel that the votes of R. Graham, D. L. Reynolds, J. A. Foot, J. S. Morgan, P. Runey, A. Biddle, J. S. Paddleford, Wm. McKay and others—in all nineteen—should be added to the number polled for respondents. The names of these parties do not appear upon the poll books; but it is claimed that their votes were illegally rejected by the judges of election. The court below refused to count them, and as a reason for such refusal declared, in substance, that in its opinion the law limited judicial inquiry to the votes returned upon the poll books. And this ruling it is charged was erroneous. An examination into the duties of the judges of election, and the rights of electors is necessary, in order to arrive at correct conclusions on this point. It is the duty of judges of election to receive all votes offered and cause them to be entered upon the poll books by the clerks. If a challenge is interposed and insisted upon, it becomes the duty of said judges to tender to all persons offering to vote the oath prescribed and set forth in sec. 13, p. 700, general laws. If the person so challenged fails or refuses to take the prescribed oath, the same section declares that his vote shall be rejected. By sec. 14, p. 700, it is enacted that even if the person challenged takes the prescribed oath, further inquiry may be made into his qualifications, and if a majority of the judges are of opinion that he does not possess the qualifications of an elector, his vote shall be rejected. Though such an one is rejected and excluded from voting, sec. 18, p. 701, requires his name to be entered on the poll books as a rejected voter. It is also provided that the names of the persons for whom he intended to vote shall be taken down, the evident intention of the law being to have preserved a complete record of all rejected as well as all accepted votes. The wisdom and policy of this enactment is very apparent. Proper compliance with it facilitates judicial inquiry when necessary into the rights and qualifications of the voter, and at the same time tends to prevent improper

action on the part of judges of election. In refusing to record the votes of the persons named, the judges acted in direct contravention of law. They should have been received and entered upon the poll books as rejected voters. It is urged that notwithstanding the failure on the part of the judges to comply with the law, these votes should be counted, the evidence showing that they were properly offered and improperly rejected, conceding that the evidence is entitled to all the weight claimed for it, we find no authority for so doing. Cases of this nature must be heard and determined "in such a manner as shall carry into effect the expressed will of a majority of the legal voters, as indicated by their votes." (General laws, sec. 41, p. 708.) This *expressed will* can only be gathered from the poll books, and a vote must be recorded before it can be said to have obtained such an expression as the law contemplates. In contests such as this, the main question is, which candidate received the highest number of legal votes cast. It is claimed that the persons named did all they could to express their will and intention on election day; and that as the evidence shows they were qualified voters, their votes should be counted. It is unnecessary to discuss the evidence. Suffice it to say it is exceedingly unsatisfactory, and we cannot give it the weight which counsel claim for it. Besides, we are clearly convinced that it would be productive of ardent fraud and gross perjury to establish the rule that the courts could properly count the vote of a person who did not vote at the time of the election, and whose name is not to be found on the poll books, leaving it to be ascertained subsequent to the election from the testimony of such person himself in whose favor his vote would have been cast. If such a rule should be established, it would be both possible and probable that the result of elections, as declared by the board of canvassers and the will of the people, as expressed by the poll books, would frequently be changed and thwarted through the contrivance of the judges and the ready testimony of suborned witnesses. In refusing to count the votes of these persons, the court below did not err.

It is claimed by appellants' counsel that the court below erred in refusing to deduct the votes of B. P. Cardwell and Jacob Fritz from respondents' tally, for the reason that the evidence establishes the fact that they are employees of the United States government, and consequently disqualified by article II, section 4, of the state constitution, which declares that "for the purpose of voting no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States, or of this state," and etc. B. P. Cardwell came to Wasco County from Portland more than ninety days before the election, and brought with him his family. At the date of the election and for a long time prior thereto, he was and had been the deputy of the United States assessor and collector of internal revenue. The court below found that the transfer of his domicile from Portland to Wasco County was accompanied by such appropriate acts on his part as to leave no doubt that it was a *bona fide* change of residence. Jacob Fritz came to Wasco County in 1863, and was at that time a private soldier in G company of the Fourth Infantry of the United States regular army, and in 1865, his term of enlistment having expired, he was honorably discharged from the military service. Subsequently he was employed as a civilian by the proper authorities to take charge of the abandoned military post and reservation adjacent to the Dalles; he discharged no military duty whatever, but acted simply as a sort of keeper and protector of the government property in about the post abandoned. He continued to reside in Wasco County almost uninterruptedly from the time of his discharge from the military service until the day of the election, a period of almost five years. Both these individuals were employees of the United States government and in the civil service. The facts being as above set forth, the question arises as to the applicability and effect of article II, section 4, of the state constitution to and upon the persons so situated. We cannot see the legal force or propriety of placing such a construction upon that section as would preclude an em-



ployee of the United States or state government from making any change in his domicile that he may desire to make. Though such an one cannot gain or lose a residence by reason of his presence or absence when employed in the service, yet he can establish his domicile and gain a residence at such a point as he may see fit, by taking the proper and appropriate steps so as to do independently of his employment. In *The People v. Holden* (28 Cal. 137,) it was decided that section 4, of article II, of the constitution of California, (the language of which is almost identical with that of article II, section 4, of the constitution of Oregon,) does not add to or take from the conditions upon which the fact of residence is made to depend; and it was held that that section meant simply that in determining the fact of residence, presence or absence in the service of the United States shall not be taken into account, or in other words, neither presence nor absence in the service of the United States is a condition upon which the fact of residences can be affirmed or denied. It sufficiently appears that both Cardwell and Fritz had acquired a legal residence in Wasco County prior to the election. This they had a right to do; nor can any such interpretation be put upon the section of the constitution referred to as would prevent them from acquiring such residence, or from removing their residence from the locality at which they were domiciled at the time they entered the civil service of the United States government. They voted at the election, and had a legal right so to do, and the court below did not err in refusing to strike their votes from the number returned, as cast for the respondents.

Among those who cast their votes for the appellants was one Mathias Meng. On June 26, 1867, Meng was convicted of the crime of arson in the circuit court of the state of Oregon, for the county of Wasco. He was subsequently sentenced to imprisonment in the penitentiary for the term of five years. On September 25, 1867, and before the expiration of his sentence, he was pardoned by the governor of the state, and was released from imprisonment. The pardon was general and unconditional. Upon these facts,

the court below held, in substance, that while the pardon remitted the punishment and blotted out the offense for which Ming was incarcerated in the penitentiary, yet it did not restore him to his political rights; they had become forfeited and that there was no provision in the constitution or the laws that authorized or warranted their restitution. We cannot yield our assent to this proposition. The doctrine of pardons, as now recognized and applied by civilized nations has its origin in Divine law, upon which rests the merciful administration of human justice, and finds its sanction in the rules of political and social ethics, which have been firmly established and approved by the wisdom of ages. The pardoning power has been exercised from time immemorial by the sovereigns of those nations who have made any advancement whatever in the science of human government. Although it is liable to great abuse, yet, from the very necessity of things, no government could be said to be well ordered, without having this power somewhere vested. Every one who has made well directed investigations into this subject must, we think, reject the idea that the pardoning power is vested in the sovereign or executive solely with a view that its exercise may relieve convicted criminals from the punishment which the law inflicts as a consequence of their adjudged guilt. The administration of human justice being necessarily imperfect, it sometimes happens that from a combination of untoward circumstances, innocent individuals are adjudged to be guilty of the commission of crimes of which they are in reality innocent. Though such instances are of rare occurrence, the fact that they have occurred, and are likely to again occur, forbids that we should refuse to admit the fearful truth. The government so organized and administered as to preclude the possibility of relief to one thus unfortunate would present a very lamentable spectacle. It would defeat one of the main objects for which governments are formed—that of promoting the individual and collective happiness and welfare of mankind. The necessity and efficiency of the pardoning power will be much more readily acknowledged when it is

exercised to prevent injustice; it being ascertained that an error of the kind referred to has been committed; than when it is invoked to temper the judgment which the law has pronounced upon one whose guilt is established beyond peradventure. In the one case it should be extended as a matter of right, in the other, a matter of grace and mercy, it should be exercised with care and discrimination. Article V, section 14 of the state constitution vests in the governor in very general terms the power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason. Article II, section 3, of the same instrument, declares that the privilege of an elector shall be forfeited by a conviction of any crime which is punishable by imprisonment in the penitentiary. As before stated, Meng was convicted of the crime of arson—a crime punishable by imprisonment in the penitentiary, and after such conviction, the governor moved by merciful consideration, granted him a general, absolute pardon. The question therefore arises, did the pardon restore to him the privileges of an elector, which were forfeited by his conviction of the said crime, or did it operate solely to relieve him from the corporal punishment of incarceration, leaving him to suffer all the other consequences flowing from such conviction. After careful consideration of the law as it exists, and the abundant authorities on this point, we can arrive at no other consistent or satisfactory conclusions than that a general absolute pardon relieves the offender not only from imprisonment but from all the consequential disabilities of the judgment of conviction, and restores him to the full enjoyment of his civil rights, with this restriction merely: "That it cannot divest any person of any right or interest, which the law has permitted to be acquired and vested in consequence of the judgment," (4 Blackstone's Commentaries, 402; 8 Bacon's Abr. Title Pardon; Hawkins' Pleas of the Crown, Title Pardon, b. 2, c. 37, sections 34 and 54.) It seems to us that it would be a cause of profound regret if the law were otherwise. In *The People v. Pease* (3 Johnson's Cases, 333-4), the inquiry of the court was directed towards ascertaining whether the pardon of

the governor did away with all the consequent legal disabilities which attached to one convicted of an infamous crime. It was held "That the disabilities formed no part of the judgment against a convict, but are the legal marks of infamy which it fixes upon him. When, therefore, the judgment is pardoned, the legal infamy flowing from it is equally disposed of by the pardon." The Court further declared the proposition that the judgment to which those disabilities are merely consequential can be released, and yet the disabling effect thereof remain, to be untenable. In *the matter of Deming* (10 Johnson, 233), the court wisely said that "policy and humanity require that we should give the convict so pardoned as complete a restoration of his private rights as may be consistent with the intervening rights and interests of others," and it held "that the effect of the pardon was to acquit the offender of all the penalties annexed to the conviction, and to give him new credit and capacity." The force and applicability of these decisions will be more readily observed by a comparison of the section of the constitution of Oregon, above cited, with very similar provisions in the constitution and the laws of New York. In *Perkins v. Stevens* (24 Pickering, 277), it was in substance declared that a full pardon of an offense removes all blemishes of character, wiped away the infamy of the conviction, and restores the convict to his civil rights. Article II, section 2, of the constitution of the United States, provided that the president "shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." The power vested in the president by this provision of the federal constitution, is perhaps more extensive than that vested in the governor of this state by the provision of the state constitution already cited; but both rest upon the same broad principle, and there are no good reasons why the general rules adhered to in one case, should not govern in the other. The principles and powers are much too analogous to justify the application of different rules. In *Ex parte Garland* (4 Wallace, 333-380), the supreme court of the United States,

decided that "a pardon reaches the punishment prescribed for an offense, and the guilt of the offender, and where the pardon is full, it releases the punishment, and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevented any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights." Hence we conclude that the pardon granted to Meng, restored to him the privilege of an elector, and that in striking his vote from the number cast for appellants, the court below erred. Before leaving this branch of the case, we would state that in our opinion, article II, section 3 of the state constitution, does not in any way operate as a restriction or limitation upon the effect of a pardon granted by the executive, the force and effect of that section being confined to those convicted of infamous crimes, from whom the executive clemency has been or may be withheld.

C. H. Yates and W. S. Ford, two negroes, votes for the respondents. On behalf of the appellants, it is urged, that being negroes, they were disqualified from voting by article 1, section 2, of the state constitution, and the laws passed in pursuance thereof, which limit the privilege of the elective franchise to white persons. On the other hand, it is urged, that they became legal voters upon the ratification of the fifteenth amendment to the federal constitution, and that therefore their votes should be allowed to stand as cast. The gravity of the question presented by the conflict of the state and federal constitutions, cannot be over estimated, and for various reasons we are led to examine into it with a degree of care and circumspection commensurate with its importance. On March 30, 1870, the secretary of state of the United States by proclamation declared, in substance, that the fifteenth amendment to the constitution of the United States had been ratified by the legislatures of the states of North Carolina, West Virginia, Massachusetts,

Wisconsin, Maine, Louisiana, Michigan, South Carolina, Pennsylvania, Arkansas, Connecticut, Florida, Illinois, Indiana, New York, New Hampshire, Nevada, Vermont, Virginia, Alabama, Missouri, Mississippi, Ohio, Iowa, Kansas, Minnesota, Rhode Island, Nebraska, Texas, and Georgia—in all, thirty states. It also appears from the said proclamation, that the state of New York, by its legislature, passed resolutions withdrawing the previous ratification. The power of a state thus to withdraw its previous ratification has been strenuously asserted and as strenuously denied. Upon the question, however, we do not pass, for even if the state of New York had the power so to do, the necessary number of states ratifying the said amendment still remains. It is conceded that if the said amendment was legally ratified by the necessary number of states through their legislatures, and the proper returns made thereof to the department of state at the federal capital, then the secretary of state, acting in behalf of the president of the United States, had the power and authority, in the discharge of his official duty, to issue, or cause to be issued, such proclamation. The fact of his having issued it, basing his action, as he necessarily did, upon the official returns filed in the department over which he presides, carried with it *prima facie* evidence of the legal ratification of the said amendment. We cannot presume otherwise, than that he regularly performed his official duty, and that the resolutions of the legislatures of the states named, ratifying the amendment were in his custody, having been placed there officially. In the record and proofs of this case we find nothing overcoming this *prima facie* evidence or lessening the force of this presumption. The question of the legality of the ratification of this amendment is one which is exceedingly difficult of solution. If it is a political question, it can only be properly passed upon by the people or their representatives, and judicial inquiry is, from the very nature thereof, precluded. If judicial, then the courts have the power to inquire into and pass upon every step taken and every vote cast, in congress and in the legislatures, in

every stage of the progress of the amendment, from the time it was first proposed in the congress of the United States, to the date of the issuing of the proclamation by the secretary of state. This would certainly open up a wider range of jurisdiction than has ever before been traversed by any state court, and whatever may be the powers of the federal courts in this direction, it must be conceded, we think, that no state court has the necessary power or jurisdiction to marshal before it, the proofs necessary to establish any disputed question of fact in connection with the passage and ratification of this amendment.

Let us assume, however, for the purposes of this case, that it is a judicial question. A careful examination of the records discloses nothing to warrant the court in pronouncing it illegal and void. It is true, counsel in the argument, alluded to certain facts of pretty general notoriety, which, if true and properly established, would undoubtedly weigh heavily against the validity of the amendment, but they were all extraneous to the record, and lacked those qualities necessary to command or justify judicial consideration. The manner of the adoption of this amendment is a matter of history, and while individuals may be constrained to believe it an unwise measure of government policy, and while the very peculiar circumstances attending its ratification by the legislatures of some of the states render it obnoxious to exception, yet in view of the ascertained facts in this case, we cannot do otherwise than declare it to be a valid amendment to the federal constitution. To hold otherwise under the circumstances would be to unwarrantably overthrow certain well established principles of law, and give to judicial discussion such a coloring of partisan feeling as would lead to very unfortunate results. We proceed next to consider the effect of this amendment upon article II, sec. 2, of the state constitution. Prior to the ratification of the said amendment the several states had complete control over all questions of suffrage, that being among the powers reserved by the tenth amendment to the federal constitution. By the ratification of the fifteenth amendment they in a measure parted

with this reserved right so far as to acquiesce in the removal of all restrictions heretofore existing "on account of color, or previous condition of servitude," and to agree not to abridge the right granted by that amendment, leaving negroes, who are recognized as citizens by certain acts of the federal congress, free to exercise the privileges of the elective franchise in any and all the states upon the same conditions as white persons. Having been ratified, this amendment became a part of the federal constitution—part of the supreme law of the land and its effect is to deprive the provisions of the state constitution and the acts of the state legislature, restricting the exercise of the suffrage to white persons, of all legal force and efficacy. The votes of Yates and Ford will remain as cast, and as counted by the court below. In passing upon this case, the court below refused to allow the votes of seven persons, cast for appellants, and those of four other persons cast for the respondents; it having found that though otherwise qualified, they voted out of the several precincts in which it was claimed they resided. Article II, section 17, of the state constitution, declares that "all qualified electors shall vote in the election precinct in the county where they may reside for county officers, and in any county in the state for state officers, or in any county of a congressional district in which such elector may reside for members of congress." This provision appears to be the basis upon which rests section 1 of title I of chapter XIII, p. 695 of the general laws, which section provides, among other things, "that ninety days *bona fide* residence in a county, next preceding an election, shall be required to entitle a person to vote for county and precinct officers, and likewise ninety days preceding such election in a district for district officers." It clearly appears that a person who has resided in the state of Oregon for six months, and is otherwise qualified, may cast his vote for any candidate for any state office in any county in the state, also, that being a citizen of the state, and having resided in a certain district ninety days next preceding an election, he may vote for any candidate for any district office in any county in the district wherein he



may be on the day of the election. logical sequence would be, that, having county ninety days next preceding an may vote for county officers in any pa of the county. But it is not in view o lay down such a broad and comprehen of this inquiry being simply to ascerta should be the just and proper rule by exact point presented.

It appears that the persons referre sided within the county, had no fixed in any precinct therein, but that from avocations—being for the most part and transporters of freight—were cor locality of their temporary domiciles. the statute book which fairly reaches the persons whose right to vote is now General rules we have, and a number ments, which, if we were to construe be cited in opposition to their right t our intention to place upon these l which, while it agrees with the letter spirit thereof. Every qualified reside right to cast his vote therein for cour ter of abstract justice, the mere fact domiciled in some one of the precinct invest him with greater rights than s one who may chance to reside in a pa no precinct has been erected, or to o obliges him to shift his domicile fro such frequency as to prevent him fro cation of a residence of ninety days. All these classes are equally interest ministration of the affairs of the cou district or of the state, and should in a vote. It is true that when an ind for himself a settled residence and precinct of a county, there he must

an individual is a *bona fide* resident of a county, but has no fixed residence or domicile in any particular precinct therein, he may vote in any precinct in which he finds himself on the day of election. It may be that by allowing this class of persons to vote in whatever precinct they chance to be on the election days, may increase the facilities for the perpetration of fraud, and may induce reckless persons to repeat their votes, but if the laws punishing fraudulent voters are enforced as they should be, the danger to be apprehended is not so great as the wrong of unnecessarily and arbitrarily restricting the privileges of that large number of worthy and energetic citizens, who, from the nature of their honest employment, frequently have no fixed residence, and are constantly called upon to shift even their temporary abodes, from point to point, in order to properly conduct their business. Being well assured that our views upon this branch of the case agree with the spirit of the law, we shall allow these votes to remain as they stand upon the poll books.

Appellant's counsel charge error in the court below, in counting the votes of H. Crellish, E. Bernard, and E. A. Willis. These persons voted for the respondent, but it appears that their votes were excluded from the final count by the judges of election, in the manner prescribed by section 23, p. 702, of the general laws. From the statement of agreed facts, it appears that they were all persons of foreign birth, and that they had resided long enough in the state and county to be entitled to vote, if otherwise qualified. It also appears that they had been naturalized less than six months prior to the election, and having previously served in the armies of the United States, were admitted to citizenship in the manner set forth in section 17 of the act of congress, in relation to the naturalization of aliens. It is urged that, notwithstanding this section dispenses with any previous declarations of intentions, and permits the naturalization of an alien, under certain circumstances, to proceed without such previous declaration, still such person cannot exercise the privilege of an elector until one year has

elapsed from the date of his naturalization, this proposition, counsel cite article 1 of the state constitution, and particularly the clause which declares that "every white male of full age, of twenty-one years and upwards, who has resided in the United States one year, and in this State during the six months immediately preceding such election, and shall have declared his intention to become a citizen of the United States at the next election, \* \* \* shall be entitled to vote at all elections authorized by law," and inasmuch as these, this constitutional provision does not require, unless we treat the naturalization of the act of congress as more than a declaration of intention, the privilege of voting until a full year after the date of such naturalization. We cannot discover any legal or logical force in the argument presented. The question: Should the court furnish its own answer. When the court has answered, they became citizens of the United States, and as such had a right to vote, for they had resided in the state and county for a longer time than the law requires. That the court, in these votes, adding them to the number of votes, and in so doing, did not err.

The next question of importance is as to the proper disposition of the costs. The court below having found in favor of the plaintiff, it is that they have and recover costs as a matter of course. This judgment erroneous? We think not. All the authorities concur in the rule that to recover costs to be purely a matter of course, it must have existed at common law. The authority for disbursements *eo nomine* in favor of the plaintiff, as found in the case of Edward I, c. 1, and in the statutes, 4 James I, c. 3; 8 & 9 William III, c. 2.

c. 16; and the various amendments thereto. In this state, the right to recover costs is given by the code; the provisions in relation thereto being in principle and effect similar to the English statutes named. The rule above set forth is clearly laid down in *Clark v. Dewey* (15 Johnson, 250); in *Waterman v. Benschotten* (113 Johnson, 425), and in *The Supervisors of Onondaga v. Briggs* (8 Denio, 174), and is fully recognized and followed in *McDonald v. Evans*, recently decided by this court. Upon this point, see Bouvier's Dictionary, vol. 1, title, costs, subdivision 2, and the authorities there cited. These principles of law being settled clearly and beyond all contention, let us apply them to this case. Title V of chapter 13 of the general laws, provides for and points out the manner of contesting the election of district, county, and precinct officers. It is singularly silent upon the subject of costs and disbursements. Title V, of chapter 6 of the code of civil procedure, is devoted entirely to the subject of costs and disbursements, and sections 539 and 541 enumerate or describe the cases in which the plaintiff or defendant is allowed to recover costs. Neither of the sections contain any reference to a case of contest of election. It is evidently a *casus omissus*. Section 543 of the code, provides that "a party entitled to costs, shall also be allowed for all necessary disbursements," etc.

From the application of the rules of construction just referred to, it follows, that unless a party is allowed costs he cannot recover disbursements. For the recovery of disbursements is made dependent upon the recovery of costs by the statute. It follows, therefore, that in cases of contest of election, under title V, of chapter 13 of the general laws, costs and disbursements cannot be recovered, and the court below erred in entering a judgment therefor.

As regards the votes of the other persons named in the brief, and referred to in the argument, we find that they were disposed of on questions of fact solely, and upon examination, we have concluded not to interfere with the findings of the court below in relation thereto.

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# NOTES

## ON THE

# OREGON REPORTS.

### CASES IN 3 OREGON.

**3 Or. 1-8, OREGON IRON CO. v. TRULLENGER, Affirming 2 Or. 311.**

**Waters.**—The Right to Use Water Implies the Right to detain it long enough for the profitable use of it, pp. 6, 7.

Cited in *People v. Hulbert*, 131 Mich. 170, 100 Am. St. Rep. 588, 91 N. W. 217, 64 L. R. A. 265, adhering to the doctrine. Cited in notes to 85 Am. St. Rep. 710, 712, 725, on right of land owner to accelerate or diminish flow of water to or from lands of another; 7 Am. Dec. 534, on property in water; 79 Am. Dec. 643, 645, on riparian proprietor's right to use and detain water; 67 L. R. A. 384, on grant of water power; 41 L. R. A. 738, on correlative rights of upper and lower proprietors as to use and flow of stream.

**3 Or. 9-10, OPITZ v. WINN.**

This case has not been cited.

**3 Or. 10-12, STATE v. TAYLOR.**

**Larceny.**—Under Indictment for Stealing from the Person accused may be convicted of lesser degree of crime, p. 12.

Cited in *State v. Hanlon*, 32 Or. 102, 48 Pac. 355, and *Brown v. State*, 90 Ga. 456, 16 S. E. 204, both applying the rule by analogy to different facts. Cited in note to 58 Am. Dec. 541, on former jeopardy.

**3 Or. 13-18, JOHNSON v. OREGON CITY.**

**Taxation.**—Debts Due to a Person are taxable to such person at his residence, p. 15.

Cited in *Ankeny v. Multnomah County*, 4 Or. 277, holding that a debtor must show that his creditor resides in the state before he can claim a deduction of his indebtedness; *Comptoir National D'Escompte etc. v. Board of Assessors*, 52 La. Ann. 1329, 27 South. 804, holding that credit is taxable where owned not where owed; *Scripps v. Board of Review*, 183 Ill. 283, 55 N. E. 701, holding credits owned by a

resident of Illinois against resident of Iowa, taxable in Illinois. Cited in notes to 56 Am. Dec. 536, on place for taxation of property; 20 L. R. A. 153, on place of taxation of trust property; 16 L. R. A. 731, on situs for purpose of taxation of debts evidenced by notes and mortgages.

**3 Or. 18-24, HEDGES v. STRONG.**

**Statute of Frauds.**—Where the Promise to Pay the Debt of another arises out of some new and original consideration of benefit to the promisor, it need not be in writing, p. 21.

Cited in *Rudwick v. Watson*, 3 Or. 257, 258, reaffirming and applying the rule.

**Statute of Frauds.**—Complaint Need not Allege that contract sued on is in writing, p. 20.

Cited in *Taylor v. Patterson & Co.*, 5 Or. 124, approving the rule. Cited in note to 86 Am. Dec. 685, on pleading statute of frauds.

**3 Or. 24-27, MILLER v. OREGON CITY PAPER MFG. CO.**

This case has not been cited.

**3 Or. 27-29, TOBY v. FERGUSON.**

**Pleading.**—If Any Part of Answer State Cause of Action general demurrer must be overruled, p. 29.

Cited in *Waggy v. Scott*, 29 Or. 388, 45 Pac. 775, and *Heid v. Ebner*, 133 Fed. 157, 66 C. C. A. 222, both applying the rule.

**3 Or. 29-34, BURTON v. MOFFITT.**

**Party-walls.**—Owners are not Tenants in Common, p. 32.

Cited in *Shiverick v. R. J. Gunning Co.*, 58 Neb. 33, 78 N. W. 461, reaffirming the rule. Cited in notes to 92 Am. Dec. 29; 89 Am. St. Rep. 930, 939; 92 Am. Dec. 292, on party-walls.

**3 Or. 34-35, CHAPMAN v. RALEIGH.**

This case has not been cited.

**3 Or. 35-39, LANDER v. MILES.**

Cited in note in 67 L. R. A. 304, 307, on homicide by official action or by officers of justice.

**3 Or. 40-45, LANDER v. MILES.**

**New Trial.**—Newly Discovered Evidence as Ground, p. 43.

Cited in *Stern v. Volz*, 52 Or. 602, 98 Pac. 149, and *Templeton v. State*, 5 Tex. App. 419, both approving the rules. Cited in note in 12 Am. Dec. 143, on impeachment of verdict by jurors.

**New Trial.**—Insufficient Evidence as Ground, p. 42.

Cited in *State v. Hill*, 39 Or. 95, 65 Pac. 520, sustaining verdict based on conflicting evidence.

**3 Or. 45-49, BROWN v. CAHALIN.**

This case has not been cited.

**3 Or. 50-54, STEPHENS v. KNOTT.**

This case has not been cited.

**3 Or. 55-58, BAIL v. LAPPINE.**

Mandamus to public Officer Lies to O joined by law, p. 56.

Cited in Badger v. City of New Orleans South. 895, 37 L. R. A. 540, following the Am. St. Rep. 865, on mandamus as proper officers.

Mandamus.—The Right must be Certain p. 56.

Cited in McGill v. Osborne, 131 Ga. 544, writ is not allowed unless the act commanded possible.

**3 Or. 58-60, DUFERNOY v. STITZEL.**

This case has not been cited.

**3 Or. 61-63, STATE v. BERTRAND.**

This case has not been cited.

**3 Or. 64-69, HEATH v. GLISAN.**

Physicians.—Surgeon is Only Responsible skill and the exercise of his best judgment

Cited in Boydston v. Giltner, 3 Or. 124, in note to 48 Am. Dec. 482, on civil liabilities for negligence.

**3 Or. 69-77, STATE v. CONALLY.**

Homicide.—Self-defense and Defense of

Cited in Terrell v. Commonwealth, 13 rights of aggressor after retreating.

**3 Or. 77-84, HEDGES v. PAQUETT.**

Corporations.—Control of Courts Over,

Cited in Baker v. Louisiana etc. R. Co., that authority to appoint receiver is stated 76 Am. Dec. 515, on power of equity to remove officers; 53 Am. Dec. 640, on liability of

**3 Or. 84-88, OLIVER v. NORTHERN PAC**

Cited in notes to 35 Am. Dec. 198, on master's torts; 40 L. R. A., N. S., 389, 394, 395, by servant to third person in use of damage N. S., 418, on liability for tort committed to furtherance of master's business, but not actions; 27 L. R. A. 181, on civil responsibility of servant or agent toward one relation.

**3 Or. 88-91, STARK v. OLNEY.**

**Interest.**—Computation When Rate has Been Changed by statute, p. 90.

Cited in *State v. Guenther*, 87 Wis. 676, 58 N. W. 1106, following the rule. Cited in note to 73 Am. Dec. 646.

**3 Or. 91-98, OREGON C. R. R. CO. v. WAIT.**

**Abatement and Revival.**—Plea in Abatement not pressed before plea to merits is waived, p. 95.

Cited in *Bridal Veil Lumber Co. v. Johnson*, 25 Or. 108, 34 Pac. 1027, *Elliott v. Kuzek*, 2 Alaska, 589, and *Oregonian Ry. Co. v. Oregon Ry. & Nav. Co.*, 22 Fed. 248, 10 Saw. 464, all following the rule.

**Eminent Domain.**—Offset of Benefits Against Injury in assessing damages, p. 97.

Cited in *Newman v. Metropolitan El. Ry. Co.*, 118 N. Y. 627, 23 N. E. 903, 7 L. R. A. 289, deducting benefits in assessing damages to house by elevated railway. Cited in note in 9 L. R. A., N. S., 819, on right to set off benefits against damages on condemnation.

**3 Or. 99-103, WILLIAMETTE FALLS CANAL & L. CO. v. KELLY.**

Cited in notes in 9 L. R. A., N. S., 819, on right to set off benefits against damages on condemnation; 61 L. R. A. 844, on construction and operation of canals.

**3 Or. 103-114, WHITE v. ALLEN.**

This case has not been cited.

**3 Or. 115-118, WHITE v. THOMPSON.**

This case has not been cited.

**3 Or. 118-126, BOYDSTON v. GILTNER.**

**Trial.**—Compromise Verdicts Approved in Certain Cases, p. 125.

Cited in *Clem v. State*, 42 Ind. 438, 13 Am. Rep. 369, approving the rule.

**3 Or. 126-129, PORTLAND v. WHITTLE.**

This case has not been cited.

**3 Or. 129-137, BESSER v. HAWTHORN.**

**Mortgages.**—Junior Mortgagee, not Made a Party, is not bound by foreclosure decree, p. 132.

Cited in *Besser v. Hawthorn*, 3 Or. 512, same case on another appeal; *De Lashmutt v. Sellwood*, 10 Or. 326, approving the rule.

**Mortgages.**—Mortgagor Retains the Right of Possession and the legal title, p. 133.

Cited in *Teal v. Walker*, 111 U. S. 251, 4 Sup. Ct. Rep. 420, 23 L. ed. 418, holding that mortgagee is not entitled to rents and profits until he gets possession under decree.

**Mortgages.—Equity of Redemption** can of court or actual conveyance, p. 135.

Cited in *Marshall v. Williams*, 21 Or. the rule.

**Mortgage.—Merger of Equity of Rede**

Cited in *Bowling v. Garrett*, 49 Kan. Pac. 138, and *Woodhurst v. Cramer*, 29 approving the rule.

**3 Or. 138-139, McOALL v. ELLIOTT.**

This case has not been cited.

**3 Or. 139-153, WILLIAMS v. POPPLET**

**Physicians.—Malpractice**, p. 151.

Cited in *Grainger v. Still*, 187 Mo. 214 49, holding physician to ordinary skill v. *Holm*, 100 Minn. 283, 284, 111 N. W. holding surgeon not liable for error in 48 Am. Dec. 482, 483, 485, on civil lia geons for negligence; 98 Am. St. Rep. 6 and surgeons for negligence and malpr on liability for performing surgical op L. R. A. 831, on degree of care and ski must exercise; 37 L. R. A. 833, on de physician or surgeon must exercise.

**3 Or. 154-157, DAVIS v. MASON.**

**Contracts.—Judgment on Contract fo**

Cited in *Knox v. Gerhauser*, 3 Mont in action for gold coin should be rende Cited in note in 29 L. R. A. 520, 523, on tions to make payment in gold or silver

**3 Or. 157-159, STATE v. LEONARD.**

Cited in note in 18 L. R. A., N. S. voluntary.

**3 Or. 160-161, CARE v. HURD.**

**Justices of the Peace.—Notice of A** party or his attorney, p. 160.

Cited in *Butler v. Smith*, 20 Or. 128 rule; *Hughes v. Clemens*, 28 Or. 442, 42 *Printing Co. v. Reeves*, 26 Or. 446, 38 attorney sufficient under statute requi

**3 Or. 161-164, OREGON C. R. CO. v.**

**Abatement.—Plea in Abatement mus** p. 162.

Cited in *Bridal Veil Lumber Co. v.* 1027, approving the rule. Cited in n

seission for fraud or misrepresentation in procuring subscription to stock.

**3 Or. 164-178, OREGON CASCADE R. CO. v. BAILY.**

**Eminent Domain.**—Property Acquired by a Railroad for right of way by grant is for a public use, and such property is not subject to condemnation, p. 175.

Cited in *Platt v. Pennsylvania*, 43 Ohio St. 241, 1 N. E. 427, holding that corporation condemning more land than necessary cannot convey surplus to another company; *Venable v. Wabash Ry. Co.*, 112 Mo. 119, 20 S. W. 497, 18 L. R. A. 68, holding widow not entitled to dower in land conveyed to railroad for public use. Cited in note to 9 Am. St. Rep. 138, 139, 143, on condemnation of corporate property under power of eminent domain.

**3 Or. 178-182, OREGON CASCADE R. CO. v. OREGON STEAM NAV. CO.**

**Vendor and Purchaser.**—Possession is Evidence of Title until better title is shown by another, p. 179.

Cited in *Mickey v. Stratton*, Fed. Cas. No. 9530, 5 Saw. 475, following the rule. Cited in notes in 13 L. R. A., N. S., 59, on possession of land as notice of title; 42 L. R. A. 378, on view by jury.

**3 Or. 182-184, BOWMAN v. HOLLADAY.**

This case has not been cited.

**3 Or. 184-186, RITCHEY v. RISLEY.**

This case has not been cited.

**3 Or. 187-188, LANNAHAN v. MULTNOMAH COUNTY.**

This case has not been cited.

**3 Or. 189-197, KELLY v. PEOPLE'S TRANSP. CO.**

**Corporations.**—*Ultra Vires Acts*, pp. 192-195.

Cited in *Society Perun v. City of Cleveland*, 43 Ohio St. 498, 3 N. E. 364, upholding acts of invalidly organized company.

**Cancellation of Instruments.**—**Grantor Retaining Purchase Money** cannot have voidable deed set aside, p. 196.

Distinguished in *Tyler v. Cate*, 29 Or. 525, 45 Pac. 803, where deed was void.

**3 Or. 197-206, NORMAN v. ZIEBER.**

Cited in note in 34 L. R. A. 649, on constitutionality of imprisonment for debt.

**3 Or. 206-208, KAHN v. LOVE.**

**Landlord and Tenant.**—**Duty to Repair** is not incident of lease, p. 207.

Cited in *Rogan v. Dockery*, 23 Mo. App. 315, and *Kline v. McLain*, 33 W. Va. 38, 10 S. E. 13, 5 L. R. A. 400, upholding the rule; *Blake*

*v. Ranous*, 25 Ill. App. 490, holding that spring from the relation; *Belfour v. Wes* Eng. Rul. Cas. 456, not accessible.

**Negligence.—Plaintiff must so Frame His** an inference that he was guilty of contribu

Cited in *Johnston v. Oregon S. L.* etc. 284, approving and illustrating the rule. 4 Dec. '776, on recovery over by municipal 830, on liability of lien of local assessment.

**3 Or. 208-212, KAMM v. HARKER.**

**Partnership.—Power to Sue and be Sued**

Cited in *Frank v. Tatum*, 87 Tex. 206, 25 partnership has no personality in absence of *v. Freye-Bruhn & Co.*, 1 Alaska, 145, approving admission of debt by one member not binding notes to 56 Am. Dec. 151, on proper form warranty; 13 L. R. A., N. S., 662, on made fact officer; 31 L. R. A. 350, 364, on render of office.

**3 Or. 212-217, MYERS v. WARNER.**

This case has not been cited.

**3 Or. 218-229, WARNER v. MYERS.**

**Judgment.—Decision of Inferior Tribunal** dictation is binding until reversed, pp. 223, 22

Cited in *City of Chicago v. Campbell*, 118 and applying the rule; *Rex v. Mayor of Co* 331, not accessible.

**3 Or. 229-246, DARRAGH v. BIRD.**

**Elections.—Right of Government Employ** to place of employment, pp. 239, 243.

Cited in *Cory v. Spencer*, 67 Kan. 664, 275, applying the rule to inmates of soldier. Distinguished in *Powell v. Spackman*, 7 54 L. R. A. 378, holding rule inapplicable home.

**Elections.—If Judges Require Other Proof** besides his sworn statement, they must re pp. 242, 243.

Reaffirmed in *Breding v. Williams*, 37 O

**3 Or. 246-250, SHUMWAY v. BAKER CO**

This case has not been cited.

**3 Or. 250-253, GRAYDON v. THOMAS.**

This case has not been cited.

**3 Or. 253-256, WELLMAN v. HERKER.**

Cited in note to 72 Am. St. Rep. 85, as to when appointment of receiver is proper.

**3 Or. 256-258, LUDWICK v. WATSON.**

Statute of Frauds.—Promise to Pay Debt of Another, p. 257.

Cited in *Plano Mfg. Co. v. Burrows*, 40 Kan. 364, 19 Pac. 810, approving the rule.

**3 Or. 258-260, NORTROP v. PORTLAND.**

This case has not been cited.

**3 Or. 260-263, STATE v. CUTTING.**

Intoxicating Liquors.—In Prosecution for Selling Without License burden is on defendant to prove license, p. 261.

Affirmed in *State v. Perkins*, 53 N. H. 437, by divided court.

**3 Or. 263-269, KENNARD v. SAX.**

This case has not been cited.

**3 Or. 269-274, KNOTT v. STEPHENS.**

This case has not been cited.

**3 Or. 275-277, COGGAN v. REEVES.**

Mechanics' Liens.—Suit to Foreclose must be Commenced by filing a complaint within time limited, p. 276.

Cited in *Burns v. White Swan Min. Co.*, 35 Or. 312, 57 Pac. 639, approving the rule.

**3 Or. 277-282, ANDERSON v. LAUGHERY.**

This case has not been cited.

**3 Or. 282-286, BIRD v. WASCO COUNTY.**

Statutes.—Repealing Act Need not Set Forth Act repealed, p. 285.

Cited in *State v. Parsons*, 40 N. J. L. 127, 29 Am. Rep. 210, approving and following the rule.

Distinguished in *Dolan v. Barnard*, 5 Or. 393, being an amendatory act.

**3 Or. 286-292, FLEMING v. BILLS.**

Lotteries.—What Constitutes, pp. 289-291.

Approved in *Lynch v. Rosenthal*, 144 Ind. 91, 55 Am. St. Rep. 163, 42 N. E. 1105, 31 L. R. A. 835, a lottery case. Cited in note to 16 Am. St. Rep. 43, on what is a lottery.

Habeas Corpus.—Voidable Commitment by Court of competent jurisdiction will not warrant release on habeas corpus, p. 292.

Approved in *Ex parte Tice*, 32 Or. 184, 49 Pac. 1039, applying the rule.

**3 Or. 293-296, CARTER, IN RE.**

This case has not been cited.



**3 Or. 298-300, DEAY v. ORICH.**

Cited in note in 24 L. R. A., N. S., 2, must contain.

**3 Or. 301-302, PEASE v. HANNAH.**

This case has not been cited.

**3 Or. 303-306, McCOWN v. HANNAH.**

This case has not been cited.

**3 Or. 306-307, TAGGART v. BISLEY.**

This case has not been cited.

**3 Or. 308-310, WILLS v. WILSON.**

**Alteration of Instruments.—Rights of** note, p. 310.

Approved in *McLeod v. Despain*, 49 1066, 92 Pac. 1092, 19 L. R. A., N. S., 2, sustained by adjudicated cases. Cited in 85, 99, 122, on unauthorized alteration of

**3 Or. 311-317, OREGON & CAL. R. R. Co.**

**Eminent Domain.—Property Owner** close, p. 312.

Cited in *Indiana B. & W. Ry. Co. v. 203*, and *Baltimore etc. R. R. Co. v. Pitt Va. 848*, both reaffirming the rule.

**Eminent Domain.—Damages must be** at commencement of proceedings, p. 315.

Cited in *Oregon Short Line R. Co. v. 785*, refusing to allow interest on amount of service of summons.

**Eminent Domain.—Damages may be** from passing locomotives, p. 315.

Modified in *Kansas City & E. R. Co. v. 18*, holding the estimate limited to damages to company; *St. Louis etc. R. R. Co. v. No* that damages by fire resulting from negligence to adjacent property from negligent assessable; *Caledonian Ry. Co. v. Colt* accessible. Cited in notes to 85 Am. damage allowable in eminent domain upon damages in eminent domain; 13 L. tion of surface water as element of railroad right of way.

**3 Or. 318, CHATFIELD v. WASHINGTON.**

This case has not been cited.

**3 Or. 319-320, HOLLISTER v. HAGUL.**

This case has not been cited.

**3 Or. 320-321, CHIPMAN v. BRONSON.**

This case has not been cited.

**3 Or. 321-325, ALBEE v. ALBEE.**

Cited in notes to 113 Am. St. Rep. 117, on emancipation of infants; 11 L. R. A., N. S., 880, on implication of agreement to pay for services of relative or member of household.

**3 Or. 326-332, CHAPMAN v. WILBUR.**

This case has not been cited.

**3 Or. 332-337, ATKINSON v. MORRISSY.**

Cited in note to 89 Am. St. Rep. 110, on estoppel to deny landlord's title.

**3 Or. 337-339, SHARTLE v. HUTCHINSON.**

Cited in notes to 91 Am. St. Rep. 302, on justification in slander and libel; 27 Am. Dec. 568, on dedication to public use.

**3 Or. 340-352, HOLLADAY v. ELLIOTT.**

Cited in note to 69 Am. St. Rep. 432, on grounds for dissolution of partnership.

**3 Or. 353-355, HARTY v. LADD.**

Acknowledgment.—Failure of Certificate to Show Separate Examination of wife cannot be cured by parol, p. 355.

Cited in Hill v. Alliance Bldg. Co., 6 S. D. 175, 55 Am. St. Rep. 819, 60 N. W. 756, applying the rule to defective jurat to mechanic's lien claim. Cited in notes to 41 Am. Dec. 180, on sufficiency of acknowledgment of deeds; 1 Am. Dec. 82, parol evidence as to acknowledgment.

**3 Or. 355-361, CLINE v. CLINE.**

This case has not been cited.

**3 Or. 361-363, HARPER v. HARDING.**

Judgment.—Insanity of Defendant at Time of Trial is no ground for collateral attack, p. 362.

Cited in Morrill v. Morrill, 20 Or. 102, 23 Am. St. Rep. 95, 25 Pac. 364, 11 L. R. A. 155, holding judgment of court of competent jurisdiction immune from collateral attack. Cited in note to 130 Am. St. Rep. 847, on judgment for or against insane persons.

**3 Or. 363-369, SMITH v. SMITH.**

Divorce.—Allowance of Suit Money to wife, p. 369.

Cited in State v. Phillips, 32 Fla. 405, 13 South. 921, leaving the question undecided. Cited in note in 19 L. R. A. 817, on right of court to caution jury as to believing testimony of accused in own behalf.

**3 Or. 370-371, PROVOST v. MILLARD.**

This case has not been cited.

**3 Or. 372, WILCOX v. KEITH.**

**Mechanic's Lien.**—Complaint Must Allege Facts showing that contract was made with owner, p. 372.

Cited in *Peck v. Bridwell*, 6 Mo. App. 453, reaffirming the rule.

**3 Or. 372-373, MAROONEY v. McKAY.**

**Justice of the Peace.**—Right to Certify Copy of Complaint, p. 373.

Cited in *Belfils v. Flint*, 15 Or. 161, 14 Pac. 296, assuming that justice is authorized to certify to copy of complaint.

**3 Or. 374-376, HOLBROOK v. PAGE.**

This case has not been cited.

**3 Or. 377-379, DUFER v. CULLY.**

This case has not been cited.

**3 Or. 380-385, RUSSELL v. LEWIS.**

**Courts.**—County Court in Matters of Probate is a court of general jurisdiction, p. 384.

Cited in *Bewley v. Graves*, 17 Or. 282, 20 Pac. 326, *Hekle v. Slate*, 40 Or. 351, 68 Pac. 399, and *Lydick v. Chaney*, 64 Neb. 290, 89 N. W. 302, all approving and applying the rule.

Distinguished in *Farley v. Parker*, 6 Or. 113, 25 Am. Rep. 504, holding rule inapplicable to probate court at the time it was a court of limited and inferior jurisdiction.

**Courts.**—Presumptions in Favor of Proceedings of Courts of general jurisdiction, p. 385.

Cited in *Walker v. Goldsmith*, 14 Or. 145, 12 Pac. 555, applying the rule.

**3 Or. 386-387, ANKENY v. MULTNOMAH COUNTY (No. 1).**

**Taxation.**—Note is Taxable at the Place where it is payable, p. 387.

Cited in *Ankeny v. Multnomah County*, 3 Or. 388, *Ankeny v. Multnomah County*, 4 Or. 271, and *Wetmore v. Multnomah County*, 6 Or. 464, all following the rule.

**3 Or. 388, ANKENY v. MULTNOMAH COUNTY (No. 2).**

This case has not been cited.

**3 Or. 389-393, GASTON v. McLERAN.**

This case has not been cited.

**3 Or. 394-406, GEOSLOUIS v. NORTHCUT.**

**Public Lands.**—Under the Donation Law Title Passes to donee by operation of statute, p. 397.

Cited in *Northcut v. Lemery*, 8 Or. 319, referring to the decision in stating the facts.

**3 Or. 406-414, KING v. HIGGINS.**

**Quieting Title.**—Complaint must Show That Adverse Claim is a cloud on the title, pp. 409, 410.

Cited in *Douglass v. Nuzum*, 16 Kan. 520, approving and applying the rule.

**3 Or. 417-419, PEASE v. KELLY.**

**Vendor and Purchaser.**—Vendor's Lien is Waived by taking higher security, p. 419.

Cited in *Trullinger v. Kofoed*, 7 Or. 231, 33 Am. Rep. 708, reaffirming the rule; *Featherstone v. Emerson*, 14 Utah, 27, 45 Pac. 717, dissenting opinion, quoting the rule approvingly; *Partridge v. Logan*, 3 Mo. App. 516, applying the rule where the security taken was almost worthless.

**Vendor and Purchaser.**—Vendor's Lien Exists when there is no higher security, p. 419.

Cited in *Kelly v. Ruble*, 11 Or. 92, 116, 14 Pac. 602, 616, 617, in majority and dissenting opinion discussing existence of vendor's lien and construing cited case; *Gee v. McMillan*, 14 Or. 274, 275, 276, 58 Am. St. Rep. 315, 12 Pac. 419, reviewing previous cases and recognizing lien of vendor; *Coos Bay Wagon Co. v. Crocker*, 4 Fed. 583, 6 Saw. 574, holding that the lien holds good against all subsequent purchasers having notice that purchase price is unpaid.

Explained in *Frame v. Sliter*, 29 Or. 122, 54 Am. St. Rep. 781, 45 Pac. 290, 34 L. E. A. 690, reviewing previous cases and holding that vendor has no implied lien. Cited in note to 41 Am. Dec. 223, on waiver of mechanic's lien.

**3 Or. 420-424, DEARBORN v. PATTON.**

**Limitation of Actions.**—Judgment Lien is a "Liability incurred" within the saving clause of a repealing act, p. 423.

Cited in *Daggy v. Ball*, 7 Ind. App. 69, 34 N. E. 247, approving and applying the rule.

**3 Or. 424-426, McCALLA v. MULTNOMAH COUNTY.**

**Counties.**—Liability for Negligence of Officers, p. 425.

Cited in *Sheridan v. City of Salem*, 14 Or. 334, 335, 12 Pac. 927, 928, holding city liable for defective streets; *Grant County v. Lake County*, 17 Or. 459, 460, 21 Pac. 449, holding county liable to civil action; *Templeton v. Linn County*, 22 Or. 316, 29 Pac. 796, 15 L. R. A. 730, holding liability of county purely statutory; *Kirtley v. County of Spokane*, 20 Wash. 115, 54 Pac. 937, holding county liable for injury from defective bridge; *Ridings v. Marion County*, 50 Or. 34, 91 Pac. 24, following the rule; *Bailey v. Lawrence County*, 5 S. D. 397, 49 Am. St. Rep. 881, 59 N. W. 220, holding county not liable for failure to keep bridge in repair in absence of statute; *Bedfield v. School Dist. No. 3*, 48 Wash. 90, 92 Pac. 772, holding school district liable for negligent injury to child under Washington statute. Cited in notes in 11 Am. Rep. 67, on liability of counties, towns, etc., for

injuries by defective bridges and highways; 30 L. R. A. 51, on liabilities of counties for torts and negligence.

**3 Or. 426-427, MOFFITT v. COFFIN.**

This case has not been cited.

**3 Or. 428-435, OREGON C. R. CO. v. WAIT.**

This case has not been cited.

**3 Or. 435-438, BROWN v. MOORE.**

Pleading.—Variance may be Disregarded Within the Discretion of the trial court, p. 438.

Cited in *Denn v. Peters*, 36 Or. 491, 59 Pac. 1110, approving the rule.

**3 Or. 438-439, POOL v. BUFFUM.**

Wills.—Attesting Will by Mark is a Sufficient Signing by the testator, p. 442.

Cited in *Moreland v. Brady*, 8 Or. 312, 34 Am. Rep. 581, and *Scott v. Hawks*, 107 Iowa, 725, 70 Am. St. Rep. 228, 77 N. W. 468, both reaffirming the rule. Cited in notes in 22 L. R. A. 300, on signing by proxy; 22 L. R. A. 371, on signature by mark.

**3 Or. 445-451, 8 Am. Rep. 621, WEISE v. SMITH.**

Navigable Waters.—Test of Navigability, pp. 448, 449.

Cited in *Shaw v. Oswego Iron Co.*, 10 Or. 375, 382, 45 Am. Rep. 146, holding stream capable of floating logs and small boats navigable; *Haines v. Hall*, 17 Or. 180, 20 Pac. 838, 3 L. R. A. 609, holding navigable a stream which will float sawlogs long enough to make it useful; *East Hoquiam Boom etc. Co. v. Neeson*, 20 Wash. 146, 54 Pac. 1002, holding that a stream which can only be made navigable by artificial means is not a public highway; *Hallock v. Suitor*, 37 Or. 11, 60 Pac. 385, holding stream capable of floating logs for part of year navigable; *Kamm v. Normand*, 50 Or. 11, 13, 126 Am. St. Rep. 698, 91 Pac. 449, 450, 11 L. R. A., N. S., 290, holding that a stream that cannot float logs except at extreme high water is not navigable; *Hume v. Rogue River Packing Co.*, 51 Or. 245, 131 Am. St. Rep. 732, 92 Pac. 1068, holding navigability in fact the true test; *Gaston v. Mace*, 33 W. Va. 24, 25 Am. St. Rep. 848, 10 S. E. 64, 5 L. R. A. 392, holding stream navigable if it would float logs during high water; *Gwaltney v. Scottish-Carolina Timber etc. Co.*, 111 N. C. 563, 16 S. E. 696, dissenting opinion, involving right to float logs; *Thunder Bay River etc. Co. v. Speechly*, 31 Mich. 343, 18 Am. Rep. 184, holding stream navigable in its natural condition a public highway; *Micklethwait v. Newlay Bridge Co.*, 28 Eng. Rul. Cas. 190, not accessible. Cited in notes in 13 Am. Rep. 263, 126 Am. St. Rep. 714, 727, and 42 L. R. A. 317, on what waters are navigable.

Navigable Waters.—Relative Rights of Riparian Owners and navigators, p. 450.

Cited in *Smith v. Atkins*, 110 Ky. 182, 96 Am. St. Rep. 424, 60 S. W. 930, 53 L. B. A. 790, holding that navigators have no right to use banks and trees growing thereon; *Harold v. Jones*, 86 Ala. 278, 5 South. 440, 3 L. B. A. 406, holding persons constructing boom not liable for damages for obstruction of log jam in absence of negligence; *Viebaum v. Board Crow Wing County Commrs.*, 96 Minn. 282, 104 N. W. 1092, 3 L. B. A., N. S., 1126, upholding right of loggers to enjoin obstruction on river; *Page v. Mille Laes L. Co.*, 53 Minn. 501, 55 N. W. 610, holding obstruction of navigation enjoined at suit of individual specially injured.

Disapproved in *Kalama Electric etc. Co. v. Kalama Driving Co.*, 48 Wash. 616, 125 Am. St. Rep. 948, 94 Pac. 470, 22 L. B. A., N. S., 641, holding right of riparian owner superior to that of loggers. Cited in notes to 81 Am. Dec. 583, 587, 588, on right to use water-course as highway; 4 L. B. A., N. S., 879, on right of way on shore; 39 L. B. A. 492, on right to construct log booms; 41 L. B. A. 373, on right to use stream for floating logs; 41 L. B. A. 495, on liability for injuries to riparian owner by running logs.

### 3 Or. 452-455, *BOWEN v. EMMERSON*.

**Pleading.**—Objection That Complaint Does not State cause of action is not waived by not demurring, p. 452.

Cited in *Wyatt v. Henderson*, 31 Or. 52, 48 Pac. 791, *Byers v. Ferguson*, 41 Or. 81, 68 Pac. 6, and *Kohn v. McKinnon*, 90 Fed. 625, all approving and applying the rule.

**Assumpsit.**—Sufficiency of Complaint for Money Due under code form of pleadings, p. 453.

Cited in *Distler v. Dabney*, 3 Wash. 204, 28 Pac. 336, approving rule; *Keene v. Eldridge*, 47 Or. 182, 82 Pac. 804, holding allegation of promise to pay not necessary in complaint for money received; *Busta v. Wardall*, 3 S. D. 147, 52 N. W. 420, upholding complaint for money had and received in form of assumpsit. Cited in note to 57 Am. Dec. 548, on how far common counts are allowable under code pleading.

### 3 Or. 455-458, *FELGER v. ROBINSON*.

**Navigable Waters.**—Test of Navigability, p. 458.

Cited in *Shaw v. Oswego Iron Co.*, 10 Or. 382, 45 Am. Rep. 146, holding stream capable of floating logs and small boats navigable; *Haines v. Hall*, 17 Or. 180, 186, 20 Pac. 836, 841, 3 L. B. A. 609, holding navigable a stream that will float sawlogs during logging season; *Gaston v. Mace*, 33 W. Va. 24, 25 Am. St. Rep. 848, 10 S. E. 64, 5 L. B. A. 392, holding stream navigable if it would float logs during high water; *Gwaltney v. Scottish-Carolina Timber etc. Co.*, 111 N. C. 567, 18 S. E. 697, dissenting opinion, involving right to float logs; *Minnesota Canal etc. Co. v. Roachiching Co.*, 97 Minn. 441, 107 N. W. 409, 5 L. B. A., N. S., 638, holding that stream is navigable if it be naturally navigable at certain seasons.

Disapproved in *Kalama Electric etc. Co.* 48 Wash. 616, 125 Am. St. Rep. 948, 94 Pac. 641, holding right of riparian owner superior to notes to 81 Am. Dec. 583, 584, on right of way; 42 L. R. A. 318, on what waters a stream; 373, on right to use stream for floating log.

**3 Or. 459-465, DELAY v. CHAPMAN.**

**Public Lands.—Descent of Interest of** Public Lands.—Descent of Interest of completion of residence under the donation act.

Cited in *Coulson v. Wing*, 42 Kan. 510 Pac. 571, holding that where patent issued to settler's estate; *Whittmore v. Cope*, 11 U. S. 100, holding that deed to administrator in trust for court jurisdiction over the land; *Hall v. Hall*, 3 Saw. 506, holding that on death of settler his residence his interest passed to his widow as heirs but as donees of the United States.

Reconciled in *Burch v. McDaniel*, 2 W. Va. 100, holding that on death of settler a sale to his administrator in trust for the heirs.

Overruled in *Quinn v. Ladd*, 37 Or. 268, holding that donation does not pass fee but mere possession.

**3 Or. 465-468, COWENIA v. HANNAH.**

**Public Lands.—Possessory Rights of A.** Public Lands.—Possessory Rights of A. ceased on being abandoned or on death of settler.

Cited in *Town v. De Haven*, Fed. Cas. 148, 150, reaffirming the rule. Cited in *Quinn v. Ladd*, 37 Or. 268, on effect of treaties upon alien's right to land.

**3 Or. 469-470, FASSMAN v. BAUMGARDNER.**

**Appeal.—Judgment by Confession or** Appeal.—Judgment by Confession or Verdict. p. 469.

Cited in *State v. Leasia*, 45 Or. 411, holding that judgment by confession or verdict is final.

**Appeal.—Upon Appeal from a Nonappealable** Appeal.—Upon Appeal from a Nonappealable Judgment. no jurisdiction other than to dismiss the appeal.

Cited in *State v. McKinnon*, 8 Or. 481, holding that appeal from nonappealable judgment is not a new trial. *Pacific Co.*, 34 Or. 375, 55 Pac. 976, approved.

**3 Or. 470-472, BECKLEY v. LEARN.**

**Ferries.—Right of Riparian Owner to** Ferries.—Right of Riparian Owner to Use of Stream. Same case, *Beckley v. Learn*, 3 Or. 470.

Same case, *Beckley v. Learn*, 3 Or. 470. license. Cited in note in 59 L. R. A. 511, holding that right of riparian owner to use of stream and protection of ferries.

**3 Or. 472-474, PITTMAN v. PITTMAN.**

**Appeal.—Order Awarding Custody of** Appeal.—Order Awarding Custody of Land. appealable, p. 473.

Cited in *Re Woman's etc. Board of Missions*, 18 Or. 345, 350, 22 Pac. 1188, applied to order awarding custody of abandoned children to benevolent society.

**3 Or. 474-476, McDONALD v. EVANS.**

Costs are a Creature of Statute, p. 475.

Cited in *Wood v. Fitzgerald*, 3 Or. 584, holding that no costs can be recovered in election contests. Cited in note to 88 Am. Dec. 182, on items of expense recoverable as costs.

**3 Or. 477-482, BANKS v. CROW.**

Pleading.—Variance may in Some Cases be disregarded, p. 481.

Cited in *Denn v. Peters*, 36 Or. 491, 59 Pac. 1110, illustrating the rule.

**3 Or. 482, WILSON v. CITY OF SALEM.**

Costs.—Objections to Cost-bill must be specific, p. 483.

Cited in *Cross v. Chichester*, 4 Or. 116, 117, reaffirming the rule; *Walker v. Goldsmith*, 16 Or. 162, 17 Pac. 866, holding that objection must be made to each separate item excepted to; *Wills v. Lance*, 28 Or. 383, 43 Pac. 384, holding that when witness was not sworn, a showing of materiality should be made.

**3 Or. 484-487, SCHIROTT v. PHILLIPPI.**

Review.—Certiorari and Appeal are Concurrent, pp. 486, 487.

Cited in *Garnsey v. County Court of Klamath County*, 33 Or. 208, 54 Pac. 1091, holding that statute making appeal and review concurrent did not extend the scope of the writ; *Ramsey v. Pettingill*, 14 Or. 208, 12 Pac. 440, holding writ of review unavailable to party who could have appealed but neglected to do so in time; *Feller v. Feller*, 40 Or. 77, 66 Pac. 470, holding that appellant may abandon appeal before filing transcript and file writ of review.

Questioned in *Evans v. Christian*, 4 Or. 376, 377, declaring the ruling dictum and that review is not available to party having right to appeal; *Sellers v. City of Corvallis*, 5 Or. 275, to same effect.

Review.—The Writ Brings Up Only Questions of Law, p. 487.

Cited in *Canyonville etc. Road Co. v. County of Douglas*, 5 Or. 283, holding that writ of review does not bring up the evidence.

**3 Or. 488-495, HOWE v. DOUGLAS COUNTY.**

Officers.—Fee Bill Construed, pp. 490-495.

Cited in *Coleman v. Ross*, 14 Or. 351, 12 Pac. 649, holding sheriff entitled to no commission for making execution sale where creditor bids in property for amount of his debt.

**3 Or. 495-497, CROSSMAN v. LANDER.**

This case has not been cited.



**3 Or. 497-498, STATE v. ELLIS.**

**Criminal Law.**—Code Provisions Relating to Appeals in criminal cases differ from those in civil cases, pp. 497, 498.

Cited in *State v. Berger*, 51 Or. 167, 94 Pac. 181, holding provisions of Civil Code inapplicable to criminal appeals.

**3 Or. 498-503, FAILING v. OSBORNE.**

This case has not been cited.

**3 Or. 503-508, FISKE v. KELLOGG.**

**Executors and Administrators.**—Probate Sale to Pay Debts is void as to heirs not made parties to the proceedings, p. 507.

Cited in *Ball v. Clothier*, 34 Wash. 310, 75 Pac. 1102, reaffirming and applying the rule. Cited in note to 91 Am. Dec. 623, on appointment of guardian ad litem.

**3 Or. 508-511, STEWART v. PERKINS.**

**Principal and Agent.**—Person in Possession of Land as an agent cannot be made individually liable for rent, p. 511.

Cited in *Holman v. De Lin River etc. Co.*, 30 Or. 434, 47 Pac. 710, holding that rent must be based on some conventional relation.

**3 Or. 512-515, BESSER v. HAWTHORN.**

**Mortgages.**—All Subsequent Encumbrancers Should be Made Parties to foreclosure suit, p. 513.

Cited in *De Lashmutt v. Sellwood*, 10 Or. 326, holding junior lienholder not made a party not affected by foreclosure decree; *Wilson v. Tarter*, 22 Or. 510, 30 Pac. 500, holding that persons not parties are not bound by the decree.

**3 Or. 515-518, SIMPSON v. BAILEY.**

**Counties.**—Act Locating County Seat may delegate duty of locating site of building, pp. 517, 518.

Cited in *McWhirter v. Brainard*, 5 Or. 430, further illustrating the rule.

**Statutes.**—Object of Requiring Subject to be Expressed in title is to prevent matters wholly foreign and disconnected with the subject from being inserted in the body of the act, p. 517.

Cited in *McWhirter v. Brainard*, 5 Or. 429, and *Ingles v. Straus*, 91 Va. 218, 21 S. E. 493, approving and applying the rule; *Singer Mfg. Co. v. Graham*, 8 Or. 21, 34 Am. Rep. 572, upholding insurance tax act; *O'Keefe v. Weber*, 14 Or. 57, 12 Pac. 75, upholding gambling law; *Lawrey v. Sterling*, 41 Or. 521, 69 Pac. 461, upholding act relating to executors; *State v. Richardson*, 48 Or. 318, 85 Pac. 229, 8 L. E. A., N. S., 362, upholding local option act; *Ballentyne v. Wickersham*, 75 Ala. 536, holding that title may be very general and need not specify every clause in the statute.

Explained in *Oregon etc. Inv. Co. v. Rathburn*, Fed. Cas. No. 10,555, 5 Saw. 32, holding that regulating certain foreign corporations cannot

**3 Or. 542-543, HILL v. MELLON.**

Pleading.—Variance to be Material must have Misled party to his prejudice and must have been admitted over objection, p. 543.

Cited in *Simonds v. Wrightman*, 36 Or. 125, 58 Pac. 1102, *Denn v. Peters*, 36 Or. 490, 59 Pac. 1110, and *Brace v. Doble*, 3 S. D. 428, 53 N. W. 860, all approving and applying the rule.

**3 Or. 544-547, BECKLEY v. LEARN.**

Ferries.—Riparian Owner's Right to License, p. 546.

Cited in *Lyon v. Fishmongers' Co. etc.*, 23 Eng. Rul. Cas. 164, not accessible. Cited in note in 59 L. R. A. 532, on establishment, regulation and protection of ferries.

**3 Or. 548-550, NEWTON v. SPENCER.**

This case has not been cited.

**3 Or. 550-552, HAYDON v. STEADMAN.**

This case has not been cited.

**3 Or. 553-555, PITTMAN v. PITTMAN.**

Appeal.—Discretion of Lower Court will not be Reviewed unless abused, p. 554.

Cited in *Nunn v. Bird*, 36 Or. 518, 59 Pac. 809, applying the rule to the allowance of amendments.

**3 Or. 555-563, KAFKA v. SIMONS.**

This case has not been cited.

**3 Or. 563-565, SEBLEY v. SEBASTIAN.**

Appeal.—Return of Service of Notice may be Amended, p. 563.

Cited in *Barbre v. Goodale*, 28 Or. 468, 38 Pac. 67, reaffirming the rule.

**3 Or. 565-567, HOWARD v. RAMFORD.**

This case has not been cited.

**3 Or. 568-585, WOOD v. FITZGERALD.**

Election.—Government Employee may Move His Residence wherever he is called, p. 573.

Distinguished in *Powell v. Spackman*, 7 Idaho, 710, 65 Pac. 509, 54 L. R. A. 378, holding that inmates of soldiers' home cannot establish a residence there. Cited in notes to 83 Am. Dec. 751, on essentials to validity of elections; 97 Am. Dec. 264, on power of state to impose qualifications for voters and office-holders; 25 L. R. A. 480, as to how far right to vote absolute.

Pardon.—Restores Convict to Full Enjoyment of all civil rights, pp. 574-577.

Cited in *State v. Foley*, 15 Nev. 69, *Diehl v. Rodgers*, 169 Pa. 321, 47 Am. St. Rep. 908, 32 Atl. 425, *Hunnicutt v. State*, 18 Tex. App. 519, 51 Am. Rep. 330, and *Carr v. State*, 19 Tex. App. 660, 53 Am. Rep.

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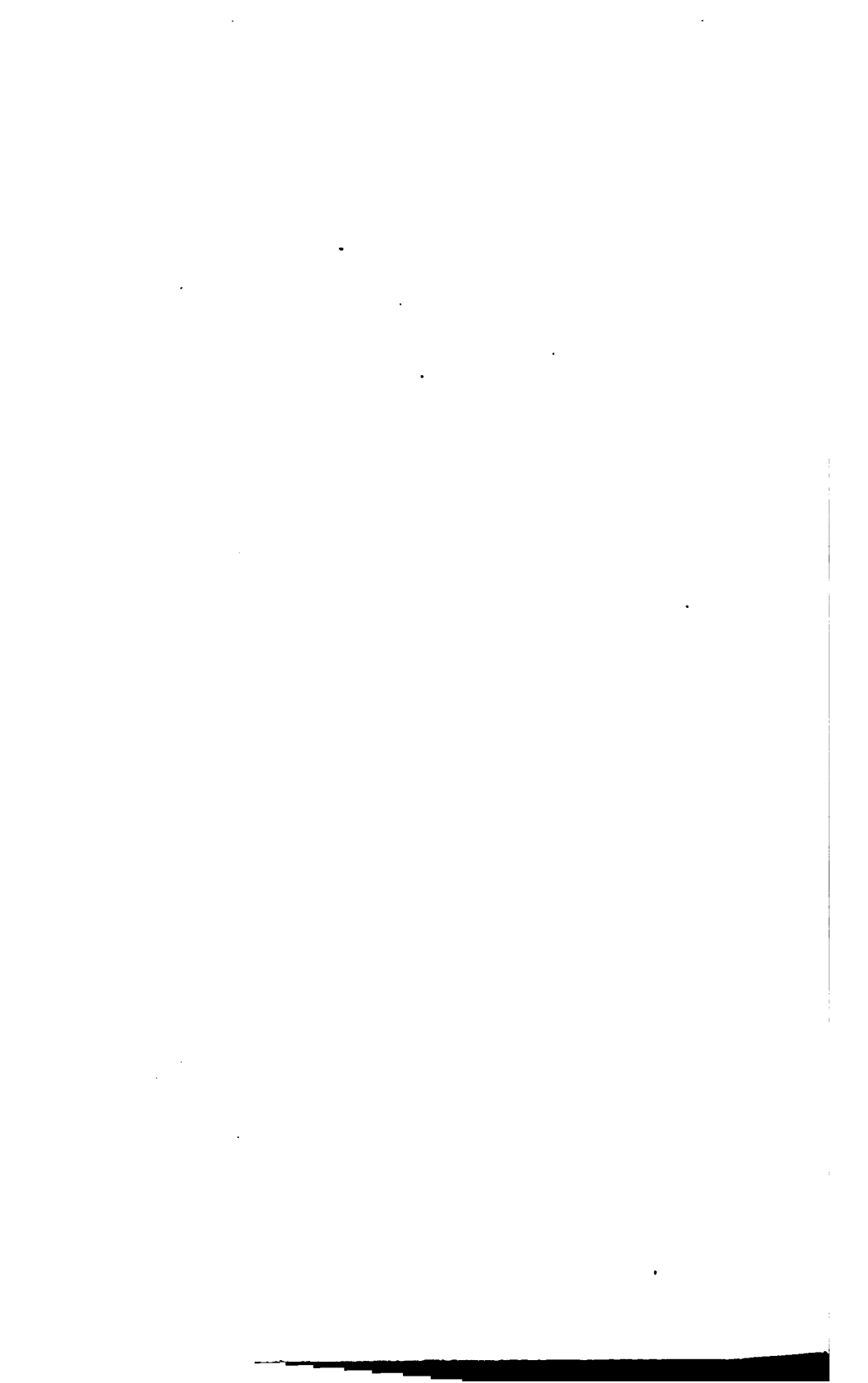
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